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MARSHALL F. McCOMB - - - - - - - - - Los Angeles
EMMET H. WILSON[4] - - - - - - - - - - Los Angeles

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[1] Retired Nov. 1, 1945.
[2] Appointed, took office Nov. 1, 1945.
[3] Died Sept. 2, 1945.
[4] Appointed, took office Oct. 5, 1945.

DISTRICT COURTS OF APPEALS—Cont'd.

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[1] Temporary assignment.

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RAYMOND T. COUGHLIN	Sacramento

ATTORNEY GENERAL

ROBERT W. KENNY	San Francisco

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[1] Retired April 9, 1945.
[2] Appointed, took office April 9, 1945.

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CALIFORNIA REPORTER

161 PACIFIC REPORTER

SECOND SERIES

26 Cal.2d 663

CHRISTOPHER v. STATE BAR OF CALIFORNIA.

L. A. 19081.

Supreme Court of California.
June 29, 1945.

As Modified on Denial of Rehearing
July 26, 1945.

1. Attorney and client 🔑49

State Bar had jurisdiction to take disciplinary proceedings against an attorney who was also serving as justice of the peace for unprofessional conduct in that he acted as attorney for plaintiff in an action filed in a justice's court of township in which he resided, as against contention that offense was against the judicial office of justice of peace, which would require removal from office and not against the legal profession or practice of law, which would require discipline. Code Civ.Proc. §§ 103g, 171; St.1939, pp. 348, 355, §§ 6002, 6068(a, b); Const. art. 6, § 18.

2. Attorney and client 🔑53(2)

Evidence supported finding that attorney who was also serving as justice of peace was guilty of unprofessional conduct in that he acted as attorney for plaintiff in an action filed in a justice's court in township in which he resided, so as to justify suspension from the practice of law for a period of six months. Code Civ.Proc. § 171.

3. Attorney and client 🔑38

The statute, in prescribing duties of an attorney and imposing penalties for a breach thereof, did not manifest intent that moral turpitude, dishonesty, or corruption should be discovered as a separate and distinct element of the act. St.1939, p. 357, §§ 6101, 6103.

4. Attorney and client 🔑58

Proof that attorney who was also serving as justice of the peace acted as attorney for plaintiff in an action filed in a justice's court of township in which he resided, in violation of statute, involved moral turpitude sufficient to justify attorney's suspension. Code Civ.Proc. § 171, St.1939, pp. 355, 357, §§ 6068(a, b), 6101, 6103, 6106.

CARTER and SCHAUER JJ., dissenting.

In Bank.

Proceeding by Charles E. Christopher against the State Bar of California, to review recommendation of the Board of Governors of the State Bar that petitioner be suspended from the practice of law for the period of six months.

Petitioner suspended for a period of six months.

J. E. Simpson, of Los Angeles, for petitioner.

Henry F. Prince, of Los Angeles, for respondent.

PER CURIAM.

This is a proceeding to review the recommendation of the Board of Governors of the State Bar that petitioner be suspended from the practice of the law for the period of six months.

The petitioner was admitted to the bar of this state on March 18, 1927. From January, 1935, to January 5, 1943, he was justice of the peace of San Gabriel township in Los Angeles County. On May 26, 1943, he received a notice to show cause why he should not be disciplined for unprofessional conduct in that he acted as attorney for the plaintiff in an action filed on July 7, 1939, in the justice's court of San Gabriel township and thereafter prosecuted the action to judgment at a time when he was prohibited by section 171 of the Code of Civil Procedure from practicing law in that court; and that the conduct of the petitioner in the premises involved moral turpitude.

The petitioner had theretofore acted as the attorney for Linda Sandoval and others and had received from them a promissory note payable to himself for $85 on account of legal services rendered. The note was unpaid except as to $10. The petitioner assigned the note to his wife. Acting as his wife's attorney he caused a complaint to be prepared entitled Winnie W. Christopher v. Linda Sandoval et al., in which it was sought to recover the sum of $75 with interest, costs and $20 attorney fees. The petitioner signed the complaint as attorney for the plaintiff and caused it to be filed in said justice's court on July 7, 1939. On August 2, 1939, he caused an order to enter the default of the defendants to be filed and a judgment to be entered in favor of the plaintiff and against the defendants in the sums demanded in the complaint. On the same day he notarized the oath of his secretary to the cost bill. On August 25, 1939, as attorney for the plaintiff, he caused an abstract of judgment to be recorded in the office of the county recorder of said county. On March 15, 1943, about two and one-half months after he had ceased to be a justice of the peace in said township he personally requested that a writ of execution be prepared and issued for the total sum of $107.99, including $20 attorney's fee, and directed that the writ be executed.

In response to the notice to show cause the petitioner filed an answer in which he did not deny the commencement and prosecution to judgment of the action as outlined in the notice to show cause but denied that those steps had been taken "knowingly and willingly" as charged; and alleged affirmatively (1) that he signed the complaint as attorney for the plaintiff and as a notary public took and subscribed to the oath of his wife in verifying the complaint through inadvertence and that the other steps leading to and including the entry of judgment were taken during his absence on vacation and without his knowledge; (2) that the notice to show cause did not state facts which, if true, would involve moral turpitude; (3) that if the facts alleged constituted an offense of any kind it would be an offense against his office as justice of the peace, and that The State Bar of California was without jurisdiction over the petitioner for acts committed against that office; and (4) that in 1939 the district attorney of Los Angeles County presented all of the facts alleged in the notice to show cause to the grand jury of that county whose duty it was to investigate offenses of public officials including justices of the peace, with the result that the petitioner appeared before, but no action was taken by, that body.

The petitioner appeared at the hearing before the local committee. The jurisdictional point, at once presented by him, was sustained by a vote of two to one. The proceeding was certified to the Board of Governors for dismissal. Thereafter the board decided in favor of jurisdiction and referred the matter to the local committee for a hearing and recommendation in due course. After a full hearing held in November, 1943, the local committee found that the petitioner had committed the acts as alleged and not through inadvertence, but failed to find that moral turpitude was involved. It recommended a public reproval. The board adopted the findings of the local committee and in addition concluded that the conduct charged and found to have taken place involved moral turpitude within the meaning of section 6106 of the State Bar Act, St.1939, p. 357, and has recommended to this court that the petitioner be suspended for a period of six months.

On review three questions are involved: 1. Did The State Bar have jurisdiction to take disciplinary proceedings against the petitioner? 2. Are the findings supported by the evidence? and 3. Do the acts charged and found to have been committed by the petitioner constitute cause for disciplinary action?

[1] On the first question the petitioner reiterates his contention that the charges, if true, constituted offenses against his office of justice of the peace, and not offenses against the profession of the law.

Section 171 of the Code of Civil Procedure provides: "No justice, or judge of a court of record * * * shall practice law in any court of this state * * * during his continuance in office; nor shall any justice of the peace practice law before any justice's court in the county in which he resides."

As a member of the bar the petitioner had the right to practice law in all of the courts of this state with the sole exception provided in section 171, that is, that he could not practice law in any justice's court in Los Angeles County while he was a justice of the peace in that county. During the time that he was both a practicing lawyer and a justice of the peace he was acting in a dual capacity with corresponding and reciprocal obligations to the courts and the profession. He was just as much controlled by section 171 in the practice of the law as he was curtailed in his professional activities as a justice of the peace. As a general law of this state section 171 has the same meaning and effect as if it provided that "no attorney at law shall practice law in any justice's court in the county in which he resides while he is a justice of the peace in that county." Practice of the law in violation of that section is an offense against the profession of the law, and an attorney so offending is subject to disciplinary proceedings through the medium of the State Bar Act even though it might be said that thereby he would offend also against the office of justice of the peace. When it is determined that a law of the state relating to his professional activities has been violated by an attorney at law, the court on review should not be astute to relieve him from the consequences of his act because forsooth he might suffer some other penalty for an offense against his judicial office; nor should he be permitted to use his judicial office to shield him from the consequences of his delinqency as an attorney at law.

The laws of the state, both constitutional and statutory, have been unremitting in an endeavor to safeguard the administration of justice from both the actual and the apparent conflict of interest between court and practitioner. Justices and judges of courts of record are prohibited from practicing law in any court of the state by section 18 of articie VI of the Constitution. They are excluded from membership in The State Bar by section 6002 of the State Bar Act, St.1939, p. 348. Justices of the peace in certain cities are prohibited from practicing law "in or out of court" during their continuance in office. Code Civ.Proc. § 103g. Notwithstanding the right of the petitioner to practice law during his continuance in office, he was bound to observe the statutory injunction not to practice before any justice's court in the county in which he resided. In the conduct of his practice it was his duty "to support the Constitution and laws of the United States and of this State," and "to maintain the respect due to the courts of justice." State Bar Act, § 6068, subds. (a) and (b), St.1939, p. 355. Section 171 was binding on the petitioner both as a justice of the peace and as a lawyer. By violating that statute he was nurturing a conflict in interest which the fundamental and statutory law prohibited. Since his right to practice law continued, he remained amenable to the processes of The State Bar.

The petitioner seeks to sustain his contention on the jurisdictional point by reliance on the Hardy case. State Bar v. Superior Court, 207 Cal. 323, 278 P. 432. That case can be of no assistance to him. There The State Bar sought to prosecute proceedings against a judge of the superior court, a court of record, for the alleged practice of the law contrary to his obligation as a member of the legal profession. This court held that The State Bar was without jurisdiction so to proceed for the reason that the right of the accused to practice law was suspended under constitutional provision during his continuance in office and that as he was not a member of The State Bar he was not amenable to its disciplinary processes.

The jurisdiction of the offense was therefore within the accusatory powers of The State Bar, and the decision of the Board of Governors on the point was correct.

[2] On the question of the sufficiency of the evidence to support the findings of the local committee and of the Board of Governors the petitioner contends that the evidence supports only the conclusion that he did not know what he was doing when he signed the complaint as attorney for the plaintiff, the verification of his wife appended thereto, and as notary on the cost bill; that they were so signed by inadvertence, and that the subsequent steps in the litigation were taken without his knowledge. The record does not support the contention.

Miss Ellen C. Neilan was the petitioner's legal secretary from February, 1937, to April, 1942, when she became assistant clerk of the justice's court of San Gabriel township and later, in November, 1942, court clerk, a position she occupied at the time of the hearings in the proceedings before The State Bar. She testified that in the latter part of June, 1939, the petitioner handed to her the promissory note with the request that she prepare a complaint based thereon in the name of Mrs. Christopher as plaintiff and instructed her to file it in the justice's court. Before the complaint was prepared she had a conversation with the petitioner in which she called his attention to the fact that the action could not be brought in the municipal court of Los Angeles because the parties defendant were residents of San Gabriel township. She testified that she had no recollection of a conversation in which she was told, as claimed by the petitioner, to file the complaint in his name in the justice's court.

The complaint was verified by Mrs. Christopher and her oath was subscribed to by the petitioner as notary public. A certified copy of the complaint is an exhibit in this proceeding. In support of the contention of the petitioner that he signed the complaint and verification by inadvertence he relies on the fact as testified by Miss Neilan that it was her custom to clip back pages for his ready signature on the appropriate page, and his own statement that he did not notice that he was verifying his wife's signature. Miss Neilan stated that she did not remember whether she followed this practice on that occasion, but that she recalled that Mrs. Christopher signed the verification on her desk and that Mr. Christopher was there at the time and signed the endorsement on the note, the complaint as attorney for the plaintiff, and the verification as a notary; that petitioner left about July 1, 1939, for a month's vacation and she filed the complaint on July 7th; that in accordance with her usual custom she signed the petitioner's name to the order to enter the default judgment; that she signed her own name to the memorandum of costs, which the petitioner notarized on his return prior to August 2nd. The default judgment was entered and the cost bill was filed on August 2, 1939. She testified that she prepared the writ of execution and issued it in March, 1943, when she was clerk of the court, at the personal request of the petitioner.

The petitioner testified that he instructed Miss Neilan to commence suit on the note in Mrs. Christopher's name in the municipal court in Los Angeles; that following the conversation concerning the impropriety of filing the complaint in the municipal court he instructed her to file it in the justice's court in his own name. He admitted his signature on the complaint as attorney for the plaintiff, and on another page his signature as notary public on the affidavit of verification signed by his wife. He stated that he signed the complaint and verification affidavit when his wife was not there, but that he had no distinct recollection of signing the same because it was the practice of his secretary to prepare papers and stack those requiring his signature on his desk folded back and clipped so that only the signature page appeared; that the practice was followed in this case; and that he did not observe at the time that the complaint was entitled in the name of his wife as plaintiff; that he thereupon departed on vacation for the month of July, during which time another justice of the peace in the county sat in the San Gabriel township court; that after a complaint was signed it was the practice in his office for his secretary to follow the matter through in default cases; that his signature as notary public appeared on the memorandum of costs and disbursements filed after his return from vacation, but that he did not notice at that time what action was involved; that the endorsement to his wife on the reverse side of the note was not cancelled because that question never came to his attention; that the first time he had notice of the facts was when the matter came before the grand jury in October, 1939, following which no proceedings were taken against him by that inquisitorial body.

The local committee made a finding that "it is not true that at the time suit was filed on said promissory note it was filed in the name of Winnie W. Christopher through inadvertence, but that said complaint was filed in said court in the name of the plaintiff therein named with the full knowledge of" the petitioner. Similarly the committee found that the acts of the petitioner in causing to be filed the order to enter default judgment including $20 as attorney fees, and the memorandum of costs and disbursements including $1.00 as fees for notarial services performed by the petitioner, were not done through inadvertence but with the full knowledge of the petitioner. Likewise as to the abstract of judgment filed for record on August 25, 1939, the committee found that the acts of the petitioner were not inadvertent but were with his full knowledge.

It is obvious that the local committee and the Board of Governors in the light of the record evidence believed the testimony of Miss Neilan and refused to believe the testimony of the petitioner on the vital questions involved. An examination of the transcript and the exhibits in the proceeding supports the conclusion that there is a sound basis for not according full credit to the testimony of the petitioner.

The petitioner admitted that at the time of the transactions in question he was familiar with the provisions of section 171 of the Code of Civil Procedure and that he knew it was improper for him to appear as attorney on behalf of anyone in an action filed in his own court. His claimed inadvertence in signing the complaint as attorney for the plaintiff, in notarizing the cost bill and particularly in notarizing his wife's verification of the complaint is persuasively negatived by an examination of the exhibits. The complaint shows that he signed it as attorney for the plaintiff immediately above the typewritten words showing that relationship. His wife signed the verification. The petitioner's signature is almost immediately opposite and very near the signature of his wife. Aside from other implications arising from his action as a notary public, as he claims it took place, credulity is taxed to the breaking point to believe that when he signed as notary he did not know that he was taking the verification of his wife. The facts and circumstances make the asserted custom of clipping back pages dubious support for his claim of inadvertence. He admitted that when he obtained the writ of execution in March, 1943, he knew all of the facts surrounding the grand jury investigation. Since he personally obtained that writ he should not be heard to say that he did not know that the item of attorney's fees was specifically included therein. Even if it be assumed that he did not, through inadvertence, appreciate that the item of attorney's fees was sought by the allegations and the prayer of the complaint, he cannot avoid knowledge of the inclusion of that item in the writ of execution. Since he must have known of such inclusion, he likewise must have known that he was not entitled to an attorney's fee if he was prosecuting the action in his own name as plaintiff. Certain it is that if he believed that the action had been prosecuted in his own name, he should have taken steps to relieve his former clients, the judgment debtors in the case, from the payment of the unjust exaction of an unauthorized attorney's fee. He took no such steps. It must therefore be concluded that the evidence is sufficient to support the findings of the local committee and the Board of Governors and that it would be improper, under all of the circumstances of the case, for this court, in exercising its supervisory powers in state bar matters, to find contrary to those findings.

[3, 4] On the final point the petitioner contends that the facts as found would not, if true, disclose moral turpitude on his part. The presence of moral turpitude sufficient to justify disbarment or suspension may be disclosed under varying circumstances. For example, if an attorney is convicted of a felony or misdemeanor involving moral turpitude the record of a final judgment of conviction is conclusive against him. State Bar Act, § 6101, St. 1939, p. 357. The commission of an act of moral turpitude, dishonesty or corruption, whether committed in the course of his relations as attorney or otherwise, is sufficient cause for suspension or disbarment. State Bar Act, § 6106; cf. Jacobs v. State Bar, 219 Cal. 59, 25 P.2d 401. Such provisions were undoubtedly included in the State Bar Act because it was realized that the acts of an attorney in violation of law, aside from any breach of his duty as an attorney, might reflect upon his integrity and fitness as an attorney and require his suspension or disbarment. But in prescribing the duties of an attorney and imposing penalties for a breach thereof, it was not considered that moral turpitude, dishonesty or corruption should be discovered as a separate and distinct element of the act. When it was provided in section 6103 of the State Bar Act that "* * * any violation of the oath taken by him, or of his duties as such attorney, constitute causes for disbarment or suspension," such violation was to be deemed sufficient to support a disciplinary proceeding. We are not here dealing with the case of a violation of a traffic or other law applying to the public in general and which has no relation to the duties of an attorney. The law violated by the petitioner was one specially directed to him for his observance and faithful adherence as a justice of the peace and as an attorney, the violation of which would tend to bring the courts and the profession into disrepute. To say that the violation of such a law does not constitute grounds for discipline would be to set at naught a salutary legislative enactment designed to safeguard the public as well as the attorney in professional relationships.

Since it must be held that the petitioner knowingly practiced law in violation of a statute governing his duties as a lawyer his conduct in that respect was a breach of his duty to support the Constitution and laws of this state and to maintain the respect due to courts of justice. State Bar Act, § 6068(a) and (b). It was also a violation of the oath of an attorney prescribed by section 6067 of the State Bar Act. Such conduct therefore constituted cause for discipline pursuant to section 6103 of that act.

In accordance with the recommendation of the Board of Governors, the petitioner is hereby suspended from the practice of the law in this state for a period of six months commencing thirty days from and after the date of the filing of this opinion.

CARTER, Justice (dissenting).

I dissent. The majority opinion in this case evades the material issues and disregards pertinent authorities which should control the disposition of the case. While giving lip service to the so-called Hardy case (State Bar v. Superior Court, 207 Cal. 323, 278 P. 432), it utterly disregards the holding in that case and emasculates the doctrine therein enunciated. It fails to even mention the numerous cases which hold that a violation of a statute relating to the duties of justice of the peace is an offense against the judicial office and not against the legal profession or practice of law. It does not attempt to differentiate or suggest any basis for a distinction between a violation by a justice of the peace of the provisions of section 170 of the Code of Civil Procedure and a violation of the provisions of section 171 of that code. It fails to suggest any basis for its holding that petitioner's acts involved moral turpitude.

In my opinion the offense of a justice of the peace in violating section 171 of the Code of Civil Procedure, if proven, may amount to such misconduct in office as would subject him to removal from office in the manner provided by law. It is now held by the majority that it also places him in peril of proceedings which may destroy his eligibility to practice his profession or remove him from his membership in The State Bar and thus accomplish by indirection his disqualification to hold, and hence, necessarily his removal from office for which the Legislature has set up a direct, if not exclusive mode of procedure. Pen.Code, § 758 et seq. A justice of the peace of a Class A township must be an attorney at law. Code Civ.Proc. § 159a.

In State Bar v. Superior Court, 207 Cal. 323, 278 P. 432, 438, sought to be distinguished by the majority opinion, attention was directed to the foregoing dangerous and untoward consequences. It was there held that The State Bar was without jurisdiction to proceed against a judge of the superior court for the reason that the right of such judge to practice law was suspended during his continuance in office. In the course of the opinion this court stated: "There would seem to exist many reasons, rooted in public policy, why this public and, it may well be said, powerful corporation, considering its membership and the relation thereof to the administration of justice through the judicial arm of the state government, should not lightly be held to be invested with the power and authority over judicial officers which in the instant case it has sought to exercise." Notwithstanding this declaration, I am disposed to hold that inasmuch as a justice of the peace may act in the capacity of a lawyer with certain restrictions it may be desirable that The State Bar be not completely short of regulatory powers over him. However, I cannot agree with the majority, that this court should not be astute to heed any demarcation between an offense committed against a judicial office and one that may be committed against the profession of an attorney at law. In our system of government, the independence of the judiciary is fundamental. It is essential in all courts that the judges who are appointed or elected to administer the law should be permitted to administer it under the protection of the law, independently and freely, without favor and fear. The proper method for ridding the people of any district, county, township, or municipal officer, for misconduct in office is set forth in section 758 et seq. of the Penal Code. A justice of the peace is in need of protection similar to any other judge or justice, hence, should a disciplinary proceeding against an incumbent justice of the peace come before us, I do not want to be foreclosed by the instant decision from considering the applicability and propriety of the holding in the case of State Bar v. Superior Court, supra, that the regulatory power of The State Bar over a justice of the peace be deemed suspended, at least, to the extent that his right to practice law has been suspended. Thus, if what is charged against him is a violation of that suspension, it would not be a matter for State Bar action, but would leave the matter of his qualification to hold office to be determined in the manner provided by law.

In some jurisdictions it is held as a logical sequence of the rule that a judge cannot be disciplined, as a lawyer, during his tenure of office because of misconduct, that such acts cannot be made the basis of disbarment proceedings afterwards. In re Jones, 202 La. 729, 12 So.2d 795; In re Meraux, 202 La. 736, 12 So.2d 798. However, it has been determined otherwise in this state. See In re Craig, 12 Cal.2d 93, 82 P.2d 442. Under this rule it would seem to follow that petitioner being no longer a justice of the peace, The State Bar has jurisdiction over his person and of the acts committed by him while he was a justice of the peace. Notwithstanding this rule it does not follow that cause for discipline has been made out in this case.

The majority opinion seeks to obviate the necessity of finding moral turpitude in the conduct attributed to petitioner by holding that the violation of section 171 of the Code of Civil Procedure constitutes an offense against the profession or practice of law. Local Administrative Committee # 8 for the County of Los Angeles, before whom the disciplinary proceedings in the instant matter were initiated found that petitioner had committed the acts charged against him, but did not find any moral turpitude. The Board of Bar Governors (by a vote of 12 to 3) made an additional finding and conclusion to the effect that the conduct charged and found to have taken place involved moral turpitude. The theory of respondent, The State Bar, is that petitioner should be disciplined pursuant to section 6106 of the Business and Professions Code (State Bar Act), which provides that an attorney may be disbarred or suspended for "the commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise." Petitioner has vigorously attacked the conclusion that his conduct constitutes moral turpitude. The majority opinion makes no effort to meet this attack but as aforesaid seeks to obviate the necessity thereof. In order to arrive at their conclusion that petitioner may be disciplined irrespective of the discovery of moral turpitude "as a separate and distinct element of the act," the majority have bypassed numerous authorities which distinctly hold that an offense such as charged against petitioner is an offense against the judicial office which he holds, only, and not an offense against the profession or the practice of law. State Bar v. Superior Court, 207 Cal. 323, 278 P. 432; Baird v. Justice's Court, 11 Cal.App. 439, 105 P. 259; Connecticut M. Life Ins. Co. v. Most, 39 Cal.App.2d 634, 103 P.2d 1013; In re Silkman, 88 App.Div. 102, 84 N.Y.S. 1025; In re Strahl, 201 App.Div. 729, 195 N.Y.S. 385.

State Bar v. Superior Court, supra, involved an application by The State Bar for a writ of mandate to compel the Superior Court of Los Angeles County to require Carlos Hardy, a judge thereof, to testify before a committee of the Board of Governors of The State Bar investigating charges against him involving the practice of law and acceptance of $2,500 in fees while a judge of the Superior Court of Los Angeles County. Article VI, section 22 of the state Constitution then provided that: "No judge of a court of record shall practice law in any court of this state during his continuance in office." The writ was denied. During the course of the opinion this court stated: "An attorney and counselor at law who may be the incumbent of a judicial office, by essaying to practice law, does not by so doing violate any particular principle of legal ethics to which our attention has been directed. This is shown by the fact that the occupants of judicial positions in the courts of this state not of record, who are otherwise eligible so to do, may and in most instances do, practice law without any suggestion that in so doing they are violating either former or existing laws defining and regulating the ethical practices of the legal profession. The offense of a judge of a court of record who violates the foregoing provision of the Constitution is not an offense against his profession, but against his office."

In Baird v. Justice's Court, supra, a judgment of a justice's court ordering a police judge "disbarred from practicing law in the justice court of Riverside township, so long as he shall remain police judge of said city," was annulled. One ground of decision was that if as a matter of fact the police judge had violated the law by engaging in the practice of his profession before a justice of the peace, when at the same time he was occupying a judicial position, his offense is that of a judicial officer and not that of an attorney, and that if he subjected himself to any penalty by reason of misconduct, it was that provided by section 758, Penal Code (removal from office).

In Re Silkman, supra [88 App.Div. 102, 84 N.Y.S. 1027], it was urged that the New York Supreme Court, Appellate Division, had "inherent" power to discipline lawyers, and "that an offense committed by a judge in practicing, when prohibited, is likewise an offense committed by him as a lawyer, which calls for the exercise of the inherent power." It was held that if the accused "has violated the injunction of the Constitution, he has offended as surrogate, and not as an attorney. As an attorney his right to practice law is undoubted, and it is only as surrogate that it is or can be questioned, and it follows that the violation of the Constitution, if it has been violated, has been committed by him in his judicial or official, rather than in his professional capacity." A similar holding was made in Re Strahl, 201 App.Div. 729, 195 N.Y.S. 385.

The place occupied by section 171 in the Code of Civil Procedure discloses similarly that it is a disqualification or prohibition against the conduct of judges and was never intended to be a statute regulating the conduct of attorneys as such. It is found under the chapter heading: "Disqualifications of Judges." The section of the code immediately preceding, and a part of the same chapter, is the more commonly known section 170, prescribing grounds for disqualification of a "justice, judge or justice of the peace" for personal interest, interest by relationship, prior service as attorney and bias or prejudice. The chapter containing sections 170 and 171 is a part of part I, title II of the code. Part I is titled, "Courts of Justice," and title II bears the title, "Judicial Officers." On the other hand, chapter I, title V of part I of the Code of Civil Procedure as originally enacted related to attorneys as such and bore the heading, "Attorneys and Counselors at Law." The sections therein contained have for the most part been repealed and reenacted as chapter IV of the Business & Professions Code, under the heading, "Attorneys." St.1939, p. 347. These headings or titles being a part of the codes as originally enacted or amended by the Legislature may be consulted in interpreting the sections of the codes, so that they may be given effect according to their true import. Sharon v. Sharon, 75 Cal. 1, 16, 16 P. 345; In re Forthmann, 118 Cal.App. 332, 336, 5 P.2d 472; 23 Cal.Jur., § 147, p. 772.

It is manifest from the foregoing authorities and what has been said that section 171 of the Code of Civil Procedure does not purport to regulate the duties of a lawyer. Its obvious purpose is to prevent reciprocity in the administration of justice that might result if justices of the peace in the same county were allowed to practice law before each other. The consequences of the instant decision are far-reaching. If a justice of the peace may be disciplined by The State Bar for a violation of section 171 of the Code of Civil Procedure, then he may be similarly disciplined for sitting in a case in which he is interested in violation of section 170 of that code.

The charges against petitioner not amounting to an offense against the profession or the practice of law, disciplinary proceedings against him are not justified unless his conduct falls within section 6106 of the Business & Professions Code, which provides that an attorney and counselor may be disbarred or suspended for "the commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise." A consideration of the record before us leads to the inescapable conclusion that the additional finding and conclusion of the Board of Bar Governors (not made by the local administrative committee), that petitioner "committed acts involving moral turpitude, dishonesty and corruption within the meaning of section 6106 of The State Bar Act," cannot be sustained. According to the uncontradicted evidence adduced at the hearings before the local administrative committee, the promissory note sued upon was given for a legal and just claim, and was unpaid in the amount sued for. No attempt was made to show that the makers of the note, the defendants in the action brought upon it, at any time had, or believed they had, a defense to the action. The notice to show cause does not even allege facts showing that petitioner committed any acts which were detrimental to the makers of the note or that any advantage was obtained by him contrary to their legal obligations. In Wallis v. State Bar, 21 Cal.2d 322, 131 P.2d 531, it appeared that the petitioner borrowed money from a client on a number of occasions, promising interest and large bonuses, in order to make speculative investments. Representations in regard to the investments not warranted by any information in the possession of the petitioner were made to the client. It was contended that because of the making of these representations petitioner should be suspended for six months. We held that even if the client had a cause of action for fraud against the attorney under the rule stated in section 1572 of the Civil Code, disciplinary action was not justified because there had been no intent to mislead. Cf. Bryant v. State Bar of California, 21 Cal.2d 285, 296, 131 P.2d 523; 3 Cal.Jur., § 122, p. 727.

At the time of the filing of the suit complained of, July 7, 1939, petitioner actually was not sitting in his court, but was on vacation, and remained on vacation while service of copies of the complaint and summons were made on defendants and beyond the time in which defendants were directed to answer. A visiting justice from another township sat in petitioner's court during the entire month of July, 1939. Petitioner did not act upon any issue of law or fact in the matter, but on the contrary testified that if any issue of fact or law arose while he was sitting he intended to disqualify himself and call in another justice. The action being in contract for the amount of $75, all the parties residing within San Gabriel township, and the note being payable within the township, the justice's court of that township was the proper court for institution of the action. Code Civ.Proc.1937, §§ 112, 395. As heretofore stated, it was not alleged or shown that any ulterior motive prompted bringing the action, or that the makers of the note have been deprived of a defense. At the time of issuance of execution petitioner had ceased being a justice of the peace, and the Board of Bar Governors made no finding conforming to the allegations in the notice to show cause that petitioner had caused the issuance of the writ of execution and delivered it to the constable knowing "full well that the judgment rendered in said action theretofore was wholly void and of no legal effect." The judgment was not void. Connecticut M. Life Ins. Co. v. Most, 39 Cal.App.2d 634, 103 P.2d 1013. The matters herein concerned, except the issuance and levy of execution, occurred during the summer of 1939 and were not repeated, yet no action was taken by respondent until May, 1943. Petitioner ceased being justice of the peace and returned to the full time practice of law in January, 1943. Therefore, the delay in instituting proceedings may have been caused by respondent's doubting whether or not it had jurisdiction while petitioner continued to be a justice of the peace, although according to its argument in this proceeding it had the power to investigate and maintain proceedings at all times. At any rate, in 1940, when the matter was fresh in the minds of everyone, it was investigated by the Los Angeles County grand jury, a body that had the power to present an accusation directed toward removing petitioner from office, "for willful or corrupt misconduct" (Pen.Code, § 758 et seq.), which body, after summoning and hearing witnesses, took no action. Evidently it was of the opinion that the offense, if committed, did not include "willful or corrupt misconduct in office." I am equally convinced that it did not involve moral turpitude and that therefore these proceedings should be dismissed.

The majority apparently attempt to derive some support from a statement made toward the close of the opinion, that "The presence of moral turpitude sufficient to justify disbarment or suspension may be disclosed under varying circumstances. For example, if an attorney is convicted of a felony or a misdemeanor involving moral turpitude the record of a final judgment of conviction is conclusive against him. State Bar Act, § 6101." Whatever the intended significance of the statement it clearly has no application to the facts of this case. Petitioner has not been convicted of any crime and the majority opinion fails to state any basis for holding him guilty of acts involving moral turpitude. For a definition of moral turpitude see In re O'Connell, 184 Cal. 584, 194 P. 1010; In re Craig, supra; In re Rothrock, 16 Cal.2d 449, 106 P.2d 907, 131 A.L.R. 226.

The effect of the majority opinion is to overrule the Hardy, Baird and Connecticut Mutual Life Insurance cases, and also the Rothrock case, without giving consideration to the reasoning which formed the basis of those decisions. Certainly if these cases are to be overruled, some mention should be made of them in the majority opinion and some basic reason should exist for such action. I challenge anyone to read the last cited cases and reconcile the views therein expressed with the majority opinion in this case.

From what I have said in the foregoing dissenting opinion it is obvious that the proceeding against the petitioner should be dismissed.

SCHAUER, J., concurred.

Rehearing denied; CARTER and SCHAUER, JJ., dissenting.

HIMES v. LOS ANGELES COUNTY et al.*

L. A. 18936.

Supreme Court of California.

June 29, 1945.

Rehearing Granted July 26, 1945.

In Bank.

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Prior opinion, 152 P.2d 541.

Murphey & Davis, of Los Angeles, for appellant.

J. H. O'Connor, Co. Counsel, and A. Curtis Smith, Deputy Co. Counsel, both of Los Angeles, and Clyde Woodworth, City Atty., of South Gate, for respondents.

PER CURIAM.

This case presents for determination the same questions which were decided in S. Siwel Co. v. County of Los Angeles, Cal. Sup., 160 P.2d 789. It is conceded by counsel that the issues of fact and law in the two cases are identical, and that the Siwel decision will control the disposition of this appeal.

The judgment herein is reversed with directions to the trial court to overrule the general demurrer to appellant's complaint and to proceed in accordance with the views stated in S. Siwel Co. v. County of Los Angeles, supra.

TRAYNOR, Justice (dissenting).

I dissent for the reasons set forth in my dissenting opinion in S. Siwel & Co. v. County of Los Angeles, Cal.Sup., 160 P.2d 789.

* Subsequent opinion 167 P.2d 189.

TRABUE PITTMAN CORPORATION, LIMITED, v. LOS ANGELES COUNTY et al.*

Civ. 14708.

District Court of Appeal, Second District, Division 1, California.

July 24, 1945.

Hearing Granted Sept. 20, 1945.

1. Fixtures 🔑1

In determining whether an article is a "fixture", manner of its annexation, its adaptability to purpose for which realty is used and intention of party making annexation must be considered.

See Words and Phrases, Permanent Edition, for all other definitions of "Fixture".

2. Statutes 🔑179

Definitions contained in Revenue and Taxation Code, in so far as they are comprehensive, are to be applied in taxation matters. St.1939, p. 1277, §§ 104, 105.

3. Statutes 🔑179

The Revenue and Taxation Code does not indicate a purpose to depart from time honored distinctions between real and personal property, nor to discard usual tests in reference to intention and manner of affixation of fixtures for tax purposes. St.1939, p. 1274, § 1 et seq.; p. 1277, §§ 104, 105; St.1941, p. 3111, § 405.

4. Constitutional law 🔑87

The right to own property is a basic constitutional right along with right of individuals to contract and, among themselves, determine ownership.

5. Statutes 🔑179
Taxation 🔑576

Under the rule that ownership cannot be impressed by law against will of individual, state is without power, by a series of definitions or otherwise, to attach property of one person to property of another against will of either or both and then seize property of latter because of a failure to pay taxes on property of former.

6. Municipal corporations 🔑972(3)

Where national bank leased building for a branch and in lease reserved ownership of vault door which bank installed in a manner so as to make it easily removable without damage to walls of building, door, like other bank fixtures, remained personal

* Subsequent opinion 168 P.2d 156.

property of bank and could not be properly assessed by Los Angeles as an improvement to lessor's realty. St.1939, p. 1277, §§ 104, 105; St.1941, p. 3111, § 405; 12 U.S.C.A. § 548; Const. art. 13, § 16, subd. 1(a).

7. Municipal corporations ⚷972(3)

The rule that nothing may be done indirectly which cannot legally be done directly applies to attempts of Los Angeles to tax personal property of national bank, legally taxable only by state, by declaring bank fixtures installed in leased premises to be improvements taxable to lessor.

8. Municipal corporations ⚷972(3)

Los Angeles assessor could not, by a mere reclassification, convert personal property into real property and thus bring it within right to tax. 12 U.S.C.A. § 548.

9. Municipal corporations ⚷977

Lessor of building leased to national bank was entitled to recover full amount of tax payments made under protest covering assessment on vault door unit and other fixtures installed by lessee bank, which fixtures, under terms of lease, were to remain the personal property of bank.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by Trabue Pittman Corporation, Limited, against the County of Los Angeles and City of Los Angeles for a tax refund. From the judgment, plaintiff and defendants appeal.

Affirmed in part and reversed with directions in part.

Holbrook & Tarr, of Los Angeles, for plaintiff, appellant and respondent.

J. H. O'Connor, County Counsel, S. V. O. Prichard, Asst. County Counsel, and A. Curtis Smith, all of Los Angeles, for Los Angeles County.

Ray L. Chesebro, City Atty., and Louis A. Babior, Deputy City Atty., both of Los Angeles, for City of Los Angeles.

DORAN, Justice.

This is an appeal by both the plaintiff and the defendants from a judgment entered in a tax refund case which involves the taxability of banking fixtures installed in leased premises by a national bank, namely, the Bank of America National Trust & Savings Association. The bank's lessor, plaintiff herein, has appealed from that part of the judgment which denied recovery of taxes paid under protest, in reference to a vault door and door frame owned and installed by the lessee bank but assessed to the plaintiff on the theory that such vault door unit constituted an improvement to plaintiff's building. The defendants have likewise appealed from the trial court's holding that certain tellers' cages, wickets, counters, partitions, etc., were personal property belonging to a national bank and hence exempt from local taxation, and adjudging that plaintiff should recover the amount of taxes assessed against such property and paid under protest. The question here under consideration, therefore, is in respect to the nature of banking fixtures in a leased building,—whether, for taxation purposes they shall be considered as realty or as personalty.

The complaint, occupying 107 pages of the clerk's transcript, describes the situation and certain alleged discrimination in great detail, the reason for such particularization being explained by plaintiff's counsel in the opening statement as follows, "* * * we had hoped to present sufficient facts so it would be a test case for several hundred other cases, * * *".

By stipulation the trial court first proceeded "to take all the evidence and determine the issues as to whether or not the property in question was real estate * * or personalty," and at the end of the trial after the court had rendered its decision as to the nature of the property, plaintiff's attorney announced that the question of discrimination would not be pursued further and such issue was therefore not passed upon by the court.

It should be noted at the outset that the subject here considered and the opinion as well, are concerned only with property of the character and nature herein described and the relation of the contracting parties with regard thereto. This limitation is noted because of the application of the Federal Constitution and statutes, and Section 16, subd. 1(a) of Article XIII of the California Constitution to the tax problem here presented, a condition which, manifestly, does not apply generally.

It appears from the record that during the years 1930 and 1931 the plaintiff constructed, at the corner of Rimpau Avenue and Washington Boulevard in Los Angeles, a one-story and basement store building, the building being designed for the occupancy of stores and a market, and no part thereof being specially designed for bank use. After having been occupied by a drug store, dress shop and lamp shop, the corner store room was leased on July 31, 1936 for a term of six years by the plaintiff to the Bank of America, at the end of which term the premises were leased to the bank for a new term of five years ending July 31, 1947. Pursuant to the usual practice of the bank, when quarters are leased for a branch bank, the banking officials prepared plans for alteration of the premises, which in this particular instance included both interior and exterior alterations, the construction of a vault room and the installation of a vault door, counter line, partitions, and what appear to be the usual and customary bank fixtures. The cost of the alterations, exclusive of furniture and fixtures, was $11,630.36, which figure did not include the cost or value of the bank vault door which was moved there from a warehouse maintained by the bank for the storage of such vault doors. The value of this particular vault door, the main subject of contention herein, was estimated at $1500, and the cost of moving and installing it was $234. The vault room constructed by the bank after leasing the plaintiff's store room, was built of reinforced concrete, approximately 17 feet long, 8½ feet wide, with a height of 8½ feet, and with a door opening 7 feet 5 inches high by 3 feet 6 inches wide, which door opening, as appears from the trial court's findings of fact, "was not constructed so as to require the installation of any particular type or make of door or door frame and which said opening was devoid of any bars, hooks or other contrivance intended for the hanging thereon or attachment thereto of any door frame or door whatsoever."

The vault door and frame, owned and installed by the bank, is one unit and is described by the bank's architect as follows: "Well, this door is a Miller make, three and a half inches in thickness, polished steel finish, and there is a double combination and a triple time lock, and then there was a frame, and then there is an inner vestibule which is made of three by three angles and plates." The door unit was skidded in on rollers, "Then the door is put in its position in the opening in the vault, wooden wedges are inserted at the top of the door, and the frame, to hold the door in its vertical position. * * *

"Q. When this has been plumbed and found in a true vertical position then what holds it in that position? A. The wooden wedges.

"Q. And at all times do these wooden wedges hold it in position? A. Yes. * * After the door has been tested for its plumbness, then the opening between the inner vestibule and the rough opening in the vault is filled with cement grout."

This cement grout is "Not necessarily tamped" in. As to whether the filler or grout between door and wall formed a bond, the same witness testified, "Well there is a semisort of bond there, but the grout when it dries out the moisture content leaves the grout and there is a tendency for the grout to shrink, so it is possible there might be a slight space between the grout and the concrete wall and in between the grout and the steel vestibule.

"Q. Is that grout placed there for the purpose of making a bond between the vault and frame and the wall of the vault? A. No, it is not.

"Q. What is it placed in there for? A. Well, more for fire protection purposes."

The wooden wedges used to hold the vault door in a vertical position are left in place and "They still hold the door in position." The inner flanges of the door unit "are attached to the lining of the vestibule by means of a type of screw or bolt that is screwed in there". The bank has removed similar vault doors from one location to another "a good many times" by loosening the cement grout with a hammer and shoving the door out, and this procedure does not do any substantial injury to the building. Such removal "would take two or three men maybe three or four hours", and it was common practice to thus remove vault doors. Likewise the other bank fixtures such as partitions, counters, etc., can be removed without injury to the building.

The trial court found that by the express provisions of the written lease between plaintiff and the bank, "all title in and to the furniture, fixtures, vault door, vault door frame, safety deposit boxes, business equipment and other personal property, placed in or about the said leased premises by lessee National Bank, remains in lessee National Bank"; likewise that "all custody, possession and control" thereof, "during the pendency of its lease, or any renewal thereof, remains solely in lessee National Bank, together with the right of removal therefrom"; and that plaintiff "has never made or asserted any claim or property right or interest" in any of said business equipment. Mr. B. F. Lane, Assistant Vice President of the bank, testified that the vault door was installed in plaintiff's building with the intention on the part of the bank to remove it at the termination of the lease or any extension thereof. The court further found that the vault door unit was "a commodity which is the subject of commerce and trade * * * bought and sold on the open market by at least six firms * * *; that similar vault door frames and vault doors in a number in excess of 150 have been removed from premises occupied by banks, jewelers, furriers, building and loan associations, and other types of business within the last five years in Southern California, * * *".

Quoting from the opening brief filed by plaintiff-appellant, it appears that "During the 1941 assessment season the Los Angeles County assessor, for the first time, included in the assessment of plaintiff's building, the vault door, counters and trade fixtures, which had been installed by the bank in the leased store room, being the sum of $29,250.00, which according to the assessor, included a valuation placed on the bank's vault door of $660.00, and on the counter lines, etc. of $910.00, or an aggregate of $1,570.00 on the bank's property." At the beginning of the trial, in response to an inquiry by the trial judge, the Assistant County Counsel explained this assessment as follows: "Before the San Diego vault door case (San Diego Trust & Savings Bank v. County of San Diego, 1940, 16 Cal.2d 142 [105 P.2d 94, 133 A.L.R. 416]) was decided by the Supreme Court, it was the general practice in this county to regard trade fixtures installed by lessees as being personal property, including bank vault doors, regardless of the matter of the unity of use, and so forth and so on."

An application was made on behalf of plaintiff to the 1941 Board of Equalization of Los Angeles County to eliminate from the assessment on plaintiff's building the value placed on the bank's property, both plaintiff and the bank objecting to the assessment of the vault door and other banking fixtures as "improvements" to plaintiff or to anyone, and claiming that such property was personal property belonging to the bank and therefore not assessable under the provisions of Article XIII, section 16, subd. 1(a) of the California Constitution providing for a tax measured by a national bank's net income in lieu of all other taxes except taxes on real property, and in view of Section 5219 of the Revised Statutes of the United States, U.S.C.A. Sec. 548 of Title 12, permitting the taxation of real property belonging to national banking associations "to the same extent, according to its value, as other real property is taxed." The Board of Equalization denied the application, plaintiff thereafter paid the taxes under protest and instituted this action for the recovery thereof.

After hearing the testimony and viewing the premises the trial court found that the vault door and frame "were and had become integral parts of the building of the Plaintiff herein, but * * * that the remaining banking fixtures * * * were trade fixtures and should have been classified by the Assessor as personal property of the lessee National Bank.", and rendered judgment accordingly. It may be further noted that the court found that on May 2, 1941, the bank had notified the County Assessor in writing of its claim that the bank vault doors and other banking fixtures "were personalty and not realty and that they should not be assessed to Plaintiff Landlord as constituting a part of the improvements", and that the Assessor thereafter "advised said Bank of his intention to classify for tax purposes such fixtures as 'improvement' regardless of the fact that they were located on 'leased' premises".

It seems evident from an examination of the briefs and, indeed, from the record of the trial itself, that the decision in this case depends largely upon an interpretation of the rule as laid down in the case of San Diego Trust & Savings Bank v. County of San Diego, 1940, 16 Cal.2d 142, 105 P.2d 94, 133 A.L.R. 416, and the application of that rule to the facts presented in the instant case. In announcing his decision the trial judge said, "My opinion is based largely upon the rule laid down in several cases, particularly the San Diego Bank case, that we must give consideration to the manner of annexation, the adaptability to the use and purpose for which the realty is used, and the intention of the annexing party; that we must also consider, as said in the Southern California Telephone case (Southern California Telephone Co. v. State Board of Equalization, 12 Cal.2d 127, 82 P.2d 422) that where the rights of those not parties to a private agreement are involved, the intent is manifested by the physical fact, with due consideration to the status of the parties by whom the articles have been installed."

The San Diego Bank case referred to above was an appeal from a judgment granting an injunction permanently enjoining the assessor of San Diego County from assessing as real property for local taxation purposes certain bank vault doors and other equipment belonging to the plaintiff banking corporations. Commenting on the facts in the San Diego Bank case, respondent's brief says: "A closer examination of the case by scrutiny of the record itself reveals that the case involved 15 vaults, 22 vault doors and 1 elevator. Ten of the vaults, 15 of the vault doors and the elevator were located upon premises where the Plaintiff banking corporation owned both the land and the building. Two of the vaults and 4 of the vault doors were upon premises where one of the banks owned the building to which the property in question was attached but leased the land upon which that building was situated. One vault and one vault door were on premises where another of the Plaintiff banks owned the land but leased the building, and two of the vaults and two of the vault doors were upon premises where both the land and the buildings were leased from private owners." Reversing the judgment of the lower court the Supreme Court held that "vaults and vault doors constitute a unit for use together and are improvements to the realty." However, as pointed out in appellant's brief, the court in the San Diego case expressly withheld determination of the precise question which arises in the instant case, and at page 152 of the opinion in 16 Cal.2d, at page 99 of 105 P.2d, 133 A.L.R. 416, says, "In those instances where the owner of the vault doors is also the owner of the building to which they are annexed their classification as real property for purposes of taxation creates no further problem. Where the owner of the vault doors has annexed his property to the real property of another, however, the question immediately arises as to whom the tax on the vault doors shall be assessed. We are reluctant to render this decision without first disposing of that question, since we are of the opinion that it could well be considered here. However * * * counsel for both parties stated to the trial court that said question was not to be considered as an issue in this case inasmuch as it was said to be at issue in a proceeding for a writ of prohibition (No. 91,260) 'trailing' this case * * *. The trial court, therefore, did not consider the question, nor did the parties discuss it in their briefs. In order therefore to permit the parties the benefit of their briefs and argument *we shall not determine that question in this opinion.*" (Italics added.) It is evident, as commented upon in appellant's closing brief, that in the San Diego case "No distinction is there noted between the vault doors, etc. installed in leased premises and those installed in premises owned by the banks." Indeed, in that case the Supreme Court says at page 150 of 16 Cal.2d, at page 98 of 105 P.2d, 133 A.L.R. 416, "It is significant that in nearly every instance the party installing the vault doors owned the building in which the same were installed." The San Diego Bank case, therefore, cannot be deemed authority for respondent's contention that the vault doors owned by the bank in the instant case were properly assessed as improvements to plaintiff lessor. In the San Diego case the action was brought, not by a lessor having no interest in the vault doors but by banking corporations which in most instances were the owners of both the vaults and the real estate to which they were attached. There is nothing in the San Diego case to indicate that the Supreme Court sought to alter the long established law relating to the trade fixtures of tenants, nor is any arbitrary authority given to tax assessors to declare that the real estate of a lessor is "improved" by trade fixtures in which he has no interest and over which he exercises no control.

It is provided in Revenue and Taxation Code, Section 405, St.1941, p. 3111, that, "Annually, the assessor shall assess all the taxable property in his county, except State assessed property, *to the persons owning, claiming, possessing, or controlling it* at 12 o'clock meridian of the first Monday in March. The assessor shall ascertain such property between the first Mondays in March and July." (Italics added.) In view of this provision considered in connection with the trial court's definite finding that "all custody, possession and control" of the vault door and other banking fixtures "remains solely in lessee National Bank, together with the right of removal therefrom" and that the title to said property "remains in lessee National Bank" it is difficult to see where any authority exists for assessing such property to the plaintiff lessor.

The respondents lay particular stress upon the following statement found in the San Diego Bank case, 16 Cal.2d 142, at page 150, 105 P.2d 94, 133 A.L.R. 416: "The nature of a vault door itself suggests an intent permanently to affix it to a vault which by ordinary tests must be said to constitute an improvement to realty. Vaults alone without doors would not be useful as vaults, and would fail in their intended purpose." While the quoted statement was doubtless applicable to the facts of the San Diego case where separate ownership of building and vault door was not involved, it is not controlling in reference to the present litigation. In the instant case the evidence shows the existence of an intent diametrically opposed to that suggested in the quoted statement from the San Diego opinion. The manner of installation, the ease of removal, the general practice of removing such vault doors and their status as a commodity bought and sold on the open market, the fact that the vault door in question was not designed or constructed for installation in the plaintiff's building, the lease provision giving the bank the right to remove the vault door, and practically every other fact shown by the evidence, is inconsistent with any other intent than that of a temporary attachment to the plaintiff's building. The matters just mentioned are all incorporated in the trial court's Findings of Fact. Not least important in this connection is the finding "that said bond could be broken without injury to the walls of the building and the vault door and frame removed without physical injury to the remainder of said building". Also, as found by the court, the assessor's office was fully advised by the bank on May 2, 1941, in respect to its ownership of the vault doors.

Another case discussed and relied upon by both parties to this appeal is Southern California Telephone Co. v. State Board of Equalization, 12 Cal.2d 127, 82 P.2d 422, in which a writ of mandate to compel the State Board of Equalization to correct an assessment by classifying central office equipment as personal property instead of improvements to realty, was denied. In reference to this case and the San Diego Bank case respondents' brief contains the following: "While the question presented by the instant case was thus not directly decided in that case (the telephone case), we respectfully submit that the Telephone Company case, supra, coupled with the bank vault door case, supra, (San Diego Bank case) makes it very plain that the property involved in this case constitutes a unit of use which gives to it the character of realty for the purpose of taxation." The instant case, however, is not one dealing with "central office equipment" such as was involved in the Telephone case, but with the equipment of a branch bank located in a leased store building not originally constructed for bank use. In fact, a distinction between "central office equipment" and branch office equipment is recognized in the Telephone case at page 138 of 12 Cal. 2d, at page 428 of 82 P.2d, which recites that, "In no proper sense can equipment in small leased offices be held an improvement to and part of real property owned by another." The facts in the Telephone case were, of course, entirely different from those existing in the present case, and manifestly the decision in the Telephone case is no authority for upholding the assessment of the bank's vault doors as an improvement to plaintiff's real estate.

[1] In this connection it is interesting to note the comment of the trial judge in the instant case: "I believe the effect of that case (the Telephone case) is to say that * * * in the case of the main building under that unit rule the so-called fixtures became realty, became a part of the building, within the class of improvement under the Assessor's right of assessment; *but that branch installation, particularly in leased premises, might well be personalty, and not improvement to the real estate.* * * * I think the same reasoning could apply to banks. The main offices of the bank, such as at Seventh and Spring and Seventh and Olive, of this Bank of America, have been constructed, in so far as the lower floors are concerned, * * * for banking purposes and might well be considered and determined by the court under the unit rule to be realty; but again when small branches are installed, such as this one—and this is a small branch in so far as its equip-

ment is concerned—the unit rule does not apply and it remained as personalty." (Italics added.) Evidently the trial court was here referring to the counters, tellers' cages, partitions, etc., which were held to be personalty and not improvements to the plaintiff's building, rather than to the vault door which that court deemed an improvement to the real estate. However, it cannot be doubted that the vault door, moved to its present position from the bank's warehouse with the evident intention to remove it elsewhere at the termination of the lease, was as much a part of the banking equipment of this branch bank as were the other fixtures and, so far as the present controversy is concerned, no more of an improvement to plaintiff's building exists in the one case than in the other. The three tests which, according to the San Diego Bank case, must be applied in determining whether or not an article is a fixture, namely: "(1) the manner of its annexation; (2) its adaptability to the use and purpose for which the realty is used; and (3) the intention of the party making the annexation", have been duly considered in reference to the present controversy but, so far as the vault door is concerned, with a different result from that reached by the trial court.

[2, 3] In seeking to maintain the propriety of the present assessment defendants' position is stated as follows, "Second, the plaintiff has assumed that ordinary common law cases applying the law of fixtures to the correlative rights of landlord and tenant are determinative of the present case. The Defendant takes the position that in so far as the tax laws have provided definitions for taxing purposes these definitions are to be applied regardless of whether they comport with ordinary common law cases." It is true, as mentioned by defendants, that Section 104 of the Revenue and Taxation Code, St.1939, p. 1277, declares that real estate shall include "improvements", and Section 105, St.1939, p. 1277, provides that "Improvements" include: "(a) All buildings, structures, *fixtures,* and fences erected on or *affixed* to the land, except telephone and telegraph lines." (Italics added.) And it is doubtless true, as stated in the above quotation from defendants' brief, that the definitions contained in the tax laws, in so far as they are comprehensive, are to be applied in taxation matters. In answer to this contention, however, it should be particularly noted that there is no provision either in the Revenue and Taxation Code, or in any of the cited cases, which indicates either directly or by implication, a purpose to depart from the time honored distinctions between real and personal property, nor to discard the usual tests in reference to intention and the manner of affixation, both of which matters were specifically mentioned in the San Diego Bank case. .

While it is true that many of the cases dealing with trade fixtures arose in reference to controversies between landlords and tenants or involved other contractual relationships, it is impossible to ignore the analogy between such cases and the present dispute concerning tax assessment, at least in respect to the permanency of attachment to realty and the intent of the parties in making the annexation. Even as it relates to the tax assessor, denominated by the defendants as a "third party" not bound by a "hidden secret intent" contained in the private agreement (lease) between landlord and tenant, such analogy must be preserved, otherwise a confusion in the law would result which would seriously imperil all contracting parties wherever trade fixtures are involved. In other words, there cannot be one interpretation of the law to be applied in the one case, and an entirely different interpretation to be adopted in another case. And in this connection it may be noted that in the present case no "secret" intent was involved, for the assessor was duly notified concerning the situation. Furthermore, the "physical facts" commented upon by defendants as being the proper criterion in reference to intention, indicate that the attachment of the vault door was not intended to be permanent or in any sense an "improvement" to plaintiff's building.

[4, 5] Defendants' argument, that the state merely taxes the property and is not interested in ownership, is no answer to plaintiff's contention. The right to own property is a basic constitutional right. Moreover, individuals retain the constitutional right to contract and, among themselves, determine ownership. Ownership cannot be impressed by law against the will of the individual. In the circumstances, the effort to separate property and ownership is pure fiction. The state is without power, by a series of definitions or otherwise, to attach the property of one person to the property of another against the will of either or both, and then seize

the property of the latter because of a failure to pay the taxes on the property of the former. Such a process, obviously, destroys that security in property guaranteed by the Federal Constitution.

[6] Under the evidence in the present case the only rational position is that bank vault doors, when attached as they were in the branch bank in question and under the circumstances herein shown to exist, cannot be properly assessed as improvements to the lessor's realty. In fact, any other view would place all landlords in a most precarious position, subjecting them to possible tax liability by reason of the fact that a tenant has brought in removable trade fixtures and in some manner temporarily attached such articles to the rented building with the landlord's consent.

[7] It is axiomatic that, nothing may be done indirectly which cannot, under the law, be done directly. There can be no question, as stated in the appellant's brief, that "Under the provisions of the Constitution of the United States, a federal instrumentality, including a national banking association, is not subject to taxation by any state, or subordinate entity, or subdivision of such state, except to the extent granted, or permitted, by the statutes of the United States of America, and the sole grant or permission to tax national banking associations, including Bank of America National Trust and Savings Association, Plaintiff's tenant, is contained in the provisions of section 5219 of the Revised Statutes of the United States, U.S.C.A. sec. 548 of Title 12 * * *", heretofore mentioned, permitting the local taxation of real estate owned by a national bank but giving no authority for taxation of such bank's personal property. It is also clear that the only taxation of national banks contemplated in this state is the "in lieu" taxation measured by the bank's net income, provided for in Section 4a of the State Bank and Corporation Franchise Tax Act (Act 8488, Deering's Gen.Laws), which taxes are in lieu of any other local taxes except the tax on realty, and expressly authorized by Article XIII, section 16, subd. 1(a) of the California Constitution. In 1896 an attempted assessment on the money and fixtures of a national bank was held void in First National Bank of San Francisco v. City and County of San Francisco, 129 Cal. 96, 61 P. 778. Assessment of personal property and fixtures of a national bank was also held void in City and County of San Francisco v. Crocker-Woolworth National Bank of San Francisco, C.C., 92 F. 273. That this is the law, there can be no doubt.

[8] It would seem, therefore, as maintained in appellant's brief, that "The assessor of Los Angeles County in this instance endeavored by a mere reclassification to convert personal property into real property and thus bring it within the right to tax under Section 5219(3) above quoted". Such a reclassification, whether based upon a theory of improvement to the lessor's realty by reason of unity of use, or otherwise, is unwarranted by the evidence in this case. Nor is such a practice justified by reason of the San Diego Bank case or any other decision brought to the attention of the court. Judicial approbation of the assessment levied in this case could only lead to unnecessary confusion, and furthermore would apparently lend approval to an attempt to tax indirectly through the lessor, personal property of a national bank which under the law could not be taxed directly.

[9] For the reasons heretofore given plaintiff is entitled to recover the full amount of tax payments made under protest, covering assessments on both the vault door unit and other banking fixtures installed by the lessee Bank of America. The judgment in so far as it permitted a recovery of taxes paid on the banking fixtures other than the vault door, is to that extent affirmed, but said judgment is reversed in so far as it denied plaintiff a recovery of taxes paid on the vault door unit, and since there is no serious controversy as to the facts the court is directed to enter judgment accordingly.

Plaintiff, appellant and respondent Trabue Pittman Corporation, Ltd., to recover costs on appeal.

YORK, P. J., and WHITE, J., concur.

Hearing granted; TRAYNOR, J., not participating.

70 Cal.App.2d 369

BETHLEHEM STEEL CORPORATION v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 12883.

District Court of Appeal, First District,
Division 1, California.

July 30, 1945.

Hearing Denied Sept. 27, 1945.

1. Workmen's compensation 🔑948

Statute providing that injured employee is not entitled to compensation if he unreasonably refuses to submit to medical treatment is merely a codification of the general rule that aggravation or extension of an injury is not compensable, and that one may not recover for an aggravation of an injury caused by his own act. St. 1937, p. 276, § 4056.

2. Workmen's compensation 🔑948, 949

An employee is not compelled to undergo an operation or treatment when the outcome is problematical, uncertain, or attended with real danger. St.1937, p. 276, § 4056.

3. Workmen's compensation 🔑1939

Whether the employee has acted reasonably or not in refusing treatment is a question of fact upon which the opinion of the commission, based upon expert medical or surgical advice, is final. St. 1937, p. 276, § 4056.

4. Workmen's compensation 🔑1417

The commission's power to determine whether injured employee has acted reasonably in refusing treatment is not arbitrary, and its determination must be based upon competent expert evidence, unless the issue pertains to a problem properly falling within the scope of judicial knowledge. St.1937, p. 276, § 4056.

5. Workmen's compensation 🔑1416

In determining whether injured employee's refusal to submit to surgical operation was unreasonable, so as to deprive him of compensation, what doctors told employee, as well as testimony of doctors at the hearing, constituted medical opinion upon which the commission could base its award. St.1937, p. 276, § 4056.

6. Workmen's compensation 🔑1672

Testimony of doctors before the Industrial Accident Commission, and inferences to be drawn therefrom, and evidence as to what doctors also told injured employee, were sufficient to sustain finding that employee's refusal to accept treatment offered by employer was reasonable, so as not to deprive him of right to compensation. St.1937, p. 276, § 4056.

7. Workmen's compensation 🔑1703

In workman's compensation proceeding, conduct of hearing referee, in asking doctors certain questions after they had been examined by employer's lawyer, did not show prejudice against employer.

WARD, J., dissenting.

Special proceeding by the Bethlehem Steel Corporation, a self-insured employer, against the Industrial Accident Commission of the State of California and another to review a finding of the commission that an injury sustained by Paul Weldon McClure, employee, resulted in 100 per cent. permanent disability, and that he was entitled to such medical treatment as may reasonably be required to relieve him from the effects of such injury during his life, and that employee's refusal of further medical and surgical treatment offered by the employer was not unreasonable.

Award affirmed.

R. P. Wisecarver, of San Francisco, for petitioner.

Everett A. Corten and R. C. McKellips, both of San Francisco, for respondent Industrial Accident Commission.

PETERS, Presiding Justice.

Petition for a writ of review.

The Commission found that Paul McClure was injured in the course and scope of his employment with Bethlehem Steel Corporation, a self-insured employer, in September, 1942; that he then sustained a dislocated intervertebral disc; that such injury has resulted in 100 per cent permanent disability; that the employee is entitled to such medical treatment as may reasonably be required to relieve him from the effects of such injury during his life; and that the employee's refusal of further medical and surgical treatment offered by the employer is not unreasonable. Petitioner's main contentions are that the last mentioned finding, when tested by the requirements of § 4056 of the Labor Code, is unsupported by any substantial evidence, and that petitioner was deprived of a fair and impartial hearing because of the alleged bias and prejudice of the referee.

The facts are as follows: In 1942 McClure was employed as a welder by Bethlehem. On September 29th of that year, while working in a cramped position, he experienced a "popping" sensation in his back. For a few minutes he was unable to walk, but finally was able to get to the employer's first-aid station, where an attendant, not a physician, taped his back. He was in considerable pain, and it was with some difficulty that he got home. The next morning he was unable to get out of bed and was removed, by the employer, to a hospital, where X-rays were taken. He was hospitalized for four days and given electro-therapy treatments. Dr. Barrett, a plant physician for Bethlehem, told McClure that he probably had a pulled ligament or muscle. After his stay in the hospital McClure went back to work. He reported several times to the first-aid station and had his back taped. He suffered considerable pain and after about a month he bought a belt. He continued to work, in spite of the continuous pain, until October, 1943. In that month he had to quit work and was again examined by Dr. Barrett at the plant hospital. Dr. Barrett referred him to Dr. Hand, an orthopedic specialist. A letter from Dr. Hand to Dr. Barrett, dated November 11, 1943, states that McClure "has the signs and symptoms of low back strain and nerve root irritation. * * * These findings are consistent with a ruptured disc between lumbar four and five. I believe it would be advisable to manipulate his back under a spinal anaesthetic and apply traction to both legs." McClure was sent to the hospital where he was put in traction for five or six weeks. After his release he went back to work, but continued to suffer pain. In March of 1944 Dr. Barrett sent McClure to a physiotherapist, who gave him several treatments. These seemed to aggravate the condition. It became very difficult for him to walk. He reported to the hospital and a company doctor, who was substituting for Dr. Barrett, told him that he had rheumatism and arthritis, that he "would never be cured," and that he should retire and take a trip around the world. This doctor had an interne tape McClure's back. The condition continued and in May of 1944 McClure called at the Commission and asked what he should do. The Commission sent him to Dr. Dozier of Bethlehem who, in turn, sent him to Dr. Hand. Dr. Hand told him that there was a disc out, that it was cracked or chipped, but that he wanted verification. He was then sent to Dr. Jones. Dr. Hand's report, dated May 16, 1944, states: "This man is again totally disabled and most probably has a ruptured intervertebral disc, even though he does not have atrophy, sensory changes or reflex changes. He was greatly improved by manipulation and traction. This might be worth another attempt. If unrelieved by such a procedure, he should be seen by a neuro-surgeon for an opinion relative to the possibility of his having a ruptured intervertebral disc." The report of Dr. Jones is dated May 22, 1944. He concludes that the "history strongly suggests that this patient has a dislocated nucleus pulposus. At the present time there are no findings from the neurological standpoint. He has, however, definite evidence of mechanical difficulty in his low lumbar spine.

"I would suggest that this patient have a Lipiodol study of his low lumbar spinal canal; and if a dislocated nucleus pulposus is demonstrated, he would then require operation for removal of same."

At this time Dr. Barrett strongly recommended against an operation, stressing to McClure the uncertainty and danger of such procedure. On June 6, 1944, McClure filed his application with the Commission asking that the nature and extent of his disability be determined. The first hearing on this application was held on June 21, 1944. At this, and subsequent hearings, McClure was not represented by counsel. At this first hearing it was stipulated that McClure had been injured in the course and scope of his employment; that the employer was self-insured; that medical treatment had been furnished and compensation paid to date. McClure testified as to the history of his injury. A report of Dr. Olsen, dated June 20, 1944, was introduced. He concluded that the "clinical picture is typical of a protruded intervertebral disc. It should be removed." At the conclusion of the June 21st hearing counsel for the employer stated that they wanted McClure examined by Dr. Fender and, if he so recommended, an operation would be offered.

McClure was then examined by Dr. Fender. His report, dated June 24, 1944, gives a complete history of the case and indicates a complete examination was then made. The report concludes: "I think the man suffers from a dislocation of a portion of an intervertebral disc. However, and in spite of the long period of conservative management already followed, I would recommend deferring surgery in this case for the present." A letter from Dr. Olsen dated June 28, 1944, states that "when symptoms from a disc persist for such a time, surgery is imperative. His disability will be permanent until the disc is removed." A letter from the attorney of the employer to the Commission dated June 28, 1944, encloses the Dr. Fender report and states that "Mr. McClure is being offered this conservative treatment recommended by Dr. Fender, or the operation suggested by Dr. Jones."

McClure replied to this letter on July 7, 1944. He therein states that early in May, 1944, he called upon Doctors Barrett and Dozier for a consultation; that Dr. Barrett told him "that an operation was necessary, but that the head physican [sic] of the Bethleham [sic] Plants advised against such an operation due to the fact that they are not succesful [sic]"; that the two doctors advised that he accept a cash settlement; that he has been examined by Dr. Fender; that Dr. Fender does not deem it advisable to operate; that he has "come to the conclusion that it would be against my better judgement [sic] to have such an operation at this time"; that he has again seen Dr. Fender but at the date of this visit the doctor had not heard anything further about the case.

Under date of July 14, 1944, the rating department of the Commission recommended a 100 per cent disability rating. The attorney for the employer requested a further hearing, which request was granted. A further hearing was had on August 25, 1944.

The record shows that prior to this hearing an effort was made to settle the case. The employer offered, and McClure agreed to accept, a $3,000 cash settlement. The referee, acting well within his powers, refused to approve this settlement, giving as his reasons that at the time he accepted, McClure, because of his injury and because of certain personal matters, was unable to exercise a free judgment in the matter, and because the amount offered was insufficient.

Before the hearing of August 25, 1944, the employer had advised McClure that he should be operated upon or perhaps try several weeks' rest in bed in a hospital. McClure had again reported to Dr. Fender, but was then suffering from a cold. The doctor had told him to come back when he was over the cold. At the hearing he testified that he had not done this because "I didn't think it was worth while going back to him." He was then asked:

"Q. Will you at this time put yourself under the care of Dr. Fender for treatment? A. I don't know what he can do. I've had so many treatments.

"Q. I am asking you if you will at this time put yourself under the care of Dr. Fender? A. It wouldn't do me a bit of good to put myself under his care.

"Q. Is that your answer, you will not? A. That is true."

He then went on to reply, in answer to a question from the referee, that the reason he refused treatment was that Dr. Olsen had stated that an operation was imperative and that he felt that further treatments would be useless. He then stated that he refused to be operated upon. He gave as his reasons the following:

"Well, the idea is that as you know Dr. Barrett has told us that this is practically a new field of operation and it stands to reason that any operation that is a new field that can be improved on and I have talked to several people—I know one fellow personally and I have a brother-in-law that has the same accident. He has gone to the Mayo Clinic and they said yes, they would operate but he would have a stiff back the rest of his life.

"Q. What else did Dr. Barrett tell you when you were first discussing operation and by Dr. Barrett I mean Dr. Gilbert Barrett, the Chief Surgeon for the Bethlehem Steel Company? A. Yes, Dr. Barrett told me at the time Mr. Dozier and Dr. Barrett called me in—we were discussing operations and Dr. Barrett told me frankly that the Bethlehem would not undertake an operation of this sort and he told me that the doctor over all the Bethlehem plants had specified to give the patient a settlement and not undertake the operation and Dr. Barrett told me then, he said that the operation is very, very dangerous. He said, 'You go in there and monkey around with the trunk line and there is all nerves and everything in your back,' and he said, 'It is very dangerous to monkey with the back.' Naturally I was scared.

"Q. And you still have that information he gave you and that advice in mind? A. Yes, it is just that I am afraid of it.

"Q. Did you discuss with Dr. Olsen about operation? A. Yes.

"Q. What did Dr. Olsen tell you about operation? A. He said it was dangerous. He said it was a new field and he said some fellow—one fellow out of a percentage may get over it. Other fellows may go through the operation and get over it but it will come back to them. They will either have a pain in their back or a pain in their legs."

Dr. Fender was called as a witness and testified that the conservative treatment he would recommend before an operation was simply rest in bed for a period of two or three weeks, that the man's conservative treatment up to date had been complicated by maneuvers that had been carried on and might themselves have prevented recovery. The doctor obviously had little faith in the bed treatment. He testified that some of these cases recovered spontaneously, but that the chances of that happening in the case of this employee were dwindling down rapidly to the vanishing point. He gave it as his opinion that over half of these operations, that about 60 or 70 per cent of the cases obtained favorable results. The employee's back, if the operation was successful, would be better than it then was, and he would be able to work, but not to lift and carry heavy things as before his injury. Again he testified that the chances were 75 per cent that he would be improved and able to return to useful work; that the operation was not dangerous to life, that it was serious only in the sense that any operation, even a tonsillectomy, is serious; that an intercranial operation on the brain, or an operation on lungs or heart were more serious. He was definitely of the opinion that McClure should have the operation if conservative treatment failed.

Dr. Barrett testified that he was now not adverse to an operation if conservative treatment failed. He admitted advising against an "early" operation. (This advice was given in May, 1944, some 20 months after the injury.) He stated: "We don't like surgery if it can be avoided and I had been told by the chief surgeon that he was opposed to early operation and any operation if it can be avoided. If not, it is applied"; that they have performed such operations "but we don't like them"; that the patient should go to bed for several weeks and if that failed to give relief he should be operated upon; that the "majority" or operative cases get a "result" if done by careful surgeons; "some don't and I mentioned to Mr. McClure when we were discussing it and urged that this be not done at this time [May, 1944]. Dr. Shoudy had told us of two cases that were unfavorable, making them more skittish than ever. Dr. Shoudy is the chief surgeon of the Bethlehem Steel. It made them less inclined to have this done."

The rating expert for the Commission testified that McClure was 100 per cent disabled; that he would not guess what the rating might be if McClure were operated upon; that after such operations "some of them come out with no disability at all and some of them have severe disability afterwards"; that he has observed "several" cases of improvement after such an operation and has "seen one or two where they were worse."

On September 29, 1944, the referee made his final report. He therein explains why he refused to approve the compromise and finds that on the facts, which he reviews, the refusal to accept further medical treatment or the operation was not unreasonable; finds the disability to be 100 per cent; and finds the applicant is entitled to reasonable medical treatment for the balance of his life.

On October 18, 1944, the Commissioners filed their order disapproving the compromise and their findings and award which follow substantially those of the referee.

The employer thereafter filed a petition for rehearing, urging, substantially, the same points made on this petition. The rehearing referee recommended a rehearing and filed a report. He therein stated that in his opinion there was considerable misunderstanding in this case over the proper treatment which raised in McClure's mind a suspicion of the employer's doctors; that in the beginning they strongly advised against surgery, so that when surgery was offered he was in such a state of mind he did not want surgery at the hands of defendant's doctors but wanted a settlement so that he could go to Johns Hopkins; that from his (the rehearing referee's) experience conservative treatment should first be tried before surgery; that here all the doctors agree surgery is called for and testified no great risk is involved; that in his opinion the refusal to accept the operation was unreasonable. The hearing referee also filed a report on the rehearing. At this time McClure, still unrepresented by counsel, was living in Oregon. In this report, after reviewing the evidence, the referee points out that it was not until after McClure had come to the Commission for advice that surgery was offered; that prior to that it was discouraged; that they then tried to negotiate an inadequate settlement; that when this failed and they were faced with a 100 per cent disability rating, they then offered the operation; that in his opinion the refusal of McClure was reasonable. The Commission denied the petition for rehearing, and this present petition for a writ of review was filed.

The main legal question involved is the proper interpretation and application of § 4056 of the Labor Code, St.1937, p. 276. It provides: "No compensation is payable in case of the death or disability of an employee when his death is caused, or when and so far as his disability is caused, continued, or aggravated, by an unreasonable refusal to submit to medical treatment, or to any surgical treatment, if the risk of the treatment is, in the opinion of the commission, based upon expert medical or surgical advice, inconsiderable in view of the seriousness of the injury."

It is the contention of petitioner that under this section if the medical and surgical experts agree that the risks incident to an operation are inconsiderable in view of the seriousness of the injury then the employee's refusal of medical or surgical care is, as a matter of law, unreasonable. It is also urged that the record here shows that all the doctors agreed the operation and treatment were necessary and that the risks were inconsiderable. While we may agree with petitioner's interpretation of the section, we cannot agree with its interpretation of the record.

[1-4] The section above quoted is simply a codification of the general rule that aggravation or extension of an injury is not compensable—one may not recover for an aggravation of an injury caused by his own act. An employee is under a duty to submit to reasonable medical or surgical treatment, and, if he refuses and his injury is thereby aggravated, he may not recover compensation. See annotations 6 A.L.R. 1260; 18 A.L.R. 431; 73 A.L.R. 1303; see, also, Danziger v. Industrial Acc. Comm., 109 Cal.App. 71, 292 P. 525; General Acc., etc., Corp. v. Ind. Acc. Comm., 77 Cal.App. 314, 246 P. 570; Marshall v. Ransome Concrete Co., 33 Cal.App. 782, 166 P. 846. However, it is also well settled that an employee is not compelled to undergo an operation or treatment when the outcome is problematical, uncertain or attended with real danger. Marshall v. Ransome Concrete Co., 33 Cal.App. 782, 166 P. 846; see, also, Campbell's Workmen's Compensation, p. 668, § 751, and cases cited fn. 111. It is equally well settled that the question as to whether the employee has acted reasonably or not in refusing treatment is a question of fact upon which the opinion of the Commission, based upon expert medical or surgical advice, is final. Danziger v. Industrial Acc. Comm., 109 Cal.App. 71, 292 P. 525. The Commission's power is, of course, not arbitrary, and its determination must be based upon competent expert evidence, unless the issue pertains to a problem properly falling within the scope of judicial knowledge. Southern California Edison Co. v. Indus. Acc. Comm., 75 Cal.App. 709, 243 P. 455.

[5, 6] If these rules be applied to the evidence in the present record we think there is sufficient evidence, and reasonable inferences from the evidence, to sustain the finding that McClure's refusal to accept the treatment offered was reasonable. It is true that on the hearing all of the doctors testified that in their opinion McClure should be operated upon and that the risks attendant thereto were slight. But that is not all of the expert evidence that appears in the record. What the doctors told McClure also constitutes medical opinion upon which the Commission could base its award. This employee had undergone every form of treatment suggested by the employer's doctors for nearly two years, and his condition had grown progressively worse. It was not until November of 1943 that Dr. Hand first suggested the possibility of a ruptured intervertebral disc. Sometime later a company doctor diagnosed his condition as incurable rheumatism or arthritis and suggested that he take a trip around the world. It was not until the employee asked help from the Commission in May of 1944 that an intensive diagnosis was made. Even then the specialists were doubtful as to the advisability of an operation. Dr. Jones, in his report of

May 22, 1944, suggested a Lipiodol study which would have been of assistance in diagnosis and which apparently was not made, and suggested the possibility of an operation. When the employee suggested this to Dr. Barrett, that doctor strongly recommended against an operation, stressing the uncertainty and danger of such an operation. Dr. Fender recommended against surgery as late as June 24, 1944. Dr. Barrett told the employee that Bethlehem would not undertake such an operation and that the chief surgeon for Bethlehem had directed that such operations should not be undertaken but that settlements should, if possible, be effected. He also told the employee that the operation "is very, very dangerous," and that it was very dangerous to start cutting into the trunk line. Dr. Olsen told the employee the operation was dangerous and that it was a new field and that "one fellow out of a percentage may get over it." This is all medical evidence that creates a substantial conflict with the later opinions given by these same doctors. It is a reasonable inference from the evidence that after the company doctors had convinced the employee that the operation was dangerous and doubtful as to results, an attempt was made to settle the case. It was only after this attempt failed that the doctors unequivocally recommended an operation. Even on the last hearing Dr. Fender testified that the operation was successful in but substantially over half the cases, in about 60 or 70 per cent of the cases, later changed to 75 per cent of the cases. Dr. Barrett, while now recommending the operation, admitted that the doctors at Bethlehem do not like such operations. He also stated that in a "majority" of cases you could expect a good result, and that he knew of cases where the results were unfavorable. The rating expert for the Commission testified that he knew of cases that had been benefited and others that had been injured by such operations. This was all expert evidence, based upon the opinions of doctors, upon which the Commission was entitled to base its finding on the issue. The fact that these doctors later gave conflicting evidence does no more than create a conflict.

It must be remembered that we are not here dealing with the law of averages, but with the case of Paul McClure. The test imposed by § 4056 of the Labor Code is not entirely an objective one. The questions are, did Mr. McClure reasonably refuse the proffered treatment, and whether the Commission's finding is based on expert medical and surgical evidence. There would seem to be little doubt but that the finding of reasonableness is amply supported.

Petitioner makes much of the fact that McClure also refused the rest in bed treatment suggested by Dr. Fender. That doctor had but little faith in that treatment, as evidenced by his testimony that in view of the fact the injury was almost two years old the possibility of a spontaneous cure was rapidly diminishing to the vanishing point. In view of the many treatments undergone by this patient his lack of confidence in this treatment was obviously justified.

[7] Petitioner also contends that it was deprived of a fair trial because of the alleged bias and prejudice of the hearing referee. In this connection it cites J. G. Boswell Co. v. Ind. Acc. Comm., 67. In that case an award was annulled and a new hearing ordered because the appellate court found that the hearing referee, the same referee that heard the evidence in the present case, was biased and prejudiced. In that case, as the opinion discloses, the referee was biased and prejudiced. Each case must be determined on its own facts. The record in this case shows no such bias and prejudice. Petitioner objects because the referee asked the doctors certain questions after they had been examined by the lawyer for the employer. This was entirely proper under the circumstances. The employee was unrepresented by counsel. An examination of the questions asked shows that they were asked to bring out all of the facts, some of which had not been brought out by the attorney for the employer. The Boswell case recognizes that such procedure is permissible and proper.

Petitioner also contends that a memorandum filed by the hearing referee after the rehearing referee had recommended a rehearing shows bias and prejudice. In that memorandum the hearing referee stated the facts as he saw them. The summary is, on the whole, a fair one. He then concluded his memorandum as follows:

"Even at the risk of being charged by the eminent counsel for the defense with reflected prejudice and bias, I prefer to protect this applicant when I can do so without the risk of doing any injustice to the defendants.

"If the Commission, after a careful consideration of this memo and the entire record herein, believes that a rehearing should be granted and grants it, I will quit arguing the case—but until such time as a rehearing is granted in such case where the applicant has no attorney and is helpless and far away, I must write as I feel or write not at all. Recommendation: Deny petition for rehearing."

Assuming that this memorandum should be considered for the purpose of determining whether the referee was prejudiced, but keeping in mind that this referee had already passed on the facts, we are of the opinion that it does not demonstrate bias and prejudice. The memorandum reasonably can be interpreted as an honest and fair attempt to bring before the Commission the true facts of the case as the hearing referee saw them. It must be remembered that in these cases it is the Commission and not the referee that makes the orders. The Commission had before it the rehearing referee's recommendation and that of the hearing referee. It was its responsibility to grant or deny the petition for rehearing. We must assume, of course, that official duty was properly performed.

The award is affirmed.

KNIGHT, J., concurs.

WARD, Justice (dissenting).

I dissent. In this case an examination of section 4056 of the Labor Code is imperative. It reads as follows: "No compensation is payable in case of the death or disability of an employee when his death is caused, or when and so far as his disability is caused, continued, or aggravated, by an unreasonable refusal to submit to medical treatment, or to any surgical treatment, if the risk of the treatment is, in the opinion of the commission, based upon expert medical or surgical advice, inconsiderable in view of the seriousness of the injury."

To accept the premise that the expert testimony required by the statute may be supplied by what one doctor, who subsequently changed his opinion, told the applicant for compensation, defeats the purpose of the statute. The language of the statute leads me to conclude that the finding of the commission must be based upon expert medical or surgical advice before the commission, rather than upon a statement to the applicant and repeated by the applicant to the commission, inasmuch as the qualifying phrase follows the word "commission."

Accepting the applicant's theory for the moment—that it was not unreasonable to refuse to submit to the operation—the record discloses that one physician, a Dr. Fender, who was the last to examine the applicant, recommended further conservative treatment to relieve the applicant's difficulties because he felt that prior treatment had been complicated by incomplete rest. The treatment he proposed was simply to put the applicant in bed, flat on his back, for a period of two or three weeks. In answer to the question whether he would submit to such treatment by Dr. Fender, the applicant said he would not. In view of the seriousness of the injury—total disability—a flat refusal to submit to further conservative treatment can not be said to be reasonable. In my opinion the award should be annulled.

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70 Cal.App.2d 392

In re LYNCH'S ESTATE.

LYNCH et al. v. BELL.

No. 12853.

District Court of Appeal, First District,
Division 1, California.

July 31, 1945.

1. Wills 🔑118

The Probate Code requires that will be subscribed or acknowledged by testator before two attesting witnesses present at same time to be entitled to probate. Probate Code, § 50, subds. 2, 3.

2. Wills 🔑386

An attesting witness' testimony, accepted as true by probate court, that neither testator's subscription nor his acknowledgment of will was made in both witnesses' presence at same time, must be so considered for all purposes of appeal from judgment denying probate of will. Probate Code, § 50, subds. 2, 3.

3. Wills 🔑303(3)

An attesting witness' testimony established that will was neither subscribed nor acknowledged by testator in presence of both witnesses at same time as required to entitle it to probate. Probate Code, § 50, subds. 2, 3.

4. Wills 🔑118

The phrase "in the presence of", as used in statute requiring that will be subscribed or acknowledged by testator in presence of both attesting witnesses at same time, means conscious presence, not merely actual physical presence of witness without realization of what is transpiring, and is not synonymous with witness' being in same room as testator and another witness at time of their signatures of will. Probate Code, § 50, subds. 2, 3.

See Words and Phrases, Permanent Edition, for all other definitions of "In the Presence of".

5. Wills 🔑118, 119

To authorize admission of will to probate, both attesting witnesses must not only be actually present when will is subscribed or acknowledged by testator, but his conduct and actions must unmistakably indicate to witnesses that will is his, though no particular verbal formula need be followed. Probate Code, § 50, subds. 2, 3.

6. Wills 🔑360

Where record on appeal from judgment denying probate of contested will showed that proponent expressly waived right to demur to contest and did not complain of any insufficiency in pleading during trial and that all parties understood that only contested issue as to validity of will was whether testator signed or acknowledged it in both witnesses' presence at same time, proponent's objections that contestants' general allegation that will was not executed in statutory manner or form was conclusion of law, and that specific ground for denial of probate could not be determined from findings or judment, did not warrant reversal. Probate Code, § 50, subds. 2, 3.

7. Wills 🔑309

Where both subscribing witnesses to will testified in contest thereof and it clearly appeared from testimony of one of them that will was not executed in conformity with legal requirements, probate court owed duty to deny petition for probate of will, regardless of whether proceeding was hearing of preliminary proof or trial of contest on merits or whether burden of proving invalidity of will rested on contestants. Probate Code, § 50, subds., 2, 3.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

In the matter of the estate of Daniel W. Lynch, deceased. From a judgment denying a petition by Agnes G. Bell, formerly Agnes G. Smith, as executrix of deceased's will, for probate thereof, Mary Lynch and others, contestants, appeal.

Affirmed.

Waldo F. Postel, of San Francisco, for appellant.

Milton Marks and Morris Lowenthal, both of San Francisco, for respondents.

KNIGHT, Justice.

Daniel W. Lynch died March 17, 1944, leaving a witnessed will dated May, 1940, which was offered for probate. He was unmarried and was survived by a mother, Mary Lynch, six brothers and two sisters. By the terms of his will be devised and bequeathed his entire estate in equal undivided shares to four of his brothers, his mother Mary (erroneously described in the will as a "sister"), and a friend, Agnes G. Smith. The will named Agnes G. Smith (now Agnes G. Bell) as executrix, and she petitioned for the probate of the will. The mother and four of the brothers, two of whom were named as beneficiaries in the will, filed a contest to the will on three grounds, the first being that the will was not executed in conformity with the requirements of the law of this state. After hearing the evidence the probate court so found, and denied the petition for probate. Agnes G. Bell appeals. It is evident that the decision of the probate court is fully supported by the law and the facts.

[1] Section 1276 of the Civil Code as it stood prior to the adoption of the Probate Code in 1931 embodied four subdivisions. By the first it was provided that a witnessed will "must be subscribed at the end thereof by the testator himself, or some person in his presence and by his direction must subscribe his name thereto"; subdivision 2 provided: "The subscription must be made in the presence of the attesting witnesses, or be acknowledged by the testator to them to have been made by him

or by his authority"; and subdivision 3 provided: "The testator must, at the time of subscribing or acknowledging the same, declare to the attesting witnesses that the instrument is his will * * *." The construction placed by the courts upon the foregoing provisions was that if neither the subscription nor the acknowledgment was made before two witnesses, both present at the same time, it was not executed with the formality required by section 1276 of the Civil Code. Estate of Lawrence, 196 Cal. 321, 237 P. 738, 739. In so holding the court in that case said:

"It therefore appears that neither the subscription nor the acknowledgment of the decedent took place before two witnesses present at the same time. The precise question was presented in Estate of Emart, 175 Cal. 238, 244, 165 P. 707, 710, L.R.A. 1917F, 866, where this court construed the language of section 1276 of the civil Code, reviewed the history of the legislation on the subject, and said: 'From the language of our statute and this review of its history, we regard the conclusion as unescapable that our law requires the subscription or the acknowledgment to be before the two witnesses present at the same time.'

"The appellant contends that in Estate of Dow, 181 Cal. 106, 183 P. 794, this court, in the opinion on rehearing, so far discredited the decision in Estate of Emart, supra, as to render the point involved herein an open one. Such was not the case. In Estate of Dow, supra, the will was subscribed and acknowledged in the presence of both witnesses, but the witnesses did not sign the document in the presence of each other. It was held that, under the statute, the witnesses need not sign in the presence of each other. The distinction is pointed out by the court in the opinion on rehearing in that case.

"On the authority of Estate of Emart, supra, the judgment is affirmed."

In 1931 section 1276 of the Civil Code was reenacted into section 50 of the Probate Code. Some modifications, not material here, were made to subdivisions 1 and 4; but subdivisions 2 and 3, upon which the decisions in the Lawrence and Emart cases were based, were reenacted in the same form except that the words "present at the same time" were added to subdivision 2, so that as reenacted it is made to read: "The subscription must be made, or the testator must acknowledge it to have been made by him or by his authority, in the presence of both of the attesting witnesses, *present at the same time.*" (Italics ours.) And the obvious purpose of adding the italicized words was to make the new section harmonize with the construction theretofore placed by the courts on section 1276. Subsequent to the adoption of the Probate Code another case (Estate of Krause, 18 Cal.2d 623, 117 P.2d 1, 2) arose involving a will executed prior to the adoption of the Probate Code; and the construction placed by the earlier cases on subdivisions 2 and 3 of section 1276 was confirmed and applied. In that case the court said: "The law requires the subscription or acknowledgment to be made before the two witnesses present at the same time, and where this requirement is not met, the instrument must be denied probate. Estate of Emart, 175 Cal. 238, 165 P. 707, L.R.A.1917F, 866; Estate of Lawrence, 196 Cal. 321, 237 P. 738." From the foregoing it will be seen that the law as declared in the three cases last mentioned is controlling in similar cases arising under section 50 of the Probate Code.

[2] Here the two witnesses to the will were Miss Dorothy Kelly and J. W. Welch, and their testimony as to the circumstances attending the signing of the will is conflicting. The testimony given by Miss Kelly affirmatively shows that neither the subscription nor the acknowledgment of the decedent was made in the presence of both witnesses, present at the same time; and since the probate court accepted her testimony as true, it must be so considered for all the purposes of this appeal.

[3] The following are among the facts established thereby: The decedent was a member of the firm of Lynch & Sons, with offices on upper Market Street in San Francisco, and Miss Kelly had been in his employ as secretary for upwards of five years. Welch was an insurance salesman and transacted considerable business with the decedent. He called to see the decedent at his office at least twice a month, and Miss Kelly was well acquainted with him. The decedent and Miss Kelly occupied different desks on opposite sides of the same room, a considerable distance apart. Each desk faced a wall so that while they were seated at them their backs were toward each other. On the day in question Welch entered the room, greeted Miss Kelly and walked over to the decedent's desk. She

observed that they "were either looking at a paper or signing some paper" and that some conversation was being carried on between them; but she did not know the nature of the business they were transacting nor did she hear any part of the conversation. She stated that she was busy with her duties and paid no attention to it. Welch remained only a short time and then left the room, closing the door behind him. After he had gone the decedent walked over to her desk, and laid the document on her desk before her. The first page was folded under, and he said: "Will you sign here, Dorothy?" She asked him what it was, and he replied, "Sign here." Noting that the document had been signed by the decedent and Welch, she signed it as directed. Thereupon, so she testified, the decedent picked up the document "in a sort of joking manner and said, 'This is my will'"; and that he then walked over and put it in the file. The distance to the file from Miss Kelly's desk was about fifteen feet. Part of the testimony so given by the witness was as follows:

"Q. Before you signed was anything said to the effect that what these men were signing was a Will? A. No.

"Q. Was the word 'Will' uttered by anybody in that room before you signed? A. No. I had no idea what was going on at all, I didn't hear it.

"Q. You had no idea? A. No.

"Q. And is it not a fact that the first knowledge that you had that it was a Will was after you had signed it? A. That is true, when he told me.

"Q. Then Mr. Lynch told you? A. Yes.

"Q. And when Mr. Lynch told you that, after you had signed, Mr. Welch had already gone? A. Yes."

From the foregoing it will be seen that the situation here presented has been brought clearly within the holding of the cases above cited.

[4] Nor does the fact that Miss Kelly was present in the room at the time that the decedent and Welch signed the will alter the legal aspect of the case, for it is well settled that the phrase "in the presence of" as used in the law of wills means conscious presence and not merely the actual physical presence where the party has no realization of what is going on. Chappell v. Trent, 90 Va. 849, 19 S.E. 314; Aiken v. Weckerly, 19 Mich. 482; Heatherington et al. v. Pipes, 32 Miss. 451; Baldwin v. Baldwin's Executor, 81 Va. 405, 59 Am.Rep. 669. In short, the phrase "in the presence of" is not synonymous with "being in the same room." Reed et al. v. Roberts, 26 Ga. 294, 71 Am.Dec. 210. As said in Page on Wills (vol. 1, p. 640): "A person in whose presence an act is done must be informed of what is taking place so that he actually knows what is being done; or the act is not done in his presence, no matter how close to him it may be done. A will is not signed in the presence of one who is attending to another matter and does not know what is taking place until he is told later."

[5] And so in this state it has been held that both witnesses must not only be actually present when the subscription is made or the testator acknowledges it to have been made by him or by his authority, but it must be "unmistakably indicated to the persons signing as witnesses by the testator's conduct and actions" that it is his will, although no particular verbal formula need be followed. Estate of Silva, 169 Cal. 116, 145 P. 1015; Estate of Cullberg, 169 Cal. 365, 146 P. 888; Estate of Johnson, 100 Cal.App. 676, 280 P. 987. In other words, the circumstances attending the transaction must show that the decedent must have intended to have the witnesses know that the writing was his will. Estate of Cullberg, supra; 26 Cal.Jur. p. 781. In Estate of Norswing, 47 Cal.App.2d 730, 118 P.2d 858, one of the attesting witnesses testified that he did not know that the instrument he was signing was intended as a will, in spite of the fact that it had the word "Will" written at the top of it, and the witness could have read the attestation clause. It was there held (page 733 of 47 Cal.App.2d, page 860 of 118 P.2d): "It is essential, however, that each of the witnesses shall understand that the testator was promulgating the document as his will. Estate of Silva, supra; Estate of Johnson, 100 Cal.App. 676, 280 P. 987"; and that in that case there was "no evidence of acts or conduct on the part of the decedent which required a finding that the nature of this instrument was unmistakably indicated to this witness."

In the present case, although it appears that Miss Kelly was in the room when the document was signed by the decedent and Welch, she positively and unequivocally testified that she was wholly unaware of the nature of the transaction that was taking place between them; and that it was not indicated to her that the instrument was a will until after she had signed it, and that at that time the other witness was not present but had left the premises.

Briefly, Welch's testimony was that he brought the unsigned document to the decedent's office and stated to him, "Here is your last will and testament"; that the decedent then signed the document in the presence of himself and Miss Kelly and said, "This is my last will and testament"; that thereupon he, Welch, and Miss Kelly signed as witnesses in the decedent's presence and in the presence of each other; and that he, Welch, then left the room. It is evident, however, that since Welch's testimony was rejected by the probate court the most that can be said for it on appeal is that it merely raised a conflict in the evidence.

[6] The remaining points consist of technical objections to matters of pleading and procedure. In this connection it is contended that the general allegation that the will was not executed by the decedent in the manner or form required by law for the execution of a will is a conclusion of law and that therefore such allegation and the general finding based thereon are insufficient to support the judgment; furthermore, that it cannot be determined from the findings or the judgment upon what specific ground the will was denied probate. It appears from the record, however, that appellant expressly waived the right to file a demurrer to the contest and requested that the trial proceed without delay on the pleading as filed and appellant's answer thereto, which she had already filed; also that at no time during the trial did appellant complain of any insufficiency in the pleading. Moreover the record shows that at the trial all parties understood that the only contested issue before the probate court as to the validity of the will was the one hereinabove discussed, and all of the evidence was directed to that issue. Such being the state of the record, it is our opinion that the objections raised by appellant do not serve as grounds for reversal.

[7] Appellant's next contention is that the contest was tried on the merits; that it was not merely the hearing of the "preliminary proof"; that being a trial on the merits of the contest the burden of proof to establish the invalidity of the will rested on the respondents; that they offered no evidence, and that such being the case judgment should have been entered dismissing the contest. It is entirely immaterial, however, whether the proceeding before the probate court was a hearing of the "preliminary proof" or a trial of the merits of the contest; and it is likewise immaterial upon whom the burden of proof rested, for the reason that both subscribing witnesses were produced in court and testified as witnesses in the case; and it clearly appeared from the testimony of one of them that the will was not executed in conformity with the legal requirements; that being so, it was the plain duty of the court to deny the petition for the probate of the will.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concur.

O'MORROW v. BORAD et al. *

Civ. 14822.

District Court of Appeal, Second District, Division 3, California.

July 31, 1945.

Hearing Granted Sept. 27, 1945.

1. Trial ⚷33

Aside from requirements of automobile liability policy, plaintiff-cross-defendant and defendant-cross-complainant in automobile collision action were each entitled to present evidence on their affirmative claims against the other and to present a defense against other's claim.

2. Insurance ⚷514½

Where insurer undertakes defense of an insured through its attorneys, insurer and attorneys owe insured their undivided allegiance to his cause and duty of acting in utmost good faith in his behalf, and relationship between them should be one of highest trust and confidence, but such duty cannot be performed or relationship exist properly when insurer and its attorneys have an interest adverse to insured.

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* Subsequent opinion 167 P.2d 483.

3. Insurance ⚷514½

Where plaintiff and defendant in automobile collision case were each insured by same insurer and each had an affirmative claim against other with result that interests of insurer and its attorneys were in conflict with interests of each litigant, insurer was disqualified by public policy, from defending and, insurer being disqualified, defendant did not violate co-operation clause by appointment of his own counsel.

4. Insurance ⚷514½

Insurer, which had issued automobile liability policies to each party to automobile collision action and hence had an adverse interest to each, was not obligated to pay for services of attorneys of one insured in prosecuting declaratory relief proceeding arising out of insurer's erroneous assertion that such insured, by securing his own counsel, had violated co-operation clause and thereby invalidated his insurance coverage, since it was not necessary that insured proceed in a declaratory relief action and he could have had issue determined in ordinary legal procedure by proceeding to trial in collision case and, if not successful there, in maintaining action on policy.

5. Insurance ⚷514½

Where plaintiff and defendant in automobile collision case were each insured by same insurer, plaintiff was entitled to defend against cross-complaint through attorneys of his own selection rather than those selected by insurer but was not entitled to attorney's fees from insurer in such defense.

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Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action for declaratory relief by W. D. O'Morrow against Jack Borad, Firemen's Insurance Company of Newark, New Jersey and The Metropolitan Casualty Insurance Company of New York for a declaration that plaintiff has right by use of his own attorneys, to defend against, and to prosecute cross-complaint in, automobile negligence action without loss of insurance protection. From an adverse judgment, plaintiff appeals.

Reversed.

Musick, Burrell & Pinney, Anson B. Jackson, Jr., and Eugene M. Elson, all of Los Angeles, for appellant.

Benjamin J. Goodman and Laurence Berger, both of Los Angeles, for respondent Jack Borad.

Hunter & Liljestrom, of Los Angeles, for respondents Firemen's Ins. Co. and Metropolitan Casualty Ins. Co.

PARKER WOOD, Justice.

This is an action for declaratory relief. The plaintiff O'Morrow and the defendant Borad were insured under automobile insurance policies which policies, identical in form, covering public liability and property damage, were issued by defendants Firemen's Insurance Company of Newark, New Jersey, and the Metropolitan Casualty Insurance Company of New York, Those companies will be referred to as the "insurer." On December 19, 1943, while those policies were in effect, the automobiles of plaintiff O'Morrow and defendant Borad, which were being operated by them, collided at a street intersection. Both of them claimed to have suffered personal injury and property damage as a result of the collision and they gave prompt notice of the collision to the insurer as required by the policies. Thereafter Borad, through an attorney other than the insurer's attorneys, filed a complaint against O'Morrow in the Municipal Court of the City of Los Angeles for $1,922.54 damages alleged to have resulted from the collision. On January 18, 1944, copies of the summons and complaint in that action were served upon O'Morrow. On January 19, 1944, one of O'Morrow's attorneys notified the insurer by telephone concerning the service of the summons and complaint, and the insurer then informed said attorney that Borad was also insured by the insurer, and the insurer told the attorney to discuss the matter with the manager of the Los Angeles office of the insurer, who would be in his office the next day. On January 20 the attorney for O'Morrow told the manger by telephone that in the opinion of the attorney O'Morrow had a valid affirmative claim against Borad, that O'Morrow desired to comply in all respects with the terms of his insurance policy, that since O'Morrow and Borad were insured by the same insurer it seemed obvious that the interests of O'Morrow and Borad were the opposite of the interests of the insurer, and asked the manager what his suggestions were as to the manner in which the matter should be handled; that the manager said in reply thereto that the insurer intended to employ Hunter & Liljestrom, attorneys at law, to represent the insurer and he would have those attorneys communicate immediately with O'Morrow's attorneys, and the manager asked said attorney to send the copy of the Borad complaint to the manager. On January 21, O'Morrow's attorneys wrote and sent a letter to the insurer, enclosing the copies of the summons and complaint, and stating in substance that in their opinion O'Morrow was free from negligence and his damages would exceed the jurisdiction of the Municipal Court and that O'Morrow should not only file an answer but should file a cross-complaint; that an unusual circumstance had arisen since both parties were insured by the same insurer, and that the interests of the insurer and those of O'Morrow were divergent and from ethical considerations it would seem improper for the insurer's regular counsel to represent him at least as to the cross-complaint; and that since Borad's complaint would require an answer by January 28, the attorneys for O'Morrow suggested a conference with the insurer and their counsel immediately in order to determine a proper course to pursue.

On January 26 one of the attorneys for the insurer told O'Morrow's attorneys that he had arranged for an extension of time, until after such a conference, within which O'Morrow might answer Borad's complaint. On January 27 a conference was held wherein it was tentatively agreed, subject to further conference, that an answer to Borad's complaint and a cross-complaint by O'Morrow against Borad should be interposed by both firms of attorneys, i.e., O'Morrow's attorneys, Musick, Burrel & Pinney, and the attorneys for the insurer, Hunter & Liljestrom, but with the understanding that the attorneys for the insurer would have no responsibility in prosecuting the cross-complaint.

On January 27, after the conference and prior to any further communication from the insured or their attorneys, O'Morrow's attorneys wrote and sent a letter to the insurers wherein it was stated in substance: that since the conference the attorneys for O'Morrow had given further consideration to the conflicting interests involved and were convinced it was not to the insurer's interest to aid O'Morrow in the successful prosecution of his affirmative cause of action against Borad, who was also insured by the insurer; that it would be to the insurer's interest to defeat O'Morrow's affirmative claim; that if Borad had an affirmative claim against O'Morrow it would be to the insurer's interest to defeat that claim; that any recovery by either O'Morrow or Borad would have to be paid by the same insurer; that under such circumstances it would be improper that the insurer have any connection with the litigation and that the function of the insurer should be that of a stake-holder, abiding the result of the litigation; that it was the intention of O'Morrow's attorneys to defend O'Morrow and to prosecute his claim without any participation by the insurer; that Borad's counsel should take the same position and that an arrangement should be made between the insurer and both O'Morrow and Borad whereby the insurer should agree to pay the costs, fees of the unsuccessful litigant, and the judgment against him; and that the attorneys for O'Morrow would be glad to consult with the insurer's counsel at all times, but as to participation by the insurer's counsel in the litigation the interests of O'Morrow and the insurer were so diverse as to make that impossible. A copy of that letter was sent to Mr. Liljestrom, one of the attorneys for the insurer.

On January 28 the attorneys for the insurer wrote and sent a letter to the attorneys for O'Morrow wherein it was stated in substance: that after giving further thought to the tentative agreement and before receiving the letter of January 27 the attorneys for the insurer concluded that they should not appear on the cross-complaint; that if they felt that in representing O'Morrow in the defense against Borad's complaint there might arise any conflict in their duty to him and his insurance carrier they would not consider representing him; that the insurance carrier, in referring the defense to them, understood that they would take the position that O'Morrow was not negligent; that as to the cross-complaint the responsibility would be entirely that of O'Morrow's attorneys, Musick, Burrell & Pinney; that O'Morrow might handle the litigation as he deemed advisable, but they wished to advise him that might invalidate his coverage under his policy; that they particularly called his attention to the provision with regard to the assistance and co-operation required of the assured and the right of the company to have complete control of the defense; that the insurer insisted upon handling the defense, and unless permitted to do so would not pay any costs or attorneys' fees incurred by O'Morrow and would not waive any of its rights under the policy; and that they were enclosing a copy of a letter of January 27 which the insurer's attorneys had sent to Borad's attorney relative to their understanding with him as to additional time within which to plead.

About February 11, 1944, O'Morrow's attorneys, Musick, Burrell & Pinney filed an answer to Borad's complaint which answer was in the usual form in such cases and denied that O'Morrow was negligent and alleged contributory negligence on the part of Borad. At the time of filing the answer, said attorneys for O'Morrow also filed a cross-complaint against Borad for $6,359 damages alleged to have resulted from the collision. The cause was then transferred to the superior court. Under employment by the insurer, and on behalf of Borad, the law firm of Parker, Stanbury & Reese filed an answer to the cross-complaint.

On February 14 the insurer wrote and sent a letter to O'Morrow, and sent a copy of it to his attorneys, advising that since he had filed an answer to Borad's complaint and was proceeding with the defense of that action in violation of the terms of his policy, the insurer would not pay any costs or attorneys' fees incurred or any settlement made or any judgment rendered against him; and that the insurer reserved all its rights under the policy.

On February 23 the complaint herein for declaratory relief was filed by O'Morrow wherein he named Borad and the two insurance companies (referred to herein as the insurer) as defendants, and wherein he sought a declaration of the rights of the parties under his insurance policy, particularly as to whether under the circumstances above stated he had the right, without invalidating his insurance coverage, to defend against the Borad complaint and to prosecute his cross-complaint against Borad through competent attorneys of his own selection who should be paid by the insurer a reasonable sum for their services not to exceed the amount ordinarily paid by the insurer to its regular attorneys. By stipulation the trial of the damage action has been continued until after the determination of this appeal.

One of the provisions of the policy is:

"II. Defense, Settlement, Supplementary Payments.

"As respects such insurance as is afforded by the other terms of this Policy

"(a) under Coverages G and H the Company shall

"1. defend in his name and behalf any suit against the insured alleging such injury or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the Company shall have the right to make such investigation, negotiation and settlement of any claim or suit as may be deemed expedient by the Company;

"2. pay all premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this Policy, all premiums on appeal bonds required in any such defended suit, but without any obligation to apply for or furnish such bonds, all costs taxed against the insured in any such suit, all expenses incurred by the Company, all interest accruing after entry of judgment until the Company has paid, tendered or deposited in court such part of such judgment as does not exceed the limit of the Company's liability thereon, and expenses incurred by the insured, in the event of bodily injury, for such immediate medical and surgical relief to others as shall be imperative at the time of the accident;

"(b) the company shall reimburse the insured for all reasonable expenses, other than loss of earnings, incurred at the Company's request. The Company agrees to pay the amounts incurred under this Insuring Agreement, except settlements of claims and suits, in addition to the applicable limit of liability of this Policy."

Coverages "G and H" referred to in the above provision are:

"Coverage G—Property Damage Liability

"To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of the ownership, maintenance or use of the automobile.

"Coverage H—Bodily Injury Liability

"To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages, including damages for care and loss of services, because of bodily injury, including death at any time resulting therefrom, sustained by any person or persons, caused by accident and arising out of the ownership, maintenance or use of the automobile."

Another provision of the policy is: "The insured shall cooperate with the Company and, upon the Company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses, and in the conduct of suits. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical or surgical relief to others as shall be imperative at the time of accident."

The trial court concluded that appellant (O'Morrow) had violated the conditions of the policy of insurance in that he refused to permit respondents (the insurance companies) to defend in his name and on his behalf the action filed by Borad, and that he had failed to co-operate with respondents in the defense of said action. Judgment in accordance with those conclusions was entered, and the appeal is by O'Morrow from that judgment.

The appellant (O'Morrow) contends that the insurer was disqualified to defend him against Borad's complaint or to prosecute his cross-complaint against Board for the reason that the interests of the insurer were in conflict with the interests of O'Morrow. He argues that the insurer, being the insurer of both parties—O'Morrow and Borad, would be required to pay the judgment (within the limit of the policy) which O'Morrow might obtain against Borad upon his cross-complaint and therefore it would be to the interests of the insurer to defeat him on his cross-complaint; that the matter of defending him against the complaint of Borad, being inextricably interwoven with the matter of prosecuting the cross-complaint, could not be presented in the trial as a matter separate and apart from the cross-complaint, and since the insurer was clearly disqualified to represent O'Morrow on the cross-complaint, he was likewise disqualified to defend him against the claim of Borad; that appellant's right to recover damages from Borad is as substantive a right, if the facts entitle him to such recovery, as is his right to a successful defense against Borad's complaint; that when a person places the defense or prosecution of his legal rights in the hands of another, a relationship of trust is created where the person to whom the defense is entrusted is the trustee and the other person is the cestui que trust, and the trustee must act in the utmost good faith toward the cestui que trust in protecting his rights, not only with reference to a defense of the cestui que trust but as to an affirmative claim of the cestui que trust arising out of the same transaction which is necessarily inextricably and indivisibly bound up with his rights from a defensive standpoint; that a person assuming to act as a trustee who has an interest in conflict with those of the beneficiary is disqualified from acting as trustee, except when the beneficiary with full knowledge of the motives of the trustee permits the trustee to act for him (citing Section 2230 of the Civil Code); that the beneficiary O'Morrow, having knowledge of the motives of the insurer to protect itself against the affirmative claim of O'Morrow, has chosen not to permit the insurer to act as his trustee; that he is not obligated to do it under the express terms of the insurance policy, since it obligates the insurer in a wholly unilateral way to furnish a defense for the insured but it does not obligate the insured to permit the insurer to conduct his defense; that he is not obligated to do it under the statute, and if there were any conflict between the requirements of the insurance policy and the statute, the statute would prevail; that considerations of public policy would prevail also over such a provision of the insurance policy; that the conflict in interests between O'Morrow and the insurer is one of the insurer's own making, resulting from its chosen method of doing business—holding itself out to the general public to insure all comers and taking the chance and assuming the risk of the occurrence of such a situation as the one that has arisen here, where two of its assured in good faith assert claims against each other under conditions covered by their insurance policies; that the insurer by insuring two persons who are involved in the same collision, has so changed its position toward O'Morrow from that which normally exists between an insurer and the assured where the insurer has no interest on the other side of the controversy, as to prejudice the rights of O'Morrow if he entrusts the litigation to the insurer, and the insurer is thereby estopped to compel O'Morrow to entrust it with the litigation; that the insurer can conduct the litigation only through attorneys who are its employees, and if the attorneys employed by the insurer should be in active charge of the litigation as counsel of record for O'Morrow, a relationship of highest trust and confidence would be created between the principal, which is the insurer acting through its employee attorneys, and O'Morrow, who is the nominal client of the insurer's attorneys; that by reason of that relationship, created by the insurer, and the conflicting interests between the insurer and O'Morrow the insurer is disqualified from conducting the litigation in behalf of O'Morrow and has waived its rights, if any it had, to defend him; and that the proposal by counsel herein for the insurer, that the insurer have control of the defense for O'Morrow by one firm of attorneys and have control of the defense for Borad against the cross-complaint by another firm of attorneys and that the attorneys selected by O'Morrow have the responsibility of the cross-complaint, is wholly impractical and impossible since the issues of negligence and contributory negligence must be tried at the same time and there is no line of demarkation in such a case between the evidence for the defense and the evidence on the cross-complaint, and that if the insurer's two sets of attorneys have been successful in their examinations up to the theoretical point where evidence on the cross-complaint should begin, the negligence of O'Morrow and Borad will have been established and the cause of action on the cross-complaint will have been destroyed. Appellant also contends that the insurer is disqualified to defend Borad for the same reasons that it is disqualified to defend O'Morrow.

The insurer (respondent) asserts that appellant has the right to prosecute his cross-complaint against Borad, and that it has not contended that the provisions of the policy gave it any control over the cross-complaint. It does contend that it has the right to control O'Morrow's defense to Borad's complaint through one firm of attorneys, and to control Borad's defense to O'Morrow's cross-complaint through another firm of attorneys. It contends further that O'Morrow has violated the co-operation clause of the policy by filing an answer to Borad's complaint and by notifying the insurer that he (O'Morrow) intended to defend against Borad's complaint without any participation therein by the insurer.

[1] O'Morrow was entitled not only to present a defense against Borad's complaint, but he was entitled to present evidence under his cross-complaint against Borad. Likewise Borad was entitled to present a defense against O'Morrow's cross-complaint and to present evidence under his complaint against O'Morrow. The insurer is willing that O'Morrow, through attorneys of his own selection, have the responsibility for his cross-complaint, but it insists that it has the right to control, through attorneys of its own selection, the defense on each side of the controversy. If it should successfully defend each side there would be no recovery against it on either the cross-complaint or the complaint, and then of course it would not be required to pay a judgment under either insurance policy. The issues in the collision case, as to liability, being negligence and contributory negligence, it would seem that when the evidence necessary upon those issues had been presented under Borad's complaint by Borad's attorneys and under O'Morrow's answer thereto by the insurer's attorneys, there would not be any further evidence, on the subject of liability, available for presentation under the cross-complaint by O'Morrow's attorneys. Under such conditions, where the defenses of O'Morrow and Borad would be controlled by attorneys selected by the insurer, the delegation of responsibility for the cross-complaint to attorneys selected by O'Morrow would not afford them an adequate opportunity to represent him properly on the cross-complaint.

Counsel herein for the insurer state that one of its material rights under the insurance policy is the right to compromise, and that if it had control of O'Morrow's defense through attorneys of its own selection it might effect a compromise with Borad (whom it was defending through attorneys of its own selection), and that such a compromise would in no way prejudice O'Morrow on his cross-complaint against Borad. In such circumstances the insurer would be in reality negotiating a settlement with itself, since it would be employing the attorneys representing both sides. Assuming, under those circumstances, that O'Morrow had a strong case against Borad on his cross-complaint, it would be to the interest of the insurer to pay, on behalf of O'Morrow, some comparatively small amount to Borad in settlement of his claim against O'Morrow. Proof that O'Morrow's attorneys of record (selected by the insurer) had settled Borad's affirmative claim against O'Morrow, which claim arose out of the identical collision that was the basis of O'Morrow's cross-complaint, would have a prejudicial effect upon the cross-complaint.

[2] If the insurer were to undertake the defense of O'Morrow through its own attorneys, it and the attorneys would owe him their undivided allegiance to his cause and the duty of acting in utmost good faith in his behalf. The relationship between them and him should be one of the highest trust and confidence. Likewise the insurer and its attorneys would owe the same high duties to Borad whom they are defending on O'Morrow's cross-complaint. The attorneys selected by the insurer to defend O'Morrow and the attorneys selected by the insurer to defend Borad, even though they are members of different law firms and nominally would be the attorneys for the opposing parties O'Morrow and Borad, are in fact employed by the insurer to represent its interests and they owe their allegiance to their client, the insurer. The interests of the insurer are in conflict with the interests of O'Morrow and Borad. The interests of the attorneys employed by the insurers to represent said persons, whose interests are in conflict with the interests of the insurer, are likewise in conflict with the interests of O'Morrow and Borad.

[3] Usually in an automobile collision case which is before the court, the persons involved in the collision, if insured, are insured in different companies. In such usual case the interests of the insurer and the insured are not in conflict and the insurer has the right to defend the insured. The collision case herein is unusual in that the persons involved in the collision were insured by the same insurer and each person has an affirmative claim against the other, with the result that the interests of the insurer are in conflict with the interests of each insured. One of the insured herein, having filed his answer through attorneys of his own selection and having notified the insurer that he will defend without any participation therein by the insurer, has been notified by the insurer that he had thereby violated the co-operation clause of his policy. The question arises as to whether, under these unusual circumstances, the insurer should forego its right to defend the insured which it has in the usual case where there is no conflict of interests between the insurer and the insured, or whether the insured should forego his fundamental right, based upon considerations of public policy, to be represented in his defense by an attorney at law whose interests are not in conflict with his interests. If it should be held that O'Morrow violated the co-operation clause by reason of his election, under the peculiar circumstances herein, to rely upon his right to be represented by attorneys of his own selection whose interests are not in conflict with his interests then he is without insurance. The insurer is in the business of insuring persons for compensation, taking chances and risks of various kinds including the occurrence of such an unusual situation as the one here presented where two of its assured have affirmative claims against each other arising from the same automobile collision. O'Morrow purchased insurance in order to be insured and to avoid the chances and risks of financial loss in the event of an automobile collision. As between the two, the insurer which asserts its right to defend the insured when its interests are in conflict with his interests, and the insured who will be without insurance if he has violated the co-operation clause by relying upon his fundamental right to be represented by one whose interests are not in conflict with his interests, the question should be resolved in favor of the insured. The insurer is disqualified to defend O'Morrow through attorneys of its own selection for the reason that the interests of the insurer are in conflict with the interests of O'Morrow. The insurer, under the unusual circumstances here, is estopped to compel O'Morrow to entrust it with the control of his defense. The insurer being disqualified, as above stated, O'Morrow did not violate the co-operation clause. The insured, O'Morrow, is entitled to defend against the complaint of Borad through competent attorneys of his own selection.

As above stated, a further contention of O'Morrow is that the insurer should pay for the services of his attorneys in defending him against Borad's complaint. It appears that it was the intention of O'Morrow to prosecute an affirmative claim against Borad irrespective of whether Borad prosecuted an affirmative claim against O'Morrow. Before the complaint of Borad was filed, O'Morrow had employed attorneys to file a complaint against Borad. If O'Morrow's complaint had been filed and Borad had answered without filing a cross-complaint, the insurer would not have been required to pay for the services of O'Morrow's attorneys in prosecuting his complaint, since the insurance policy did not provide that the insurer should prosecute an affirmative claim for the insured. After Borad had filed his complaint, O'Morrow was required to defend against that complaint, and it was necessary for O'Morrow to file a cross-complaint, if he intended to prosecute an affirmative claim against Borad. O'Morrow's defense and his cross-complaint, as to liability, are based upon the same evidence. As above stated, when his defense is completed there will be nothing more to prove, as to liability, under the cross-complaint. It therefore appears that if O'Morrow had prosecuted his affirmative claim against Borad in an independent action, as he intended to do, the services rendered by his attorneys would have been the same as they would be in defending against Borad's complaint and in prosecuting O'Morrow's cross-complaint. O'Morrow was prevented from proceeding in an independent action by the filing of the Borad complaint, and O'Morrow's plan to prosecute his cross-complaint against Borad was interfered with by the insurer's insistence, under the peculiar circumstances herein, that it be permitted to defend O'Morrow through its attorneys. Since O'Morrow is entitled, under the decision herein, to defend through attorneys of his own selection, and since the evidence on his defense is included in the evidence on his cross-complaint, he is in the same position, as to prosecuting his affirmative claim, as he was in before Borad filed his complaint. It might be argued that he is not in the same position, as he was in when he intended to file an independent action, for the reason that at that time he was not confronted with the necessity of making a defense, and of course the insurer was not then obligated to defend him; and that when Borad filed his complaint it became necessary to make a defense, and since the premium paid by O'Morrow included payment for a defense the insurer should be required to pay for the defense even though O'Morrow is prosecuting a cross-complaint. It is correct that O'Morrow was not confronted with a defense when he was preparing to file an independent action, but that distinction between his position at that time and his position now is not a practical one. The insurer is willing to defend him through its attorneys and insists upon doing so, and if O'Morrow's cross-complaint were not involved he would be willing undoubtedly to be defended by the insurer. Under the peculiar circumstances of this case, where the insurer is disqualified to defend O'Morrow because he insists upon his right to prosecute his cross-complaint, the legal services to be rendered in his behalf are the same, for all practical purposes, as they were before the Borad complaint was filed. Being in the same position, for all practical purposes, as he was in originally when he intended to file an independent action and to pay for the services of his attorneys, it would result in a profit to him, not a reimbursement, if the insurer were required to pay for the services of his attorneys on the theory that the attorneys were defending him when in fact by such services he would be accomplishing his original object of prosecuting an affirmative claim against Borad. The insurer should not be required to pay for the services of O'Morrow's attorneys in defending him.

[4] Another contention of O'Morrow is that the insurer should pay for the services of his attorneys in prosecuting this declaratory relief proceeding. Although the insurer had notified him that he had violated the co-operation clause and had thereby invalidated his insurance coverage, it was not necessary that he proceed in a declaratory relief action. He could have proceeded to trial in the damage case with his own attorneys and if successful on his cross-complaint, and consequently successful in his defense, it would not be material whether his insurance coverage was valid or not, since he would not be liable for damages as a result of the collision; and if not successful in his defense against Borad's complaint and the insurer should still contend that he had invalidated his insurance, he could then have a judicial determination of that matter. If he was solicitous about proceeding in that manner and wanted the protection of a declaratory relief judgment, the insurer should not be required to pay his attorneys' fees in this declaratory relief proceeding.

[5] Borad is entitled to defend against the cross-complaint through attorneys of his own selection. He is not entitled to his attorneys' fees in such defense.

The judgment is reversed. Appellant to recover his costs.

DESMOND, P. J., and SHINN, J., concur.

70 Cal.App.2d 293

SCHULTZ v. SCHULTZ.

Civ. 14856.

District Court of Appeal, Second District,
Division 1, California.
July 26, 1945.

1. Appeal and error ⟹15

Appeal from order denying plaintiff's motion to vacate order dismissing plaintiff's action for failure to have judgment entered within three years after service of summons, no answer having been filed, was dismissed as a mere repetition of plaintiff's appeal from order of dismissal. Code Civ. Proc. § 581a.

2. Appeal and error ⟹113(2)

An appeal does not lie from an order denying a motion to vacate judgment if grounds upon which moving party seeks to have judgment vacated existed before entry of judgment and were available on appeal therefrom.

3. Dismissal and nonsuit ⟹65

Under statute providing that an action in which judgment is not entered within three years after service of summons in absence of an answer, must be dismissed by court on its own motion, a stipulation against entry of default except on ten-day notice of intention to enter default and opportunity to plead cannot take from court power and duty to dismiss action on its own motion after expiration of three year period. Civ.Code, § 3513; Code Civ.Proc. § 581a.

4. Constitutional law ⟹70(1)

The courts do not have power by judicial decision to render practically meaningless direct and positive requirements of an applicable statute.

5. Dismissal and nonsuit ⟹65

The code section providing for dismissal of an action on court's own motion when judgment is not entered within three years after service of summons in the absence of an answer was adopted to secure expeditious and prompt disposition of litigation and not for benefit and repose of individuals and cannot be contravened by private agreement or stipulation. Civ.Code, § 3513; Code Civ.Proc. § 581a.

6. Dismissal and nonsuit ⟹65

Under code section directing court on its own motion to dismiss an action in which no answer has been filed and more than three years have elapsed after service of summons, court has no discretion. Code Civ.Proc. § 581a.

7. Dismissal and nonsuit ⟹45

Although courts are loath to deny a trial on the merits, they must do so when circumstances of case fall within explicit terms of code section directing dismissal for failure of plaintiff to enter judgment within three years after service of summons when no answer has been filed. Code Civ.Proc. § 581a.

8. Dismissal and nonsuit ⟹60(6)

The burden of bringing about an expeditious trial is cast by the code on plaintiff, and, while defendant may bring about an expeditious trial, he is under no legal duty to do so and is required to do no more than meet plaintiff step by step. Code Civ.Proc. § 581a.

9. Dismissal and nonsuit ⟹60(2)

The word "answer", as used in code section requiring dismissal of an action if plaintiff has failed to have judgment entered within three years after service of summons if no answer has been filed, does not mean "appear in the action". Code Civ. Proc. §§ 437, 581a.

See Words and Phrases, Permanent Edition, for all other definitions of "Answer" and "Appear in the Action".

10. Dismissal and nonsuit ⟹60(2)

Stipulation, under which plaintiff agreed not to have defendant's default entered without giving defendant 10 days' notice of intention to do so so as to give defendant an opportunity to plead, was not an "answer" within meaning of code section declaring what an answer shall contain or within section providing for dismissal of action within three years after summons has been served if no answer has been filed and plaintiff has failed to enter judgment. Code Civ.Proc. §§ 437, 581a, 1014.

11. Appearance ⟹8(3)
Pleading ⟹76

An appearance is not necessarily an answer although an answer is an appearance. Code Civ.Proc. §§ 437, 581a, 1014.

12. Dismissal and nonsuit ⚷60(2)

The code section providing for dismissal for failure to enter judgment discloses legislative intent that specified actions be dismissed by court whenever no answer has been filed, regardless of what appearance may have been made other than by answer, when plaintiff fails to have judgment entered within three years after service of summons. Code Civ.Proc. § 581a.

13. Constitutional law ⚷56
Dismissal and nonsuit ⚷45

The code section requiring dismissal of an action within three years after service of summons, if no answer has been filed and plaintiff has not had judgment entered, is not unconstitutional as impinging jurisdiction of superior court to enter a default. Code Civ.Proc. § 581a; Const. art. 6, § 5.

◆

Appeal from Superior Court, Los Angeles County; Myron Westover and Emmet H. Wilson, Judges.

Action by Inez M. Schultz against Henry C. Schultz for separate maintenance. From an order on court's own motion dismissing the action for plaintiff's failure to have judgment entered within three years after service of summons, no answer having been filed, and from order denying plaintiff's motion to vacate order of dismissal, plaintiff appeals.

Appeal from order denying motion to vacate, dismissed; and order of dismissal affirmed.

H. Sidney Laughlin, of Los Angeles, for appellant.

George H. Pratt, of Los Angeles, for respondent.

WHITE, Justice.

This is an appeal by plaintiff from an order of the Superior Court dismissing an action pursuant to the provisions of the second paragraph contained in section 581a of the Code of Civil Procedure, which, in part, provides that "all actions * * * must be dismissed * * * if summons has been served, and no answer has been filed, if plaintiff * * * has failed, to have judgment entered within three years after service of summons."

[1, 2] Plaintiff also attempts to appeal from an order denying her motion to set aside the foregoing order, but the same must be dismissed because it is at once apparent that the attempt to appeal from the order refusing vacation of the order of dismissal is but a repetition of plaintiff's appeal from such last-mentioned order. "As to the order denying the motion to vacate the judgment, under the settled law of this state an appeal will not lie from such order if the grounds upon which the moving party sought to have the judgment vacated existed before the entry of the judgment and were available on appeal therefrom. (Citing cases.)" Mather v. Mather, 22 Cal.2d 713, 720, 140 P.2d 808, 811.

In the action with which we are here concerned, summons was served upon defendant and no answer was ever filed. After more than four years had elapsed following service of summons, the court on its on motion dismissed the action on August 30, 1944, under the authority conferred by section 581a of the Code of Civil Procedure.

The action here in question is one for separate maintenance and the record before us discloses, in chronological order, the following steps taken in the litigation from its inception up to the order of dismissal.

Dec. 27, 1939, Complaint filed, summons order to show cause re support pendente lite, costs and attorney fees, and temporary restraining order issued and duly served upon the defendant.

Dec. 29, 1939, On affidavit of defendant, temporary restraining order modified in part.

Jan. 5, 1940, Order to show cause re alimony pendente lite, costs, attorney fees and restraining order called for hearing, and continued to February 1, 1940. In the minute order appears the following: "By stipulation, as to restraining order, to be written and filed".

Jan. 10, 1940, Stipulation entered into between the parties under date of January 5, 1940, filed providing for payment by defendant of plaintiff's attorney fees and further providing *"that the plaintiff herein will not enter default against the defendant, Henry C. Schultz, except upon and after serving the Attorney of Record for said defendant with written notice of her intention to enter the same, unless the defendant plead within 10 days after service of said written notice"*, and *"that this* *stipulation in no manner constitutes a waiver of any legal right whatsoever or an admission of any liability, of either of the parties"*. (Emphasis added.)

Feb. 1, 1940, Pursuant to the foregoing order of continuance under date of January 5, cause again called and ordered off calendar.

Aug. 19, 1944, Amended complaint and supplemental complaint filed. Order to show cause and temporary restraining order returnable Aug. 28, 1944, issued.

Aug. 21, 1944, Amended complaint, supplemental complaint, order to show cause and temporary restraining order served on defendant.

Aug. 28, 1944, Foregoing order to show cause and restraining order of August 19 called for hearing and continued to September 14, 1944.

Aug. 30, 1944, Following minute order entered: "It appearing to the court from an examination of the record herein that this action should be dismissed under the provisions of Section 581a of the Code of Civil Procedure; now, therefore, upon the court's own motion the above entitled action is hereby dismissed."

[3] Appellant earnestly contends that, because of the above-quoted stipulation, the court was without power to enter the defendant's default and therefore the provisions of section 581a were inapplicable. This argument is not impressive. In Lynch v. Bencini, 17 Cal.2d 521, 531, 110 P.2d 662, it was held that the last paragraph of the code section imposes a duty upon the plaintiff to have judgment entered within three years after service of summons, with a resulting benefit to the defendant, and casts a specific penalty upon a plaintiff when he fails to perform the duty imposed upon him. The case just cited further holds, 17 Cal.2d at page 532, 110 P.2d at page 668, that whenever there is a failure on the part of the plaintiff to perform the aforesaid duty, the court "must dismiss the action", and must do so "on its own motion"; and furthermore, that "it is error for the court to fail to perform this duty directly imposed upon it." "[That] the statute is 'jurisdictional' in the sense that the court has no power to excuse the delay" and is empowered "to act only in a certain way, that is, by ordering a dismissal" was the holding in Gonsalves v. Bank of America, 16 Cal.2d 169, 172, 105 P.2d 118, 120.

[4] In the case at bar, the plaintiff, under the stipulation, at all times during the statutory period of three years following service of the summons, had it within her power to give the defendant 10 days' notice of her intention to enter his default unless he "plead within 10 days after service of said written notice". Appellant's contention that section 581a is in reality a statute of limitations, may be waived by the party benefitted thereby, and that by reason of the foregoing stipulation the defendant did in fact waive any rights he might have under the statute is emphatically answered by the very language of the stipulation that the same "in no manner constitutes a waiver of any legal right whatsoever * * * of either of the parties". We are further persuaded that the terms of the last paragraph of section 581a with which we are here alone concerned, providing that the action must be dismissed by the court "on its own motion", would be rendered practically nugatory if by stipulation the parties to an action might take from the court not only its power but its duty to dismiss the action on its own motion. The courts are without power by judicial decision to render practically meaningless the direct and positive requirement of the portion of the statute which is applicable to a case such as this where the defendant did not file an answer.

[5-8] We are further impressed that the portion of the statute here under consideration was adopted to secure expeditious and prompt disposition of litigation, and not for the benefit and repose of individuals. When a law is established for a public reason, and not intended for the benefit of an individual, such law cannot be contravened by a private agreement or stipulation (Sec. 3513, Civ.Code). While courts are loath to deny a trial on the merits, nevertheless the portion of the code provision with which we are here concerned directs in plain and explicit terms what shall be done in cases like the one at bar and the court has no discretion. To relax the rule in some cases would be to set at naught the will of the legislature. So far as the equities referred to by appellant are concerned, in the instant case it must be borne in mind as heretofore pointed out that at all times within the statutory period of three years she had it within her power to compel the defendant to answer. While the defendant may bring about an expeditious

trial of a case, he is under no legal duty so to do, but the plaintiff is. The defendant is required to do no more than meet the plaintiff step by step.

[9-11] Appellant next contends that the court, in this case, should construe the word "answer" used in the second paragraph of section 581a to mean "appear in the action"; and that the stipulation hereinbefore discussed constituted an appearance by defendant in the case at bar. Appellant relies upon the following language in Lynch v. Bencini, supra, 17 Cal.2d at page 533, 110 P.2d at page 669: "This statutory provision was plainly intended to apply in just such a case as this where the defendant did not appear"; and the case of Jacks v. Lewis, 61 Cal.App.2d 148, 151, 142 P.2d 358, 360, wherein the court used the phrase "failure of the defendant to appear and plead", is also cited by appellant. In view of the reasoning contained in the foregoing opinions taken as a whole, as well as the conclusions reached therein, we are unable to ascribe to these isolated expressions the meaning imputed to them by appellant. The history of section 581a of the Code of Civil Procedure, as set forth in People v. Southern Pacific R. Co., 17 Cal.App.2d 257, 260, 61 P.2d 1184, coupled with the holding of the Supreme Court in Lynch v. Bencini, supra, militates strongly against appellant's contention. The words "answer" and "appear" are not synonymous. To construe the word "answer" as used in section 581a as including every "appearance" would amount to judicial legislation, which is beyond the authority of the court. Sec. 437, C.C.P., provides that "The answer of the defendant shall contain: 1. A general or specific denial of the material allegations of the complaint controverted by the defendant. 2. A statement of any new matter constituting a defense or counterclaim." The stipulation filed in the instant action contains neither. Sec. 1014 of the same code provides that "A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him." This section makes it plain that, although an answer is an appearance, an appearance is not necessarily an answer.

[12] In the light of the final paragraph of section 581a, C.C.P., the only portion of the section with which we are here concerned, we must assume from the plain and unequivocal language used that when the legislature enacted the same, the legislative intent was that the actions mentioned in said paragraph must be dismissed by the court whenever no answer has been filed, regardless of what "appearance" may have been made other than by answer, when plaintiff fails to have judgment entered within three years after service of summons.

[13] Appellant's final contention, which challenges the constitutionality of section 581a of the Code of Civil Procedure upon the ground that it attempts to deprive the Superior Court of jurisdiction conferred upon it by Article VI, Section 5, of the Constitution of the State of California, is without merit. Appellant argues that the code section in question impinges upon the jurisdiction of the Superior Court to enter a default, or to do anything other than dismiss the action, after more than three years. In Phillips v. Trusheim, 25 Cal.2d 913, 916, 156 P.2d 25, 26, the court stated: "It is well settled that the trial court has jurisdiction to render a default judgment more than 'three years after service of summons' (Code Civ.Proc. 581a) although such a judgment is erroneous and subject to direct attack upon an appeal from it". (Citing cases.) However, in the instant case, the court did not attempt to enter such a judgment or take any action other than to order dismissal of the action and deny plaintiff's motion to vacate such order of dismissal. Manifestly it cannot successfully be maintained that the court is without jurisdiction to dismiss an action for lack of prosecution or that legislation authorizing such action is unconstitutional.

For the reasons herein stated, the attempted appeal from the order denying the motion of plaintiff to set aside and vacate the order of dismissal is dismissed. The order dismissing the action pursuant to the provisions of section 581a of the Code of Civil Procedure is affirmed.

YORK, P. J., and DORAN, J., concur.

70 Cal.App.2d 267

COMPTON v. SOUTHERN PAC. CO.

Civ. 12848.

District Court of Appeal, First District, Division 1, California.

July 24, 1945.

As Modified on Denial of Rehearing Aug. 18, 1945.

Hearing Denied Oct. 15, 1945.

1. Commerce ⚷27(8)
Master and servant ⚷110

The test to determine whether an employee working in a roundhouse on an engine undergoing "running repairs" or servicing, the engine being nominally engaged in interstate commerce, is engaged in interstate commerce within the meaning of the Federal Employers' Liability Act, and the test to determine whether such an engine is in "use" and on railroad's "line" within the Safety Appliance or Boiler Inspection Acts, are not synonymous. Safety Appliance Acts, 45 U.S.C.A. § 1 et seq.; Boiler Inspection Act of 1911, § 2, as amended, 45 U.S.C.A. § 23; Federal Employers' Liability Act, § 1, as amended, 45 U.S.C.A. § 51.

2. Master and servant ⚷110, 111(1)

The federal statutes imposing absolute liability on railroads for injuries caused by defective equipment exclude such liability while the car or engine is removed from actual service, even temporarily, for repairs, and with the exception of the statute making it unlawful for a railroad to use any car in interstate commerce not provided with grab irons, the statutes apply only when the engine or car is in actual use on the line or in moving traffic. Safety Appliance Acts, 45 U.S.C.A. §§ 1, 2, 4-6, 11, 13, 17; Boiler Inspection Act of 1911, § 2, as amended, 45 U.S.C.A. § 23.

3. Master and servant ⚷110

Where locomotive engaged in interstate commerce, called for a stated time, had a defective check valve which caused steam to escape into a feed water pump, and a machinist repairing the pump was burned by steam, but the locomotive was in a roundhouse for temporary "running repairs", the locomotive was not in actual "use" on the railroad's line within the Boiler Inspection Act which did not apply so as to make the railroad absolutely liable regardless of railroad's negligence. Boiler Inspection Act of 1911, § 2, as amended, 45 U.S.C.A. § 23.

See Words and Phrases, Permanent Edition, for all other definitions of "Use".

Appeal from Superior Court, Contra Costa County; A. F. Bray, Judge.

Action by Felix E. Compton against the Southern Pacific Company, a corporation, under the Boiler Inspection Act, for injuries. After defendant's motions for a nonsuit and for a directed verdict were denied, a verdict was returned for plaintiff, and from a judgment for plaintiff, defendant appeals.

Judgment reversed and trial court directed to enter judgment for defendant.

Carlson, Collins & Gordon, of Richmond, for appellant.

Hildebrand, Bills & McLeod, of Oakland (Louis H. Brownstone, of San Francisco, of counsel), for respondent.

PETERS, Presiding Justice.

Plaintiff, while employed as a machinist in the roundhouse of defendant railroad company at Yuma, Arizona, and while working on a locomotive of defendant admittedly engaged in interstate commerce, received injuries for which this action was brought. The locomotive was in an unsafe condition in that the check valve on the boiler was defective causing steam to escape into the pump on which plaintiff was working. It is not contended that the unsafe condition was caused by the negligence of defendant or its employees, the sole basis of liability being that defendant violated the Boiler Inspection Act, 45 U.S.C.A. § 23. Under that statute, in the event of a violation, liability is absolute, is not dependent on negligence, and contributory negligence of the employee is no defense. The trial court, after denying defendant's motions for a nonsuit and for a directed verdict, submitted to the jury the question as to whether such statute had been violated. The jury brought in a verdict for $4,000, and upon entry of judgment, defendant appeals. Its sole contention is that, inasmuch as the locomotive here involved was admittedly undergoing running repairs in the roundhouse of defendant at the time of the accident, the Boiler Inspection Act, as a matter of law, has no application, liability, if any, in such cases being based on the Federal Employers' Liability Act, 45 U.S.C.A. § 51, under which statute negligence constitutes an indispensable element of liability.

45 U.S.C.A. § 23, provides: "It shall be unlawful for any carrier *to use* or permit to be used *on its line* any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and *safe to operate in the service to which the same are put*, that the same *may be employed in the active service* of such carrier without unnecessary peril to life or limb, * * *." (Italics added.)

Under this section the carrier is under an absolute duty to keep its locomotives in such condition that they may be *"employed in the active service of such carrier* without unnecessary peril to life or limb." Unless the locomotive is in such condition it is made unlawful "to *use* or permit" it "to be *used on its line*." The question here is whether a locomotive detached from all cars and placed in a roundhouse for running repairs is in "use" "on its line" within the meaning of the statute.

The facts are not in dispute and are as follows: Yuma, Arizona, is a terminal point of defendant. When a freight train reaches Yuma its engine is disconnected from the train and is taken by the crew to a lead or turn in track where it is turned over to a hostler, a yard employee, who takes it to the roundhouse, where the locomotive is inspected and serviced before its next run. The roundhouse is about two blocks from the main lines. So-called "running repairs" are made at the roundhouse. These are repairs of a minor nature that do not require more than twenty-four hours to perform. If more extensive repairs are needed the locomotive is deemed "in the hole" and "out of service," and labeled "withdrawn from service." While a locomotive is being inspected and serviced, or is undergoing running repairs in the roundhouse, it may be called by the transportation office for duty. The foreman of the roundhouse then determines whether the locomotive may go out or whether further time for the repairs is needed.

The locomotive here involved had completed a run and was brought to the roundhouse by the hostler. Plaintiff reported to work at 7 a. m. at the roundhouse on the day of the accident and was instructed by the foreman to repair the leaking pump on the engine. The accident occurred at about 7:15 a. m. At that time the engine had been "called" for 8 a. m., that is, the transportation office had assigned it to a particular train leaving at that hour. Although the repairs were not completed, the roundhouse foreman had indicated that the locomotive would be ready for service at the requested time. This would mean that about 7:30 a. m. the locomotive would be driven on a lead out track by the hostler and delivered to the crew.

When plaintiff was assigned the duty of repairing the pump the locomotive had a fire in the fire box and steam up in the boiler. The job required the installation of a new gasket in the head of the hot water chamber of the feed water pump. While removing the cap to install the gasket, steam and hot water escaped and plaintiff received severe burns on the face and body. Subsequent investigation revealed that a small piece of metal had become lodged under the boiler check valve causing it to remain partially open and thus permitting steam to escape from the boiler into the feed water pump on which the plaintiff was working. It is conceded that if the Boiler Inspection Act is applicable, this unsafe condition constituted a violation of the act.

The trial court submitted to the jury the question as to whether at the time of the accident the locomotive was in use on defendant's line within the meaning of the Boiler Inspection Act. We are of the opinion that this was error in that it appears from the uncontradicted evidence, as a matter of law, that that statute is not applicable to the facts here involved.

There appears to be no case directly in point interpreting the Boiler Inspection Act, but there are several cases directly in point interpreting the Safety Appliance Act, 45 U.S.C.A. § 1 et seq., which contains language very similar to that used in the Boiler Inspection Act. The leading case is Baltimore & O. R. Co. v. Hooven, 6 Cir., 297 F. 919. In that case liability was sought to be predicated upon a violation of the Safety Appliance Act which also creates an absolute liability. As it then read that statute provided that it shall be unlawful "to haul or permit to be hauled or used on its line any car" not equipped with certain safety appliances. Section 2. The plaintiff, a machinist, was working upon a locomotive that had been sent to the roundhouse the day before the accident for its regular monthly inspection and for running repairs. At the time of the accident, as in the instant case, the locomotive had been called for service. It was customary for engines brought into the roundhouse to be sprayed with oil to protect them from rust. The oil was then washed off with warm water. The engine had been sprayed but the oil had not yet been removed. The plaintiff in descending from the top of the boiler slipped on a steel running board on which there was some oil, and was injured. He was unable to save himself by grabbing the safety grab rails because they also were covered with oil. The Circuit Court of Appeals reversed the judgment for the plaintiff. In so doing the court stated the question involved as follows (page 921 of 297 F.): "Does the absolute liability of the railroad for the appliances and their security as fixed by the statute follow its instrumentalities of transportation beyond their actual present use or hauling, or, more specifically, is it the intent of the act to have the absolute liability imposed by it attach to the vehicle during such time as it is withdrawn temporarily from actual service and after it has reached the place of repair and is undergoing conditioning and repair for the purpose for which it is intended and for the use to which it is assigned?"

After pointing out the test for liability under the Employers' Liability Act is entirely different from that under the Safety Appliance Act, the court stated that under the latter statute the test was whether the car was in "use" "on its line," and that under that test "it is difficult to see wherein the safety of a highway of interstate commerce may be endangered by a locomotive withdrawn from service and at rest in a stall of the railroad's roundhouse undergoing repairs, even though such withdrawal be but temporary."

The court then held (page 922 of 297 F.):

"The act forbids the 'use' or 'hauling on its line' of prescribed cars. Whatever ambiguity lies in the statute results from the susceptibility of the term 'use' to an interpretation equivalent in meaning to the terms 'employ' or 'engage,' or the phrase 'habitually use,' as distinguished from the term 'use' as implying actual present use. Having in mind the broad aims and purpose of the statute and its specific provisions, we think there can be no doubt as to the meaning of its prohibitory clause. The statute imposes an absolute liability on the carrier to equip its vehicles with safety appliances and to keep such appliances secure. The act of equipping the vehicle originally with the safety appliances and the act of repairing an appliance which becomes defective in use are acts in compliance with and not in violation of law and are not in our judgment acts which the law intends to penalize. The process of conditioning an engine and preserving it from deterioration through rust by spraying it with oil appears to be, so far as this record is concerned, the usual and necessary treatment of the engine during monthly inspection, contributing to the safety of the apparatus while in actual use. If during such treatment the safety appliances are rendered temporarily insecure by the presence of oil upon them, it does not seem to us to present a condition that comes within the purview of the act, when as in this case the engine is completely withdrawn from all relationship to the highways of interstate commerce, and from all connection with the movement of trains thereon.

"Another consideration also contributes to this conclusion. Assuming it to be the wise and humane purpose of the act to secure the utmost of safety to travelers and employees upon the highways of interstate commerce, whatever may be the source of the dangers which threaten it, it becomes the clear duty of the carrier in conformity with such purpose, as was suggested by this court (opinion of Judge Knappen, Southern Ry. Co. v. Snyder, 6 Cir., 187 F. 492, at page 497, 109 C.C.A. 344), to exercise a high degree of diligence in discovering and repairing defects in its safety appliances and in withdrawing the car from commercial use while they exist. Such diligence seems also to be imposed on the carrier by the Boiler Inspection Act (Comp.St. § 8630 et seq. [45 U.S.C.A. § 22 et seq.]) and related statutes. Can it be said that it is the intention of the Safety Appliance Act to penalize such diligence by extending the absolute liability of the carrier through the period of replacement and repair, and reaching even a case where the insecure condition of the appliance which failed was the natural and temporary result of the reconditioning process? We think such contention untenable, unless supported by specific direction of the statute."

The plaintiff in the instant case seeks to distinguish the Hooven case in that in the latter case the unsafe condition was a reasonably necessary incident of processing the locomotive, which is not true in the present case. While it is true that this factual difference exists, such difference in no way affects the basic question of interpretation as to whether an engine temporarily removed from service and undergoing temporary repairs is in "use" on the carrier's "line." The case is directly in point on this basic issue.

Other cases support the conclusion that the statute does not apply to locomotives removed from actual service and undergoing repairs. In New York, C. & St. L. R. Co. v. Kelly, 7 Cir., 70 F.2d 548, an injured employee based his action on violations of both the Safety Appliance Act and the Federal Employers' Liability Act. It was admitted that the car was in interstate commerce. Judgment for plaintiff was reversed by the Circuit Court. The plaintiff was a brakeman on a yard crew. The car in question was defective and was so marked. It was undergoing repairs on a repair track where it had been for three days. Plaintiff was injured when he fell because of the lack of a grab iron which had been removed in the course of repairs. The repairs were undoubtedly more extensive than running repairs. In holding that as a matter of law there had been no violation of the Safety Appliance Act the court stated (page 550 of 70 F.2d): "After a defective car reaches the place of repair, the Safety Appliance Act is inapplicable because such car has been withdrawn from service and is not 'in use' under the provisions of the act, nor does mere shifting of cars within the place of repair put the car 'in use' within the meaning of the statute." Citing several cases, including the Hooven case, supra.

In Sherry v. Baltimore & O. R. Co., 6 Cir., 30 F.2d 487, also a Safety Appliance Act case, the car in question had been cut from the train, placed on a "ladder" track, and reported as having a defective brake. Plaintiff was an inspector and, while inspecting the brake, was injured by reason of its defective condition. The Circuit Court affirmed a directed verdict for defendant, holding that, as a matter of law, the Safety Appliance Act had no application. The court stated (page 489 of 30 F.2d):

"The absolute liability above referred to is implied from these statutory provisions, and it is to be noted that the inhibited act on the part of the railroad company in each is 'the hauling or permitting to be hauled or used' on its line any car with the required equipment in defective condition. This constitutes the 'violation of the act' we have above referred to in statement of the general principles deduced from precedent. It has accordingly been held by this court that the act has no application to equipment withdrawn from service and undergoing minor repairs preparatory to early return to service. Baltimore & O. R. Co. v. Hooven, 6 Cir., 297 F. 919. Cf. McCalmont v. Pennsylvania R. Co., 6 Cir., 283 F. 736.

"In the instant case the defective car was not being hauled or used by the defendant, except in that it was stored temporarily upon one of the ladder tracks. It had been withdrawn from use for the very purpose of undergoing repair. No movement was immediately contemplated, and no action of setting the brakes was necessary, save as incident to inspection and repair."

Another case discussing the question involved, also a Safety Appliance Act case, is Kaminski v. Chicago, M., St. P. & P. R. Co., 180 Minn. 519, 231 N.W. 189, where a judgment for plaintiff was reversed. The car in question was in the heavy repair yard of defendant and was undergoing extensive repairs. Cars were customarily transferred from one track to another in the course of making repairs. While the car in question was being thus moved, plaintiff, in attempting to pull himself up the side of the car, grasped the grab iron. It came off and he fell to the ground. The grab iron was to be removed in the course of the repairs and the nuts holding it in place had been burned off. Usually the grab irons fell off or were taken off when the bolts were burned, but in this case the grab iron remained insecurely on the car. The court said: "We understand these cases to hold that, although a car with defective appliances is being moved for the purpose of taking it out of service and placing it at the point where it is to be repaired, it is within the operation of the Safety Appliance Act during such movement. But we have been cited to no case and know of none which goes to the extent of holding that a car with defective appliances which has been taken out of service and has been placed on a repair track to be repaired in a yard used exclusively for the purpose of making repairs, and which is actually in process of being repaired, is still within the operation of the Safety Appliance Act." (page 190 of 231 N.W.)

After analyzing both the Hooven and Sherry cases, supra, and citing certain other cases, the court concluded (page 191 of 231 N.W.): "We reach the conclusion that, where a bad order car has been withdrawn from service and taken to and placed in a repair yard where it is being repaired, subsequent movements of the car made in the course of the work and for the purpose of facilitating it are not within the operation of the Safety Appliance Act."

A case discussing the Boiler Inspection Act and apparently interpreting it when it provided that it applied to locomotives "in moving interstate traffic" is Harlan v. Wabash Ry. Co., 335 Mo. 414, 73 S.W.2d 749, 753. In that case the locomotive was undergoing inspection and conditioning in the roundhouse. During inspection it was discovered that the mechanical stoker was jammed. Plaintiff, a machinist's helper, was injured during the course of the repairs when he stepped into an open trap door in the engine vestibule and his foot was crushed by a revolving propeller. It was held that no cause of action under the Boiler Inspection Act had been proved first, because leaving open the trap door was not a mechanical defect, and secondly, because the engine was not in use or moving in interstate commerce. In connection with this last holding the court stated (page 753 of 73 S.W.2d):

"Nor can plaintiff recover under the Boiler Inspection Act for the reason that the engine in question on which plaintiff was working when injured was not at the time in use or moving in interstate commerce, as we held in Brady v. Wabash Ry. Co., 329 Mo. 1123, 49 S.W.2d 24, 29, 83 A.L.R. 655. This act, like the Safety Appliance Act (45 U.S.C.A. § 1 et seq.), while applicable only to interstate commerce, is narrower in its scope and application than is the Federal Employers' Liability Act (45 U.S.C.A. § 51 et seq.). The latter act covers negligence of an interstate carrier resulting in the injury or death of an employee when the negligent act or omission is directly connected with interstate transportation and the instrumentalities thereof, or is so nearly related to it as to be practically a part thereof. The Boiler Inspection Act, like the Safety Appliance Act, does not rest on negligence, but is absolute in its requirements and is restricted to locomotive engines when in use in moving interstate traffic. It is only when in such use that the engine and appliances are required to be 'in proper condition and safe to operate in the service to which the same are put.' We pointed out in the Brady case that the Safety Appliance Act, and the same is true of the Boiler Inspection Act, does not apply to cars or engines when withdrawn from active use in interstate commerce for temporary repairs, though intended to be again and shortly put in such active use. * * *

"It follows from these rulings that under the facts shown here the engine in question was not in actual use in moving interstate commerce at the time of the plaintiff's injury, but was so far withdrawn from such active use as to make the provisions of the Boiler Inspection Act inapplicable. But it must not be concluded that this is true as to the broader provisions of the Federal Employers' Liability Act."

These cases clearly establish that a locomotive sent to a roundhouse for temporary repairs, is not, while undergoing such repairs, in "use" on the carrier's "line" and is not, therefore, within the provisions of the Boiler Inspection Act.

Plaintiff relies principally on three cases to sustain his contention that the act is applicable—New York Cent. R. Co. v. Marcone, 281 U.S. 345, 50 S.Ct. 294, 74 L.Ed. 892; Baltimore & O. R. Co. v. Kast, 6 Cir., 299 F. 419, certiorari denied 266 U.S. 613, 45 S.Ct. 95, 69 L.Ed. 468; and Brady v. Terminal R. R. Ass'n, 303 U.S. 10, 58 S.Ct. 426, 82 L.Ed. 614. The first two cases are clearly not in point. In the Marcone case the employee in question was employed in a roundhouse to grease engines therein for inspection. He was killed when the engine was moved while he was apparently working on it. The action for his death was based on the Federal Employers' Liability Act, under which liability is based on the negligence of the carrier. One of the questions involved was whether the deceased employee was engaged in interstate commerce at the time of his death. The court held that he was. The same point was involved in the Kast case. The gist of the opinion is indicated by the first two headnotes which read: "A railroad employé, engaged in a work in interstate commerce, who had stopped work and was going after his lunch on the premises when injured, with the intention of returning immediately afterward to the same work, was employed in 'interstate commerce' at the time of injury, within Employers' Liability Act." "A machinist and his helper, who at the time of the helper's injury were engaged in making running repairs to an engine in use in interstate transportation, while it was laying off between runs at a roundhouse, held employed in 'interstate commerce,' within Employers' Liability Act."

[1] These two cases are of no help at all in deciding the problem presented on this appeal. All they decided was that an employee working in a roundhouse on an engine undergoing running repairs or servicing, where such engine is normally engaged in interstate commerce, is engaged in interstate commerce within the meaning of the Federal Employers' Liability Act. The cases did not consider whether such an engine was in "use" on its "line" within the meaning of the Safety Appliance or Boiler Inspection Acts. Most of the five cases cited by defendant, and above analyzed, point out that the two tests are not synonymous. That this is so is made quite clear when the language of the Federal Employers' Liability Act is considered. 45 U.S.C.A. § 51 provides in part:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier * * *.
>
> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce * * *."

This language is obviously different from that used in the Boiler Inspection Act which makes it unlawful "for any carrier to use or permit to be used on its line" any locomotive unless its boiler is safe "to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb." 45 U.S.C.A. § 23. This last language was carefully framed to state the thought that the absolute liability being imposed only applied while the locomotive was in actual use on the "line" of the company in "active service."

The third case relied upon by plaintiff—Brady v. Terminal R. R. Ass'n, 303 U.S. 10, 58 S.Ct. 426, 82 L.Ed. 614—is likewise not in point. Brady was an inspector for the Wabash Railway Company. He was injured while inspecting cars when a grab iron became loose. He sued the Terminal Railroad Association under the Safety Appliance Act which extends its benefits not only to employees of the defendant carrier but to any person rightfully on the premises —employee, employee of another carrier, passenger, etc.—who is injured by reason of the defective appliance. When injured Brady was inspecting a car brought by the defendant Terminal Railroad Association to yards of the Wabash line. The cars were placed on the receiving track of the Wabash line, and Brady was inspecting them to determine whether they were in proper condition to be accepted by the Wabash line when he was injured. The United States Supreme Court held that the car was still in "use" by the Terminal Railroad Association, even though not actually on a line of that company. The court was careful to point out that (page 13 of 303 U.S., page 428 of 58 S.Ct., 82 L.Ed. 614): "It is not a case where a defective car has reached a place of repair," citing with apparent approval the Hooven and Kelly cases, supra. The rationale of the opinion is that the car was still in "use" by the Terminal Railroad Association until accepted by the Wabash line. The case has no application to cars withdrawn from service and undergoing repairs.

The several federal statutes imposing absolute liability on railway carriers for injuries caused by defective equipment all seem to have been drawn carefully to exclude such absolute liability while the car or engine is removed from actual service, even temporarily, for repairs. These statutes appear in 45 U.S.C.A. Chapter 1, §§ 1–23, inclusive. Section 1 provides: "It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic" not equipped with a power driving-wheel brake. Section 2 provides that it shall be unlawful for any interstate railroad common carrier "to haul or permit to be hauled or used on its line any car used in moving interstate traffic" not equipped with an automatic coupler. Section 4 provides that it shall be unlawful for an interstate railroad carrier "to use any car in interstate commerce" not provided with grab irons. Section 5 provides that no freight cars "shall be used in interstate traffic" which do not comply with the standard as to height of drawbars. Section 6 provides that any interstate railroad carrier using any locomotive "or hauling or permitting to be hauled or used on its line any car" in violation of the preceding provisions shall be liable to a $100 penalty for each violation. Section 11 provides that it shall be unlawful for any carrier subject to §§ 1–16 of this title "to haul, or permit to be hauled or used on its line" any car subject to the provisions of these sections unless said car is equipped with certain designated safety appliances, while § 13 provides that any carrier subject to these provisions "using, hauling, or permitting to be used or hauled on its line" any car subject to §§ 1–16 of this chapter not equipped as provided in §§ 11–16 shall be liable to a penalty of $100 for each violation, provided that, if during a run such defect is discovered, the defective car may be hauled to a place of repair without the penalties, but civil liabilities will continue during such haul. Section 17 provides that it shall be unlawful for any interstate railroad carrier "to use any locomotive in moving interstate or foreign traffic" not equipped with an ash pan. Section 23 is the Boiler Inspection Act. Its language has already been several times quoted.

[2, 3] It will be noted that in not one of the absolute liability sections, except § 4, does the statute apply to cars or engines simply engaged in interstate commerce. In each section, except § 4, some further limitation appears. In some of the sections it is required, in addition, that the equipment be used in "moving interstate traffic." Others use language more comparable to that used in § 23. But with the exception of § 4 each of the sections in Chapter 1 of Title 45 U.S.C.A. clearly and without ambiguity indicates that it is to apply only when the car is in use on the line or in moving traffic. This, by necessary implication, excludes such sections when the equipment is removed from the line and placed in a roundhouse for temporary or more serious repairs.

For the foregoing reasons the judgment is reversed. See Stetson v. Sheehan, 186 Cal. 334, 200 P. 392.

KNIGHT and WARD, JJ., concur.

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70 Cal.App.2d 261

PEOPLE v. DOBBS.

Cr. 637.

District Court of Appeal, Fourth District, California.

July 23, 1945.

1. Criminal law ⚷1023(8)

Entry of minute order sustaining demurrer to information with leave to amend was a sufficient "judgment" from which the people could appeal under provision of Penal Code for appeal from judgment for defendant on demurrer. Pen.Code, §§ 1005–1008; § 1238, subd. 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Judgment".

2. Homicide ⚷127

A general charge of manslaughter, without alleging whether voluntary or involuntary manslaughter is intended, and without reciting the precise facts that will be relied upon, is sufficient to uphold conviction of either voluntary or involuntary manslaughter. Pen.Code, §§ 192, 952.

3. Indictment and Information ⚷110(17)

Information charging, in language of statute, the unlawful killing without malice of named persons, sufficiently charged the crime of manslaughter. Pen.Code, §§ 192, 952.

◆

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

John Percy Dobbs was charged with manslaughter, and, from an order and judgment sustaining his demurrer to the information and granting leave to amend within ten days, the People of the State of California appeal.

Order and judgment reversed.

Robert W. Kenny, Atty. Gen., Frank Richards, Deputy Atty. Gen., and John Neblett, Dist. Atty., of Riverside, for appellant.

Sarau, Thompson & Colegate and H. L. Thompson, all of Riverside, for respondent.

BARNARD, Presiding Justice.

The defendant was charged with manslaughter. On April 23, 1945, his demurrer to the information was argued and an order was entered in the minutes sustaining the demurrer with leave to amend within ten days. On April 27, 1945, what purports to be a formal judgment, sustaining the demurrer and granting the plaintiff leave to amend within ten days, was filed and recorded in the book of judgments. On the same day, the plaintiff appealed both from the order of April 23 and the judgment of April 27.

The first question presented is whether any right of appeal is here available to the appellant. Subdivision 2 of section 1238 of the Penal Code provides that an appeal may be taken by the People "from a judgment for the defendant on a demurrer" to the information. The respondent contends that neither the minute order sustaining the demurrer with leave to amend nor the formal judgment thereafter entered is such a judgment on demurrer as is required by subdivision 2 of section 1238; that neither is a final judgment in any sense since permission to amend was granted; that if the district attorney did not desire to amend a judgment of dismissal should have been entered; that such a judgment of dismissal is the judgment for the defendant which is contemplated by section 1238; and that a review of the order sustaining a demurrer can be had only upon an appeal from a judgment of dismissal.

There appears to be no authority in this state which is directly in point under all of the circumstances which here appear. In People v. Ah Own, 39 Cal. 604, it was held, under the old Practice Act, that an order sustaining a demurrer to an indictment amounted to a final judgment and was appealable. This was based upon the then existing difference between civil and criminal cases, the complaint in the one being amendable while in the other it was not. In People v. Jordan, 65 Cal. 644, 4 P. 683, 684, decided after sections 1007 and 1238 of the Penal Code were adopted, it was held that an appeal would lie from an order sustaining a demurrer to an indictment. The reason given for this holding was not the matter of finality mentioned in the Ah Own opinion but was because "the Penal Code does not provide for any entry of judgment on demurrer, other than the entry of the order upon the minutes. Section 1007. The order in the minutes is the judgment." Although at that time a complaint was not amendable this fact was not relied on and, in effect, the court held that the judgment on demurrer referred to in section 1238 was the order allowing the demurrer and entered in the minutes as provided for in section 1007.

The matter again arose in 1922, nearly forty years after the Jordan decision. In People v. Apple, 57 Cal.App. 110, 206 P. 487, 489, an appeal from an order sustaining a demurrer was dismissed. After holding that the appeal was taken too late, the court went on to hold that an appeal from such an order would not lie because, since the decision in the Jordan case, section 1008 of the Penal Code had been so amended as to make indictments or informations amendable, and to further provide for the entry of a judgment of dismissal in case they were not amended after the sustaining of a demurrer. The court stated that this latter provision clearly "contemplated that either a judgment of dismissal or a judgment upon the demurrer itself without a dismissal" should be entered, and that it followed that there could be no appeal except from a judgment so entered. It is difficult to see how this provision for a judgment of dismissal, under certain conditions, clearly or otherwise contemplated, as an alternative, a formal judgment upon a demurrer without a dismissal, which is nowhere provided for in the code. It may be observed that if a judgment of the latter kind is contemplated by any of the code sections, one was here entered. It should also be observed that while section 1008 then provided for a judgment of dismissal after a demurrer was sustained, under certain conditions, section 1007 had not been amended, was not limited to the conditions expressed in 1008, and still provided that the court must give judgment either allowing or disallowing the demurrer and that an order to this effect must be entered in the minutes, which order, it was held in the Jordan case, "is the judgment." The provisions of section 1007 were not discussed in the Apple case. The decision in that case was followed in People v. Ryan, 57 Cal.App. 338, 207 P. 269, and in People v. Hadley, 64 Cal.App. 221, 222, 221 P. 389, and without a discussion of the provisions of section 1007. In none of these cases was a hearing in the Supreme Court requested.

It is true that at the time the last-mentioned cases were decided there was not an entire absence from the Penal Code of any provision for the entry of a judgment of dismissal, after the sustaining of a demurrer, since section 1008 then provided for such a judgment under certain circumstances. However, in that respect the situation has now been restored to that existing at the time of the Jordan decision, since in 1927 section 1008 was so amended as to eliminate that portion which provided for the entry of a judgment of dismissal in case no amendment was made after the sustaining of a demurrer. As a result, it is again true, as pointed out in the Jordan case, that no provision is made in the Penal Code for any entry of judgment on demurrer other than the entry of the order upon the minutes, as provided for in section 1007.

There is one distinction between the present situation and that prevailing at the time of the Jordan decision, although the matter was not there mentioned. Complaints are now amendable. The respondent argues that this fact is conclusive, that the words used in section 1238, "from a judgment for the defendant on a demurrer," refer to a judgment which is a final determination of the case, that the rule should be the same as that in a civil case where a judgment of dismissal is required after the sustaining of a demurrer, and that a review of an order sustaining a demurrer can be had only upon an appeal from a judgment of dismissal.

[1] It may be assumed that good reasons could be advanced for applying the same rule in this regard in both civil and criminal actions. On the other hand, there may be good reasons for a different rule in criminal cases, where questions of jeopardy are involved, and where it may be considered an advantage to both parties to have the legal sufficiency of the charging instrument determined in advance, and before the ordeal of a criminal trial must be undergone. In any event, we regard this as a question for the legislature and not for the courts. Section 1238, which sets forth specifically the instances in which the People may appeal, makes no mention of a judgment of dismissal but definitely provides for an appeal "from a judgment for the defendant on a demurrer." Assuming that a court, under its general powers, could properly enter a judgment of dismissal, after a demurrer has been sustained and upon refusal to amend, and that such a judgment would be appealable under subdivision 2 of section 1238, it would be unreasonable to hold that this subdivision refers exclusively to a judgment entered under such implied powers and that it does not apply or relate to the only such judgment which is specifically provided for in the Penal Code, the one mentioned in section 1007. Section 1005 provides for a demurrer to an information. Section 1006 provides for an early hearing on that demurrer. Section 1007 then provides that on considering this demurrer the court "must give judgment," and then provides that its order thereon "must be entered upon the minutes." Under some circumstances, in civil cases, a minute order is considered as a judgment for the purpose of serving as a foundation for an appeal and no good reason appears why the same should not be true, in such a case as this, where the code section expressly provides that the court must give judgment and then, in effect, provides that this judgment shall be entered in the form of a minute order. As the court pointed out in the Jordan case: "The order in the minutes is the judgment." Assuming that a judgment of dismissal may properly be entered after the sustaining of a demurrer, under certain conditions, another form of judgment, to be entered as a minute order, is specifically provided for in section 1007. In our opinion the entry of such a minute order is a sufficient judgment, within the meaning of the statutes, from which an appeal may be taken.

A further question is presented as to whether the information here sufficiently charges the respondent with the commission of the crime of manslaughter under section 192 of the Penal Code. The respondent contended through his demurrer, and contends here, that the information is insufficient and uncertain in that it cannot be ascertained therefrom whether he is charged wtih voluntary manslaughter or involuntary manslaughter; whether he is charged with voluntary manslaughter or lawful act not amounting to a felony or with the commission of a lawful act in an unlawful manner; what unlawful act he was committing at the time in question; or how or in what manner he was committing a lawful act without due caution or circumspection.

Section 192 of the Penal Code defines manslaughter "is the unlawful killing of a human being, without malice." The two kinds of manslaughter, voluntary or involuntary, are then set forth. Section 952 provides that an offense may be charged in the words of the statute, or in any words sufficient to give the accused notice of the offense of which he is accused.

The information here charges that the respondent on or about the 26th day of February, 1945, in the county of Riverside, "did unlawfully and without malice kill" four persons who are named. This charges the offense of manslaughter in practically the identical language used in the statute. The language used is also practically identical, so far as material here, with that of the information involved in People v. Herbert, 6 Cal.2d 541, 58 P.2d 909, 912, where a conviction of manslaughter was affirmed. In analyzing the requirements of a manslaughter charge in that case, in connection with the question of former jeopardy, the court said:

"The ingredient of manslaughter is that a human life was unlawfully taken. * * The statute defining it is general and it makes no difference as to the particular means or methods by which it is committed if death ensues from the commission of an unlawful act not amounting to a felony, or from the commission of a lawful act which might produce death in an unlawful manner or the commission of a lawful act without due caution and circumspection. Section 192, Pen.Code. The manner of its commission need not be pleaded."

[2] In People v. Pearne, 118 Cal. 154, 50 P. 376, 377, the court said: "If this indictment had simply charged an 'unlawful killing,' without malice, it would have charged the crime of manslaughter of both kinds, voluntary and involuntary." Even before the rules of pleading in criminal cases were relaxed by the amendments of 1927 and 1929 it was held sufficient to allege an offense in the language of the statute except in cases where fraud was an essential element of the crime. In re Berto, 195 Cal. 774, 235 P. 735. In many cases, before and after those amendments, it was held that a general charge of manslaughter was sufficient to uphold a conviction of either voluntary or involuntary manslaughter, that it was not necessary to allege in the information which of the two kinds of manslaughter were charged against the defendant, and that no recital of the precise facts that would be relied upon is necessary. People v. Hunt, 26 Cal.App. 514, 147 P. 476; People v. Bones, 35 Cal. App. 429, 170 P. 166; People v. Wilson, 193 Cal. 512, 226 P. 5. Similar principles have been applied in connection with the charging of the commission of other crimes. People v. Fewkes, 214 Cal. 142, 4 P.2d 538; People v. Chait, Cal.App., 159 P.2d 445.

[3] In our opinion, the complaint here sufficiently charges the respondent with the crime of manslaughter and the court erred in sustaining the demurrer.

The order and judgment appealed from are reversed.

MARKS, J., concurs.

70 Cal.App.2d 399

In re LOUD'S ESTATE.

HOWARD v. LOUD et al.

Civ. 14788.

District Court of Appeal, Second District,
Division 1, California.
July 31, 1945.

1. Wills ⇨675

In order that a trust may arise from the use of precatory words, the court must be satisfied, from the words themselves, taken in connection with all other terms of distribution, that testator's intention to create an express trust was as full, complete, settled and sure as though he had given the property to hold upon a trust declared in the ordinary manner.

2. Wills ⇨672(3)

Where the direction to an executor is sufficiently definite and imperative, an intent to create a trust may be legitimately inferred.

3. Wills ⇨675

Where holographic will bequeathed $10,000 to testator's friend, and letter was written to designated executors bearing same date as holographic will in which testator expressed hope and wish that friend to whom bequest was made should never be in want, words in letter could not be construed as creating a precatory trust for benefit of friend in addition to specific bequest. Civ. Code, § 2221.

4. Appeal and error ⇨1056(4)

Where trial court rightly concluded that purported codicil contained no dispositive intent and therefore was not a codicil, rejection of evidence as to surrounding circumstances was not prejudicial error.

5. Wills ⇨99

A later testamentary writing which is supplementary to an earlier instrument is termed a "codicil", but a mere reference to a will with no testamentary intent is not a codicil. Probate Code, § 74.

See Words and Phrases, Permanent Edition, for all other definitions of "Codicil".

6. Wills ⇨99, 206

A letter written by testator to designated executors bearing same date as holographic will, which told executors that testator wanted them to see that a friend to whom specific bequest had been made would receive her money as soon as possible, and which expressed hope that such friend should never be in want, could not be admitted to probate as a "codicil". Probate Code, § 74.

◆

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Proceeding in the matter of the estate of Harold L. Loud, deceased. From a judgment refusing to admit certain documents in probate, Margaret Augustus Howard appeals, opposed by Archie Chester Loud and another, executors of the estate of Harold L. Loud, deceased.

Affirmed.

Henry H. Draeger, of Beverly Hills, and Kenneth E. Grant, of Los Angeles, for appellant.

Arthur L. Erb and Richard C. Waltz, both of Beverly Hills, for respondents.

DORAN, Justice.

Harold L. Loud, an attorney at law, died at Santa Monica, California, on September 27, 1943, and a holographic will dated January 28, 1937 was duly admitted to probate, the decedent's two brothers, Archie Chester Loud and August Blanke Loud being appointed as executors. The dispositive portions of this will, read as follows:

"First, I authorize and direct my executor, hereinafter named to pay out of my estate as soon as may be after my death all my just debts and funeral expenses.

"Second, I give devise and bequeath unto Margaret Augustus Howard the sum of ten thousand ($10,000) dollars to be hers absolutely and forever. This sum to be raised by the sale of as much of my personal property as becomes necessary to raise the aforesaid sum.

"Third, I give devise and bequeath unto my mother Ida Mary Loud to be hers absolutely and forever all the rest and residue of my estate, of every nature whatsoever or wheresoever situate, of which, at the time of my death, I may be seized or possessed, or to which I may be in any wise entitled.

"Fourth, In the event of the death of my mother Ida Mary Loud prior to that of my own, I give devise and bequeath the above mentioned residue to be equally divided between by brothers Archie Chester and August B. Loud, to be theirs absolutely and forever.

"Fifth, I hereby nominate and appoint my brothers Archie Chester Loud and August Blanke Loud as joint executors of this my last will and testament."

In the words of appellant's brief, "Decedent's brothers did not seek probate, as a codicil to the will, of a further holographic instrument signed by decedent and bearing the same date as the will. Thereafter, on March 25, 1944, Margaret Augustus Howard * * * petitioned the court for admission to probate of such instrument as a codicil to the will." The purported codicil, in decedent's handwriting, was found in the same compartment, with the will, and is as follows:

"Jan. 28th, 1937

Dear Aug and Arch:

This is my last will and testament and I want you to carry it out as I have stated and see that Margaret gets the money I have left her as soon as you can. She has been a good friend for a number of years and it is my hope and wish that she shall never be in want.

I would like to be cremated if there is no objection by any of you and the old ashes scattered to the four winds—However if any of you object to this procedure then do with my remains as you will. After all it can't make much difference to me—

You have both been good brothers and we have had a wonderful mother. It all goes to have made life worth while—

Bill."

It was stipulated that the above letter was in the decedent's handwriting, that decedent was commonly known as "Bill", and that the salutation "Dear Aug and Arch" was addressed to the executors of the will.

The trial court found "That the document, dated January 28, 1937, the same date as the Will, is not a codicil, there being no testamentary intent; that the objections to its probate should be sustained and a probate of said Document should be denied", and rendered judgment accordingly.

In urging reversal of this ruling appellant makes the following contentions:

"1. The rejected instrument is testamentary in character and a codicil in that (a) it protects the Howard bequest of the will against reduction under the statutory provisions for contribution, and (b) it is dispositive in character in that, being directed to decedent's executors, it commands that provision be made to assure Miss Howard against want.

"2. In construing the rejected instrument, the probate court erred in rejecting evidence of surrounding circumstances."

It is argued in appellant's brief that, "should a pretermitted heir appear the specific bequest of $10,000.00 would be invaded proportionately with the residuary devise and bequest to decedent's mother to make up the share of the estate to which a pretermitted heir would be entitled", under the provisions of Section 91 of the Probate Code, but that the purported codicil protects Miss Howard's bequest from such invasion since it indicates that "it was the obvious intention of the testator that it should be exempted from apportionment for any such contribution." This argument is, however, without merit, for as pointed out in the respondents' brief, "no facts we brought to the attention of the trial court by stipulation, or otherwise, which indicated any probability that there are or may be pretermitted heirs", and since appellant's petition indicates that the value of the estate is "in excess of $150,000.00", the possibility of the specific bequest being invaded is speculative and remote, if, indeed, it exists at all. The record shows that the deceased died September 27, 1943 and no child has yet appeared.

What may be denominated as appellant's principal contention is that "The rejected instrument is dispositive in that, being directed to the executors, it commands provision to assure Miss Howard against want." This contention is based upon the written statement, "It is my hope and wish that she (Miss Howard) shall never be in want." By these words, appellant maintains, "In legal effect, then, the executors are directed and commanded to make such provision as will insure Miss Howard from want, and a testamentary trust is created for her benefit." The respondents, on the other hand, assert that the rejected instrument is not dispositive or testamentary in character, and that deceased's expression of hope and wish that Miss Howard "shall never be in want" is insufficient to create a precatory trust.

Section 2221 of the Civil Code declares that a voluntary trust is created "by any words or acts of the trustor, indicating with reasonable certainty: 1. An intention on the part of the trustor to create a trust, and, 2. The subject, purpose and beneficiary of the trust." While it is doubtless true that the subject, purpose and beneficiary of the alleged trust are designated with reasonable certainty, it does not satisfactorily appear that there was "An intention on the part of the trustor to create a trust", without which intention, obviously no voluntary trust can exist. In this connection it may be noted that the trial court took judicial notice that the deceased was a practicing lawyer. It is therefore a reasonable assumption that if the testator had intended to create a trust in appellant's favor in addition to the specific bequest of $10,000, such intention would have been evidenced by some formal and definite language. In the purported codicil now under consideration it is clearly indicated that decedent desired the formal will to stand unchanged for at the inception of the letter it is stated, "This is my last will and testament and I want you to carry it out *as I have stated* and see that Margaret (appellant) gets the money *I have left her* as soon as you can." (Italics added.) The purported codicil was found in the same compartment with the will and bore the same date. Such facts lead to the conclusion that the formal will deposited with the letter must have been the instrument referred to in the letter when the testator said "This is my last will and testament," and that the testator intended only that the executors should "carry it out as I have stated". The writer then went on to informally admonish the executors to "see that Margaret gets the money I have left her as soon as you can", and further expressed the quite natural hope that "she shall never be in want". The appellants have cited no case, decided under the present California law, in which similar language has been construed as creating a trust. The existing cases, in fact, are quite to the contrary. Moreover, a judicial approval of appellant's contention in reference to this matter would create a precedent the dangers of which are too obvious to require comment.

[1] The appellant, seeking to establish a precatory trust, states that the case of Colton v. Colton, 127 U.S. 300, 8 S.Ct. 1164, 32 L.Ed. 138, is full authority for the contention here made. There the decedent, a resident of California, left a will reading as follows: "I give and bequeath to my said wife, Ellen M. Colton, all of the estate, real and personal, of which I shall die seized or possessed or entitled to. I recommend to her the care and protection of my mother and sister, and request her to make such gift and provision for them as in her judgment will be best." It was there held that a trust was created in favor of the mother and sister by reason of the precatory language in the will. But unfortunately for appellant's position, the Colton case does not represent the present California view, nor is it helpful in the instant case. In Sears v. Rule, 45 Cal.App.2d 374, 380, 114 P.2d 57, 61, the court said, "The early liberal construction of language upholding precatory trusts has been frequently rejected by modern authorities in this and all other jurisdictions." In the Sears case the court quotes from 1 Bogert on Trusts and Trustees, § 48, page 231, as follows: "The tide has run so strongly against turning precatory expressions into words of trust that the ordinary words of request, recommendation, wish, and desire are quite generally construed to have no legal effect." Pursuant to this rule the Sears case held that a voluntary trust was not created by a will which gave the residue of an estate to a named person and which declared that testator's reason for so doing was "that I am confident, and place my trust in him to the extent that he will distribute my estate in accordance with my wishes he and I have often discussed." In that case the rule as expressed in 69 C.J. page 717 is quoted with approval: "In order that a trust may arise from the use of precatory words, the court must be satisfied, from the words themselves, taken in connection with all the other terms of the disposition, that the testator's intention to create an express trust was *as full, complete, settled, and sure as though he had given the property to hold upon a trust declared in the ordinary manner.*"

Another case not dissimilar to the present litigation is that of In re Estate of Lee, 104 Cal.App. 15, 284 P. 948, 949, in which a holographic will instructed testator's brothers and sisters to "take care of Brother Will." The court held that such words did not create a precatory trust, and further stated that the later rule of decision in respect to this matter had been "recognized and approved in section 1322, Civil Code [now Section 104, Probate Code], which provides: 'A clear and distinct devise or bequest cannot be affected by any reasons assigned therefor, or by any other words not equally clear and distinct. * * *'" The appellant in the Lee case, as does appellant here, relied upon Colton v. Colton, 127 U.S. 300, 8 S.Ct. 1164, 32 L.Ed. 138, hereinbefore mentioned, and the opinion in the Lee case specifically states that the Colton case "repeatedly has been rejected in these jurisdictions as out of harmony with this later rule." The Lee case further states that "Any uncertainty as to the authority of the Colton case in this state was set at rest in Re Estate of Mitchell, 160 Cal. [618], 622, 117 P. 774," where the court said, "If that decision (the Colton case) was in any particular inconsistent with our own decisions on the subject, it would not be binding authority. The interpretation of wills is not a question upon which the federal courts control the state courts."

In appellant's reply brief it is stated that "With such authorities appellant has no quarrel". Although conceding that these authorities "follow a rule long established in California and elsewhere", it is nevertheless maintained that "this expression of hope and desire to the executors imposes an imperative obligation and in legal effect commands fulfillment of the testator's hope and desire by the executors".

[2, 3] While it is doubtless true that in a proper case, where the direction to an executor is sufficiently definite and imperative, an intent to create a trust may be legitimately inferred, it is obvious that the present situation does not present such a case. The so-called codicil here under con-

sideration does not direct or command or even suggest that the executors shall see to it that Miss Howard "shall never be in want". Having made a definite provision to this end in the will, nothing more is expressed in the purported codicil than, as the testator has said, a mere "hope and wish that she shall never be in want." Under no theory can such words be construed as evidencing an intention to abandon or change the will; nor is such language sufficient to create a trust.

[4] In urging a reversal of the ruling which denied probate to the purported codicil, appellant presents the further point that "In construing the testamentary character of the instrument the court erred in rejecting evidence of surrounding circumstances." A formal offer was made by appellant offering to prove among other things that Miss Howard and the testator had been engaged to be married since 1928, their marriage being prevented by the objections of the decedent's mother; that in 1934 the deceased started contributing to Miss Howard's support, paying her $200 a month in addition to providing her with living quarters, an automobile and various gifts, which allowance was increased in 1938 to $300 per month; that the amount given her in 1941 approximated $7,500, and that such contributions continued to the date of testator's death. In re Spitzer's Estate, 196 Cal. 301, 307, 237 P. 739, 742, is relied upon where the court quotes with approval from In re Estate of Beffa, 54 Cal.App. 186, 201 P. 616, as follows, "'It is well settled in this country and in England: First, that in determining whether the instrument propounded was intended to be testamentary, reference will be had to the surrounding circumstances, and the language will be construed in the light of these circumstances * * *', Clarke v. Ransom, 50 Cal. [595], 600." It is significant, however, that none of these cases suggest that surrounding circumstances may be used to create a will or codicil which legally does not exist. In Re Estate of Spitzer, relied upon by appellant, the court says, "it is true that courts will not make a will for a decedent who has failed to do so for himself, * * *." Indeed, no one would seriously deny that such is and always has been the rule.

The trial court rightly concluded that the purported codicil "contains no dispositive intent whatever and therefore it is not a codicil". Such being the case, it is obvious that no surrounding circumstances, however cogent or compelling, could supply this dispositive intent. As was said by the trial court in denying the offer of proof, "the surrounding circumstances may be shown in certain situations to clear up ambiguity of language and things of that kind, but even if the testimony offered were to be received, that testimony taken in connection with the document would still leave me of the view, gentlemen, that this is not a testamentary disposition and therefore it is not entitled to admission as a codicil to the will, which has been admitted to probate, and which as a will is not assailed here". Assuming therefore, but only for the sake of argument, that the trial court had been wrong in excluding the offered evidence of surrounding circumstances, nevertheless such exclusion would have been harmless since even if such testimony had been received, the decision would still have been adverse to the appellant's contentions.

[5, 6] Section 74 of the Probate Code provides that "Except as hereinabove provided, no written will, nor any part thereof, can be revoked or altered otherwise than: (1) By a written will, or other writing of the testator, declaring such revocation or alteration, and executed with the same formalities required for the execution of a will; * * *." The purported codicil although in the handwriting of Mr. Loud, indicates no intent to revoke or modify the will.

In the words of 26 Cal.Jur. page 809: "A later testamentary writing which is supplementary to an earlier instrument is termed a 'codicil'". However, as said in Schuler on Wills, Vol. 1, sections 393, 468, "A mere reference to a Will with no testamentary intent is not a codicil." The quotation from Schuler is particularly pertinent to the present situation. The purported codicil in the present case is no more, legally speaking, than a "mere reference to a Will", and in place of showing an intent to change the will by the creation of a trust, clearly indicates that the will provisions were to be carried out in toto. The letter in question was not a codicil.

The judgment appealed from is therefore affirmed.

YORK, P. J., and WHITE, J., concur.

HUBER v. HUBER. *

Civ. 14801.

District Court of Appeal, Second District, Division 3, California.

July 18, 1945.

Hearing Granted Sept. 13, 1945.

1. Divorce 🔑254

A provision that there was no community property must be read into divorce judgment not containing such declaration, when considered with finding that there was no community property.

2. Husband and wife 🔑264

Evidence in divorce action did not sustain finding that there was no community property and that all realty was purchased with husband's separate funds.

3. Husband and wife 🔑257

Net profits of one-man business carried on by husband, after allowing interest upon invested capital, must be considered to be value of husband's services and therefore community property.

4. Husband and wife 🔑264

A finding that realty conveyed to husband and wife as joint tenants was purchased with husband's separate funds cannot stand except upon clear and convincing proof.

5. Husband and wife 🔑262(2), 264

A wife suing for divorce was not bound to prove that community funds were used in purchase of realty conveyed to husband and wife as joint tenants, but husband had burden of accounting for community funds which came into his hands and of proving by clear and convincing evidence every fact essential to justify reformation of the deeds.

6. Husband and wife 🔑262(2)
Reformation of Instruments 🔑43

In wife's action for divorce, husband seeking to establish that property conveyed to himself and wife as joint tenants was his separate property, without alleging or proving mutual mistake or agreement with wife, was required to prove that deeds were made under mistake upon his part which would justify their reformation and that his separate property alone was used in purchasing realty. Civ.Code, § 3399.

7. Divorce 🔑286

Where there was a material variance between proof and finding in divorce action upon question of mistake in deeds conveying realty to husband and wife as joint tenants, reviewing court would not consider sufficiency of evidence to prove mistake.

8. Reformation of Instruments 🔑45(4)

The law requires exact proof to support claim that deed was not intended to convey the title which it purports to convey. Civ.Code, § 3399.

9. Reformation of Instruments 🔑45(4)

Proof justifying reformation of deeds must be clear and convincing, and not loose, equivocal, or contradictory, leaving mistake open to doubt. Civ.Code, § 3399.

10. Husband and wife 🔑14(3)

That husband's purpose in causing realty to be conveyed to himself and wife in joint tenancy was to facilitate administration of his estate and to protect wife in event of his death did not militate against effectiveness of the deeds.

11. Deeds 🔑188
Reformation of Instruments 🔑37
Trusts 🔑371(2)

Husband's cross-complaint, in divorce action, alleging that he intentionally caused property to be placed in joint tenancy, and not alleging mistake as to effect of deeds or other facts which would give him the right to recall or limit any interest vested by them in wife, stated no cause of action for annulment or reformation of the deeds, or for declaration of trust.

12. Divorce 🔑253

Testimony in divorce action did not sustain finding that husband, in causing realty to be conveyed to himself and wife as joint tenants, intended wife to have a half interest in event of his death if he did not during lifetime direct otherwise.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action for divorce by Marie Ida Huber against William X. Huber, wherein defendant filed cross-complaint. From that part of a judgment awarding divorce and alimony which denied plaintiff the interest of a joint tenant in property, plaintiff appeals.

Judgment reversed in part.

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* Subsequent opinion 167 P.2d 708.

Hahn, Graf & Ross and A. A. Goldstone, all of Los Angeles, for appellant.

George Penney, of Los Angeles, for respondent.

SHINN, Justice.

The judgment appealed from awarded plaintiff a divorce and $3,000 as alimony, payable at the rate of $75 per month; it also declared that four parcels of residential property which stood in joint tenancy and a fifth which had been sold by the parties were the separate property of defendant. Plaintiff has appealed from that part of the judgment which denied her the interest of a joint tenant in the property. She challenges the sufficiency of the evidence to support the findings upon that issue.

Plaintiffs alleged that the five properties were owned by the parties as joint tenants and that the rents, issues, and profits therefrom were community property, as well as certain personal property and cash in bank. Defendant in his answer alleged "that the properties were placed in the joint name of plaintiff and defendant in order to facilitate administration of his estate in the event that the defendant should die and for no other reason whatsoever." He filed a cross-complaint praying for a divorce and a judgment that the properties were his separate property, and he alleged "That following the marriage of the parties hereto and for the purpose of protecting the cross-defendant herein in the event of the death of cross-complainant and for no other reason, there was placed in joint tenancy certain property purchased out of the separate funds of the cross-complainant" (describing the five properties).

[1] No facts were alleged which would justify a reformation of the joint tenancy deeds, and defendant did not allege any agreement that the properties were to be held for his use and benefit or as his separate property. Plaintiff did not allege that community funds had been used to purchase them; in her answer to the cross-complaint she did not deny that the properties had been purchased from the separate funds of defendant, but the action was tried as if there were an issue as to whether community funds also had been used. No objection was made to the sufficiency of the pleadings and they appear to have been regarded as adequate to put in issue all matters in controversy between the parties and to support any judgment which the facts might justify. Plaintiff's notice of appeal also should be regarded as sufficient to call for a review of the determination that there had been no accumulation of community property. The judgment did not declare that there was no community property, but a provision to that effect must be read into the judgment when it is considered with the finding that there was no community property. The evidence as to the existence of community property is inextricably involved in a consideration of the evidence as to the source of the funds which went into the real property. The finding that there was no community property and the finding that the real property was purchased with the separate property of the husband must stand or fall together.

The parties married December 31, 1937, and lived together a little more than five years. The properties were acquired at different times within that period and required an initial outlay of $20,852.75. The court found (1) that they were purchased with defendant's separate funds, and (2) that "while defendant caused said properties to be conveyed to the plaintiff and the defendant as joint tenants, he did so as a mere matter of convenience to himself and in order that title would, as he believed, pass to plaintiff one-half of said properties upon his death if he did not otherwise direct in his lifetime * * * that defendant did not intend to vest any present interest in said properties in the plaintiff and that she was fully conversant with that fact," and (3) that there was no community property "except of a most nominal value."

[2] The primary question is whether there was evidence to support the finding that there was no community property. If there was community property at the time of the trial, plaintiff was entitled to not less than one-half of it; if the parties had accumulated community property it would have been necessary for defendant to prove that none of it was used in the purchase of the real estate. We are satisfied that there was not sufficient evidence to sustain the finding that there was no community property. Furthermore, as we shall point out, the undisputed evidence that a substantial amount of community funds came into the hands of defendant and the complete failure of defendant to account for more than a small part of them render it impossible for us to uphold the finding that all of the

real property was purchased with defendant's separate funds.

Defendant's theory of the case was that he caused the property to be placed in joint tenancy as the result of a mistake as to the effect of the deeds. His testimony will be referred to later. It is sufficient to say here that he did not allege or testify to, nor did the court find, that there was a mutual mistake of plaintiff and defendant as to the effect of the deeds. Plaintiff contends that the deeds could not be reformed, and that no other relief could be granted defendant which would affect her title as a joint tenant, except upon evidence of a mutual mistake (Civil Code, sec. 3399), or evidence of an agreement between the parties that, while the title stood in joint tenancy, the interests of the parties would be other than those of joint tenants. See Tomaier v. Tomaier, 1944, 23 Cal.2d 754, 146 P.2d 905. She contends that there was no evidence of a mutual mistake and no evidence of an agreement, and with this we agree. Her argument assumes that a large amount of community funds went into the real property. If this were true, plaintiff's title as a joint tenant would be good, in the absence of proof of a mutual mistake or an agreement giving some other meaning and effect to the deeds. Defendant could not convert community funds into his separate property except by agreement with his wife.

[3-9] A study of the transcript and an analysis of the exhibits has failed to disclose evidence to support the finding that the parties had no community property except of nominal value. The testimony upon the property issue was given by defendant and his accountant. The deductions which we make from the evidence with reference to the community income from defendant's business are based upon the testimony of the accountant and an explanatory analysis filed as an exhibit. Defendant, who was a customs broker with an established business, drew a salary, for four years following the marriage, of $300 a month, or a total of $14,400. He testified that he spent some $80 to $90 a month to maintain the household and that he paid $500 for an automobile for plaintiff, and plaintiff testified that defendant had bought her clothes to the amount of $36. Defendant did not otherwise account for the salary which he had drawn. He did not testify to the expenditure of more than $6,000 for the benefit of the community nor attempt to explain what became of the rest of his salary. Plaintiff contends that the balance of some $8,000 must have gone into the purchase of the real estate, but there was no evidence that it was used for this purpose, although we think there was no sufficient evidence to prove that none of it was so used. If we take the accountant's figures of defendant's over-all worth at the time of the marriage and at a time shortly before the time of trial, we find that they summarize as follows; at the time of the marriage defendant had cash in his business of approximately $15,000. He also had one savings account of $13,531.53 and another savings account of $522.58. The net profits of the business for the five-year period were $15,933.94. (The accountant arrived at this amount of net profits after allowing defendant 4 per cent interest upon his capital invested in the business.) Upon the record before us, the earnings that remained must be considered to be the value of defendant's services to the business, since he ran a strictly one-man business; they would therefore be community property. Witascheck v. Witascheck, 1942, 56 Cal.App.2d 277, 132 P.2d 600. There was prima facie proof of these facts as to earnings. They were shown on the accountant's summary, and as there was no evidence to the contrary, they constituted the only evidence as to the net income from the business. In computing the net income the accountant had charged to expense only $150 per month as defendant's salary, the remainder of $150 per month was reflected in his figures as earnings. Therefore, $7,200 should be added to the accountant's figure of net earnings, which gives an amount of community earnings, including salary, of $23,133.94 for the five-year period. These several figures total $52,188.05 as the amount of defendant's separate property and the community funds which he received. (We assume that the net profits from the five parcels of real estate were included in the earnings of the business, since the real estate was carried as a fixed asset of the business. These, however, amounted to only $3,925.28, according to the accountant, and if this amount should be deducted from $23,133.94, the earnings which, prima facie, belonged to the community, they would be reduced to $19,208.66, and the total figure to $48,262.77.) Defendant testified that he paid $20,852.75 for the real estate and that he expended some $6,000 for the benefit of the community and approximately $1,868.83 in

repairs and improvements on the real property; he had in bank in May of 1943 $8,769.45. These figures total $37,491.03. This amount, deducted from $48,262.77, leaves $10,771.74. The record does not contain evidence from which it is possible to reconcile these two figures, namely, the total amount of defendant's total assets, separate and community, as stated, and the amount of $37,491.03 for which he accounted. We have examined the evidence from another viewpoint but without any better results. According to the figures of the accountant, the net worth of defendant's business on December 31, 1937, was $15,420.92, and in July of 1943 was shown to be only $27,728.84, inclusive of the real estate, and it is impossible from the evidence to reconcile the latter figure with defendant's worth at the time of his marriage plus the unexpended amount of his earnings during marriage. We quote the above figures and those which follow to show the inadequacy of the evidence, from any standpoint, to support the findings upon the property issues. A study of the analysis which the accountant made of defendant's business does not furnish an answer as to the source of the funds with which the real property was purchased. It appears therefrom that if defendant had used capital from his business, as well as other separate funds, for the purchase of the property, the cash capital of the business would have been reduced to $8,860.02. The summary was purely theoretical and not evidence of any fact in issue. The transcripts of defendant's savings accounts, which were his separate property, were in evidence; they showed the state of the accounts during the period in which the property was purchased but nothing as to the sources of the funds that were added from time to time after marriage, or the uses that were made of the money. There was uncontradicted evidence that defendant had separate property in his business and in his savings accounts amounting to $8,000 or $9,000 more than the cost of the properties. He testified that all of the money that went into the real estate was his separate property. He checked out all of the money in the savings accounts but he did not explain how it was expended. His total withdrawals from the Farmers and Merchants' account amounted to $18,029.57, which was less than the cost of the property. Such withdrawals also exceeded the original savings accounts by $4,498.04, which had been added to the accounts, after marriage, in 21 separate deposits. It was not shown where this money came from and there was no evidence that any part of it represented income from the real property. The cost of the properties exceeded by $6,799.64 the savings accounts which defendant had at the time of his marriage. Other than the original savings accounts, defendant kept no separate account of his separate or community funds. His salary and the rentals from the property went into a single account in the Beverly Hills bank. The $4,498.04 that was added to the Farmers and Merchants' account necessarily came from an account in which separate and community funds were commingled, since it was not shown that defendant had any other account. If there had been evidence that all the community funds had been expended for the benefit of the community, it would necessarily have followed that the real estate had been purchased with defendant's separate funds. But when there was such a great discrepancy between the amount of community funds which defendant received and those which he accounted for, he was not entitled to a finding that the real estate had been purchased with his separate funds. Such a finding cannot stand except upon clear and convincing proof that such was the fact. It was not incumbent upon plaintiff to prove that community funds were used in the purchase of the real estate. She held title as a joint tenant and defendant was attacking the deeds. He had two burdens to carry: one was to account for the community funds which had come into his hands, and the other was to prove by clear and convincing evidence every fact which was essential to justify a reformation of the deeds. Since he did not allege or prove a mutual mistake or an agreement with plaintiff, it was necessary, in order to establish his own theory of the case, for him to prove that the deeds were made under a mistake upon his part which would justify their reformation, and further that his separate property alone had been used in purchasing the real estate. As will appear hereinafter, there was a material variance between the proof and the finding upon the question of mistake and we are therefore not considering the sufficiency of the evidence to prove a mistake justifying equitable relief. We have shown the insufficiency of the evidence to support the finding that the funds used in the purchase of the property were the separate property of defendant. The law requires exact proof to support a claim that a deed was not intended to convey the title which it purports to convey. The proof that will justify reformation of a deed "must be clear and convincing, and not loose, equivocal, or contradictory, leaving the mistake open to doubt." Burt v. Los Angeles Olive Growers' Ass'n, 1917, 175 Cal. 668, at page 675, 166 P. 993, 996. Defendant produced no checks which were used in the purchase of the property nor did he give any satisfactory explanation as to the source of all of the funds that were used therein. Even if the original amounts in his savings accounts were used for that purpose, there was still an additional $4,498.04 that may have come from community funds. Defendant had knowledge as to the source of the funds that were added to his principal savings account and was under a duty to account for the community funds. Something more was required of him than his mere unsupported statement that the money used was his separate property. The issues were difficult ones to try and the court was entitled to the most complete and explicit proof which was available.

In another view of the case, the finding that the real estate was the separate property of defendant cannot be sustained. This finding of ultimate fact was based upon the finding of a particular mistake on the part of defendant as to the effect of the joint tenancy deeds, which, as we shall point out, was not sustained by the evidence.

[10-12] By his cross-complaint defendant alleged that he knowingly and intentionally caused the property to be placed in joint tenancy. The fact that his alleged purpose was to facilitate the administration of his estate and to protect plaintiff in the event of his death did not militate against the effectiveness of the deeds. He alleged no mistake as to the effect of the deeds or other facts which would give him the right to recall or limit any interest which they vested in plaintiff. In other words, his cross-complaint stated no cause of action for annulment or reformation of the deeds, or for the declaration of a trust. He testified that he did not intend that plaintiff should have any present interest in the properties and that he believed that under the deeds she would take only a half interest *in the event that he was married to her at the time of his death.* (We note that he was not questioned as to what he believed his interest would be if he survived plaintiff.) He also testified that after he had paid the money in the first purchase, he told plaintiff that he had arranged it so that she would get a half interest in the property if they remained married at the time of his death, and that he had made no statement to her in connection with any of the other purchases. He did not testify that plaintiff made any reply to his alleged remark and plaintiff was not questioned about it. There was no evidence that plaintiff believed or understood that she was acquiring no present interest in the property. The *finding* was that defendant intended for plaintiff to have a half interest in the event of his death *if he did not during his lifetime direct otherwise.* Defendant's testimony with respect to his intentions did not conform to the allegations of his cross-complaint, but was received without objection. The finding as to his intentions did not conform to and was not supported by his testimony. Evidently he intended plaintiff to have some interest in the properties. His testimony was that it was a future interest, conditional upon the existence of the marriage to the time of his death, but the finding was that he had a different intention. There was no evidence to support the finding that defendant caused the property to be placed in joint tenancy with the mental reservation that plaintiff's interest would terminate altogether if he should, during his lifetime, "direct otherwise." There was no evidence that he had that understanding as to the effect of the joint tenancy deeds. There is a patent and serious uncertainty in the finding as to the nature of defendant's act which would terminate plaintiff's interest, but we need not discuss that point.

The effect of the judgment was to declare the deeds valid as to defendant but void as to any interest of the plaintiff. But the deeds were not void. Defendant knowingly caused the properties to be placed in joint tenancy and the deeds were valid even if subject to reformation as between the grantees.

The finding that there was no community property except of nominal value, and the finding as to defendant's intention and his understanding of the effect of the deeds, are not supported by the evidence. The judgment must be reversed for the reasons stated. No question has been raised on the appeal as to the sufficiency of the findings to support the judgment and we therefore express no opinion on that point.

The judgment is reversed, except as to the provision which awards plaintiff a divorce, attorney's fees and costs.

DESMOND, P. J., and PARKER WOOD, J., concur.

70 Cal.App.2d 382

BETHLEHEM STEEL CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 12902.

District Court of Appeal, First District, Division 1, California.
July 30, 1945.

Hearing Denied Sept. 27, 1945.

1. Workmen's compensation 🔑1939

The power of a reviewing court to annul the action of the Industrial Accident Commission in the exercise of its jurisdiction is limited, and if the specific findings have support in the evidence and such findings with the aid of fair inferences drawn therefrom sustain the Commission's conclusion as to ultimate facts, its decision will not be overthrown.

2. Workmen's compensation 🔑1939

Where two opposing conclusions may be drawn from facts found, the one accepted by the Industrial Accident Commission is controlling, provided it is reasonable and there is evidence in the record to support it.

3. Workmen's compensation 🔑52

The workmen's compensation law is to be liberally construed in favor of jurisdiction in the Industrial Accident Commission with the purpose of extending the benefits of the law for the protection of persons injured in the course of their employment. St.1937, p. 265, § 3202.

4. Workmen's compensation 🔑1939

Courts must indulge in all reasonable inferences to support the findings of the Industrial Accident Commission, and any reasonable doubt should be resolved in favor of the employee. St.1937, p. 265, § 3202.

5. Workmen's compensation 🔑1573

The conclusion of the Industrial Accident Commission that injury to employee who fell on employer's premises where he had gone to receive war bond pursuant to direction shortly after quitting work in nearby main plant, arose out of and in the course of employment was sustained by the evidence.

6. Workmen's compensation 🔑610

If the particular act is reasonably contemplated by the employment, injuries while performing it arise out of the employment and are compensable.

7. Workmen's compensation 🔑610

In determining whether a particular act is reasonably contemplated by the employment, the nature of the act, the nature of the employment, the custom and usage of a particular employment, the terms of the contract of employment, and perhaps other factors should be considered.

8. Workmen's compensation 🔑610

Any reasonable doubt as to whether an act was contemplated by the employment must be resolved in favor of the employee in view of the state's policy of liberal construction in favor of employee. St. 1937, p. 265, § 3202.

9. Workmen's compensation 🔑974

Where injured employee did not realize the seriousness of the injury he had received but on day following accident employee's daughter phoned the foreman that father had been injured and three days later employee's wife personally notified employer of such injury, and compensation claim was filed with Commission six days after the accident, notice of injury was sufficient to entitle employee to reimbursement for medical expenses. St.1937, pp. 281, 294, 295, §§ 4600, 5400, 5402.

WARD, J., dissenting.

Writ of review by Bethlehem Steel Company against Industrial Accident Commission of the State of California and Daniel E. Seaquist to annul compensation award made by the Commission to the individual respondent.

Award affirmed.

R. P. Wisecarver, of San Francisco, for petitioner.

Everett A. Corten and R. C. McKellips, both of San Francisco, for respondent Industrial Accident Commission.

KNIGHT, Justice.

On October 17, 1944, Daniel E. Seaquist, employed as a machinist by the Bethlehem Steel Company at its Twentieth Street shipbuilding plant in San Francisco, tripped and fell on a cement walk, fracturing his kneecap. He was 61 years old and had been in the employ of the company two years. On October 23, 1944, he filed an application with the Industrial Accident Commission for compensation, which the company contested upon the grounds that Seaquist's injuries did not arise out of and in the course of his employment, and that he failed to give notice of claim of an industrial injury. A hearing was had and findings were made adverse to the company on both of the foregoing issues. Accordingly, an award was entered in favor of Seaquist, which the company now seeks to have annulled upon the ground that the commission acted without and in excess of its jurisdiction, the points urged in this behalf being that the evidence does not justify the findings of fact, and that the findings of fact do not support the award.

The accident occurred about 3:30 p.m., on land belonging to the company, contiguous to the enclosed plant yard, a few minutes after Seaquist had checked out from work at the near-by main plant gate. Earlier that day he had received a card from the company stating that a war savings bond, for which he had subscribed through the company under the wage-withholding plan, was ready for delivery, and instructing him to call for the bond at a certain window in Building No. 54, located on the land on which the accident occurred. The building had been constructed and, with the exception of the ground floor, was being used by the United States Navy as a Navy Facility. The ground floor was used by the company in carrying on the bond sales transactions with its employees. Following the instructions given by the card, Seaquist called for the bond and after receiving it started to walk away, but in doing so he tripped and fell on a raised cement walk laid along the outside of the building and beneath the outside windows thereof through which the company was delivering the bonds.

The legal conclusions upon which the commission based its decision were: That the premises upon which the injury occurred were part of the premises of employment; that although Seaquist had discontinued his regular work and was on his way home, he had not left the premises of employment at the time of injury; that "the operations in which the employee was engaged at the time of the injury, namely, the withdrawing of a bond, payment for which was withheld from the wages due applicant [Seaquist], were a part of the total operations of the defendant in its capacity as employer"; that at the time of the injury Seaquist was performing a service growing out of and incidental to the employment, and that therefore the injuries received were compensable.

The basis of the argument advanced by the company in support of its position that Seaquist's injury did not arise out of and in the course of his employment is that in calling for the bond Seaquist was engaged in a strictly personal mission having no connection whatever with his employment; and that since the accident occurred outside of the plant, after Seaquist had checked out from work and was on his way home, the case does not fall within any of the exceptions to the general so-called "going and coming" rule. It is our opinion that the argument so advanced is not sustainable.

In addition to the facts above stated, the record discloses the following: The plan under which the bonds were purchased had its origin in the United States Treasury Department. In carrying out such plan the company requested all of its employees to purchase war bonds through the company by authorizing the company to withhold from their wages certain sums in payment of the bonds; and to that end the company distributed among its employees a printed form of authorization to be signed by them. When the bonds were ready for delivery, the company placed a printed form of notice to that effect in the employee's time box at the plant, instructing him to call for the bonds at a certain window in "Building No. 54"; and the bonds were there delivered by the company to its employees. Prior to July 14, 1944, Seaquist had purchased some bonds under the above plan, but later had cancelled his subscription. Shortly thereafter he was told by his foreman that they "would like to get" him "on the list again"; and on July 14, 1944, he complied with such request by signing one of the printed forms of authorization, which read in part as follows: "This authorization is given pursuant to the War Savings Plan dated Aug. 1, 1941, of Bethlehem Steel Corporation and Subsidiary Companies, a copy of which I have received, and is to remain in effect until canceled by me in writing." On the day of the accident, the company placed in Seaquist's time box the printed notice that his bond was ready and instructing him to call for it at a specified window "at Building No. 54." The notice further stated: "BRING THIS CARD WITH YOU. Bonds not called for within one week of receipt of this card will be delivered at window No. 7 [a different window]. Bonds not called for within 30 days will be mailed to bond owner." The company's name appeared in print at the bottom of the notice, and Seaquist was following the instructions thus given when he was injured.

As to the location of Building No. 54, the record shows that it was built on the southerly portion of a block of land belonging to the company lying on the southerly side of Twentieth Street, contiguous to the plant yard and opposite the company's offices. There was a fence between the block and the plant yard; and the larger portion of the block, fronting on Twentieth Street, was utilized by the company as a parking lot. It was enclosed by some sort of a single rail fence, or ropes or chains, and the entrance thereto was on Twentieth Street, only a short distance from the main plant yard gate at the end of Twentieth Street, through which the company's employees checked when going to and from work. The windows of the building through which the bonds were delivered to the employees were cut through the northerly side wall of the building facing the parking lot, and beneath the windows there was laid a raised cement walk. It was thus arranged so as to make it unnecessary for the employees to enter the building to obtain delivery of their bonds, and sometimes there were as many as 100 employees lined up in front of the windows for such purpose. On the day of the accident, Seaquist, after checking out from work through the Twentieth Street gate, walked a few feet along Twentieth Street to the gateway of the parking lot and then across the parking lot to the windows of Building No. 54, where the accident occurred.

[1-5] It is well settled that the power of a reviewing court to annul the action of the Industrial Accident Commission in the exercise of its jurisdiction under the Workmen's Compensation Law is limited, and one of the fundamental rules of limitation is that if the specific findings have support in the evidence and such findings, with the aid of fair inferences drawn therefrom, sustain the commission's conclusions as to ultimate facts, its decision will not be overthrown; and where two opposing conclusions may be drawn from the facts found, the one accepted by the commission is controlling, provided, of course, it is reasonable and there is evidence in the record to support it. (27 Cal.Jur. pp. 579, 580.) Moreover, it is declared both by legislative enactment and judicial decisions that the Workmen's Compensation Law is to be liberally construed in favor of jurisdiction in the commission with the purpose of extending the benefits of the act for the protection of persons injured in the course of their employment, Labor Code, sec. 3202, St.1937, p. 265; Fenton v. Industrial Accident Comm., 44 Cal.App.2d 379, 112 P.2d 763; and to this end it is held to be the duty of the courts to indulge in all reasonable inferences to support the commission's findings, Hatheway v. Industrial Accident Comm., 13 Cal.2d 377, 90 P.2d 68, and that any reasonable doubt should be resolved in favor of the employee. Employers' Liability Assur. Corporation v. Industrial Accident Comm., 37 Cal.App.2d 567, 99 P.2d 1089; Western Pipe & Steel Co. v. Industrial Accident Comm., 49 Cal.App.2d 108, 121 P.2d 35. Applying the foregoing rules to the situation here presented, it is quite certain that any interference with the commission's ultimate conclusion on the main issue would be unwarranted.

[6-8] As was said in Employers' etc., Corporation v. Industrial Accident Commission, supra, and later quoted with approval in Western Pipe, etc., Co. v. Industrial Accident Commission, supra 37 Cal.2d at page 573, 99 P.2d at page 1092: "If the particular act is reasonably contemplated by the employment, injuries received while performing it arise out of the employment, and are compensable. In determining whether a particular act is reasonably contemplated by the employment, the nature of the act, the nature of the employment, the custom and usage of a particular employment, the terms of the contract of employment, and perhaps other factors should be considered. Any reasonable doubt as to whether the act is contemplated by the employment, in view of this state's policy of

liberal construction in favor of the employee, should be resolved in favor of the employee." Here, the commission found, and the evidence shows, that the bond sales operations carried on between the company and its employees were part of the total operations of the company in its capacity as employer; and the evidence further shows that although Seaquist had checked out from work at the plant yard, the particular act in which he was engaged at the time he was injured, namely, calling for a bond which was to be delivered to him in lieu of part of his wages, was in furtherance of such operations and must have been reasonably contemplated by his employer, because the company had notified him to call for the bond within a week at the particular place on the company's premises where he sustained the injury. There is no evidence showing that the employees were permitted to pick up the bonds during working hours.

Aside, however, from the tests set forth in that portion of the decision last above quoted, there are many exceptions to the "going and coming" rule, and, as was said in Western Pipe, etc., Co. v. Industrial Accident Commission, 49 Cal.App.2d 108, 121 P.2d 35, at page 111, the scope of those exceptions has been considerably broadened recently by the Supreme Court in the cases of Freire v. Matson Navigation Co., 19 Cal.2d 8, 118 P.2d 809, and Smith v. Industrial Accident Commission, 18 Cal.2d 843, 118 P.2d 6. In those cases and also in the case of California Casualty Indemnity Exchange v. Industrial Accident Commission, 21 Cal.2d 751, 135 P.2d 158, it was held that because of the factual situations there presented they were taken out of the operation of the general "going and coming" rule; and those cases cite and review many others, both from within and from without this jurisdiction, wherein it was held likewise, that because of the presence of special facts the general rule was not applicable thereto. Naturally no two of those cases rested on the same state of facts, and consequently it cannot be said that factually any one of them is in point here. However, two legal principles are emphasized therein: that the term "employment" includes not only the doing of the work, but a reasonable margin of time and space necessary to be used in passing to and from the place where the work is done; and that the rule that the employee must be rendering service for the employer at the time of the injury is not of inevitable application. And it is our opinion that the reasoning of those cases fully sustains the conclusion adopted in the present case by the referee and the commission, that the injuries here arose out of and in the course of Seaquist's employment.

The company's second major point is likewise without merit. It is contended that it received no notice of the injury and that therefore Seaquist was not entitled to reimbursement for medical expenses.

[9] The pertinent provisions of the Labor Code are as follows: Section 4600 provides that medical attention which is reasonably required to cure or relieve from the effect of injury to the employee shall be provided by the employer, and that "In the case of his neglect or refusal seasonably to do so, the employer is liable for the reasonable expense incurred by or on behalf of the employee in providing treatment." Section 5400 provides: "Except as provided by sections 5402 and 5403, no claim to recover compensation * * * shall be maintained unless within thirty days after the occurrence of the injury which is claimed to have caused the disability or death, there is served upon the employer notice in writing, signed by the person injured or someone in his behalf * * *." And section 5402 provides that "Knowledge of such injury, obtained from any source, on the part of an employer, his managing agent, superintendent, foreman, or other person in authority, or knowledge of the assertion of a claim of injury sufficient to afford opportunity to the employer to make an investigation into the facts, is equivalent to service under section 5400." In 27 California Jurisprudence, at page 528, the law governing the matter of the payment of medical expenses is stated as follows: "In every case the employer should be given a fair opportunity to furnish to the employee the treatment required on account of the injury or to substitute his own treatment for that procured. Obviously, in order that he be given such an opportunity, the notice or knowledge of the injury must be such as to afford a reasonable notification of the need of medical treatment or claim thereto on account of the injury." But it is then said: "However, even though he first becomes aware of the necessity for treatment at the time the employee is being treated by a physician of his own choice, the employer is obliged then to tender treatment

else he becomes liable for the value of services rendered thereafter."

In the present case the facts are these: At the time Seaquist fell he suffered immediate and severe pain, but he did not realize the seriousness of the injury he had received, and he went on home. Later he called his personal physician, who found the kneecap fractured and placed Seaquist in a private hospital, where the fracture was reduced and the knee placed in a cast. He remained in the hospital thirteen days. On the day following the accident, Seaquist's daughter phoned to the foreman under which Seaquist was working that her father had been injured, and three days later Seaquist's wife went to the plant yard and personally notified the company of her husband's injury. At that time the company's representative with whom she talked said nothing "one way or the other what they were going to do"; and shortly after her visit to the plant Mrs. Seaquist received a phone call to the effect that the company denied liability; and on October 23, 1944, which, as will be noted, was six days after the accident and while Seaquist was still in the hospital, he filed his application for compensation with the commission.

In view of the foregoing facts, showing definitely that the company was twice notified of the happening of the accident, to wit, on the next day after it happened and again three days later, and that after having been so notified it denied liability, the company was clearly responsible for the payment of the medical expenses incurred by Seaquist in the treatment of his injury.

The award is affirmed.

PETERS, P. J., concurs.

WARD, Justice.

I dissent.

The referee found the following:

"Under ordinary circumstances, the applicant would leave the ship building yard through a gate at 20th and Illinois Streets without being required to go through the building where he picked up his bond and sustained his injury, or to enter the lot where the building stood. * * * The land on which the bonds were handed out was located so that if the applicant were to leave the premises of employment in order to go home and had no personal occasion to enter the land or building in question, he would in no way pass through the building or over the lot where it stood. * * *

"The Bethlehem Steel Company handled the bookkeeping and clerical work involved in deducting the purchase price of the bonds from the payroll and the handing out of the bonds at the proper time * * *, doing so as an accommodation to the workmen in their employ * * *, and the employees took advantage of this machinery for purchasing war bonds and receiving their bonds, not as a necessary element of their hiring, but as a part of the mutual undertaking to promote the loan to the Government represented by the bonds."

It is also in evidence that the building from which the bonds were delivered was not a part of Bethlehem Steel Company's plant directly, but a building erected for Naval facilities, the whole of the second floor being so occupied, and the handing out of bonds was done there solely to accommodate employees of Bethlehem and not as a part of the ship building operations, nor in furtherance of such operations.

Where such facts as these are found, no exception to the going and coming rule can be implied. This is not a case where the personal errand of the employee is in furtherance of the employer's business, such as washing hands, nor is it a case where the employee is using the only or usual means of egress or ingress from the employer's plant. The employer in carrying out an accommodation for its employees and for the government cannot be held to an extension of the time of the employment relationship so as to create liability under the Workmen's Compensation Act when the relationship of employer and employee has ceased for the day and the employee is not on the premises of the employer for any other purpose than his own benefit.

KALUZOK et al. v. BRISSON et al.*

Civ. 3414.

District Court of Appeal, Fourth District, California.

July 26, 1945.

Rehearing Denied Aug. 11, 1945.

Hearing Granted Sept. 20, 1945.

1. Venue ⚿4

Whether an action is local or transitory depends upon its character as disclosed by the complaint and upon the character of the judgment which could be entered in case of default. Code Civ.Proc. §§ 392, subd. 1, 395.

2. Venue ⚿5(3)

Where plaintiff purchased real property and gave a note for purchase price in part and paid balance in cash, and note was secured by trust deed upon property in which corporate defendant was named as trustee and individual defendants as beneficiaries, plaintiffs as trustors had an interest in the real property as respects application of statute providing for determination of actions involving real property, or interests therein in the county in which such property is located. Code Civ.Proc. § 392, subd. 1.

3. Venue ⚿5(3)

The statute providing that county in which realty is situated is proper forum for "determination in any form of right or interest in realty" intends to cover cases, no matter what their form, which actually involve a real or substantial interest in realty, although, technically, they may not fall within the classes which are specifically named in statute. Code Civ.Proc. § 392, subd. 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Determination in Any Form of Right or Interest in Realty".

4. Venue ⚿5(3)

Action for fraud on ground that individual defendants made false representations as to value of realty purchased from defendants by plaintiffs praying that any damage allowed should be applied upon unpaid balance of note given by plaintiffs for purchase price and secured upon realty by trust deed in which corporate defendant was named trustee involved a "determination of a right or interest in realty" within the venue statute precluding a transfer of the action from county in which realty was located to county of defendants' residence. Code Civ.Proc. §§ 392, subd. 1, 395.

5. Venue ⚿5(3)

Applicability of statute providing that action for determination of interest in realty should be brought in county where realty is located is not dependent upon whether certain of defendants have an interest in realty, but upon whether plaintiffs who have an interest in realty, have brought an action as provided by statute for determination of such right or interest. Code Civ.Proc. § 392, subd. 1.

◆

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Action by Frank Kaluzok and others against Joseph G. Brisson and others to recover damages for alleged fraudulent representations in connection with purchase of realty. From an order denying defendants' motion to transfer the action to Los Angeles County, defendants appeal.

Affirmed.

Walker and Horn, of Long Beach, for appellants.

Sarau, Thompson & Colegate, of Riverside, for respondents.

BARNARD, Presiding Justice.

This is an appeal from an order denying the defendants' motion to transfer the action from Riverside County to Los Angeles County. It is conceded that the individual defendants reside in Los Angeles County and that the corporate defendant has its principal place of business in that county.

The complaint alleges that the plaintiffs purchased certain real property in Riverside County from the individual defendants for $55,000; that they gave those defendants a note for $38,500 and paid the balance in cash; and that this note was secured by a trust deed upon the property in which the corporate defendant was named as trustee, and the individual defendants were named as beneficiaries. Briefly stated, it is then alleged that the plaintiffs were induced to purchase the property at this price by their reliance upon certain representations of fact made by the individual defendants; that these representations were false and untrue; that the real property at the time of the purchase was worth

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* Subsequent opinion 167 P.2d 481.

$35,000 and no more; and that by reason of the false representations the plaintiffs have been damaged in the sum of $20,000. The prayer is for damages in that amount and that any sum recovered be ordered applied on the unpaid balance of the note secured by the trust deed.

The sole question presented on this appeal is whether this action is one coming within the provisions of subdivision 1 of section 392 of the Code of Civil Procedure or whether it is governed by section 395 of that code. The appellants contend that since the action is based on fraud it falls within the provisions of section 395 and they rely on cases holding, in general, that where fraud alone is relied upon the action is transitory rather than local in nature.

[1] Whether an action is local or transitory depends upon its character as disclosed by the complaint and upon the character of the judgment which could be entered in case of a default. Eckstrand v. Wilshusen, 217 Cal. 380, 18 P.2d 931. While the complaint here alleges fraudulent representations these allegations are inseparably connected with allegations as to the ownership of the land and the giving of the trust deed under certain conditions. The real purpose of the action is to establish that, because of the conditions surrounding its execution, the amount and extent of the interest in the land which is represented by the trust deed is smaller, and the interest of the trustors is greater, than would otherwise appear. While the prayer includes a request for the allowance of damages it is prayed that any amount so allowed shall be applied upon the unpaid balance called for by the note and trust deed. It seems clear that had the appellants defaulted no personal money judgment could have been entered in favor of the respondents. The only judgment for the respondents possible in that event would have been one which would have had the effect of reducing the appellants' real interest in the property and correspondingly increasing that of the respondents.

[2, 3] There is no question that the respondents, as trustors, had an interest in this real property. Bank of Italy, etc., Ass'n v. Bentley, 217 Cal. 644, 20 P.2d 940. Subdivision 1 of section 392 provides that the county in which the real property is situated is the proper county for the trial of certain actions, including those for the recovery of real property or an estate or interest therein, for injuries to or partition of real property, and for the foreclosure of liens and mortgages thereon. The clause relating to the recovery of real property or of an estate or interest therein also contains the provision "or for the determination in any form, of such right or interest." This is a broad provision which seems intended to cover other cases, no matter what their form, which actually involve a real or substantial interest in real property although, technically, they may not fall within the classes which are specifically named. In Eckstrand v. Wilshusen, 217 Cal. 380, 18 P.2d 931, section 392 was held applicable because the substantial nature of the action was to cancel a deed on the ground of fraud. That section has been held applicable in an action to declare a trust in real property (Donohoe v. Rogers, 168 Cal. 700, 144 P. 958), in an action for the reformation of a contract for the sale of real property (Franklin v. Dutton, 79 Cal. 605, 21 P. 964), and an action for the specific performance of a contract for the sale of land (Grocers', etc., Union v. Kern, etc., Co., 150 Cal. 466, 89 P. 120). It was so held in Sloss v. De Toro, 77 Cal. 129, 19 P. 233, 234, an action to set aside, on the ground of fraud, a sale of real property made by an administrator. In that case, the court said:

> "The question then is, did this action require the determination, in any form, of a right or interest in real property?
>
> "It seems to us that it did. The main purpose of the action evidently was to have an alleged fraudulent sale of land set aside and the title revested in its former owners. This purpose could only be accomplished by showing—First, that the plaintiff had an estate or interest in the land; and, second, that the defendants had wrongfully tried to deprive him of that interest. If the action had been ejectment, or to quiet title, it would not more clearly have required a determination as to plaintiff's right or interest in the property."

In Stanley v. Barney, 123 Cal.App. 139, 10 P.2d 1022, 1023, the court said: "While it may be true, as appellants contend, that the relief which might be granted under the complaint would operate in personam, we are of the opinion that the action would determine, in some form, the right or interest of plaintiff in the real property. The court would be called upon to determine whether or not plaintiff was an heir of the decedent grantor. As such an heir he had the right, in the absence of administration, to attack the transfer. 9 Cal.Jur. 212.

Thus his interest was an issue. To say that the real property was not the subject of the action would be to indulge in a mere quibble. It is a direct attack upon the title."

In Franklin v. Dutton, 79 Cal. 605, 21 P. 964, an action for the reformation of a contract for the sale of certain land, the court said: "If it be an action for the determination, in any form, of a right or interest in real estate, situated in Santa Barbara county, it must be tried in that county."

In Hannah v. Canty, 1 Cal.App. 225, 81 P. 1035, 1036, it is said: "The action is therefore to be regarded as having for its sole object to establish a trust in the lands, and the accounting asked for as merely incidental to the action, which necessarily involves the determination of the amount due from plaintiff."

[4] The respondents here elected to stand on their contract and to make up for any loss caused by misrepresentations by seeking a reduction in the amount which they owed on the trust deed. Regardless of any personal element, the real and substantial nature of the action is to reduce the interest of the appellants in the property and to increase that of the respondents. This is an attempt, in some form, to determine the exact right or interest of the respondents in the real property. If this were an action to cancel this deed of trust there would be no question but that section 392 would apply. No good reason appears why it should not be equally applicable in an action to reduce the amount of interest in the land represented by the deed of trust, since that statute governs an action for the determination, in any form, of a right or interest in real property.

[5] In their reply brief, the appellants suggest that while the corporate appellant, as trustee, held the legal title to the property the individual appellants, as beneficiaries, were interested only in the note and had no legal or equitable estate in the real property, and that it follows that any reduction in the unpaid portion of the purchase price would not decrease the interest of the beneficiaries or increase the interest of the respondents whose title, being equitable, would not be affected by the amount due on the note. This argument not only ignores the real and substantial interests of these various parties but the applicability of section 392 does not depend upon whether or not, technically speaking, certain of the appellants have an interest in this land but it depends upon whether the respondents, who unquestionably have an interest in the land, have brought an action which is one "for the determination in any form, of such right or interest." For the reasons above given, it must be held that the action is one of that nature.

The order appealed from is affirmed.

MARKS, J., concurs.

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70 Cal.App.2d 279

In re DOUGLASS' ESTATE.
DOUGLASS et al. v. DOUGLASS et al.
Civ. 12856.

District Court of Appeal, First District,
Division 1, California.
July 26, 1945.

1. Wills ⇨579

Bequest of "the rest of my personal effects of every kind and description, including * * * silver, * * * linens and china," included two automobiles used by testatrix for personal enjoyment and purchased after execution of will especially where any other construction would require distribution of undivided interests among four children, which testatrix sought to avoid. Probate Code, §§ 101, 103.

See Words and Phrases, Permanent Edition, for all other definitions of "Personal Effects".

2. Wills ⇨565(1)

Where used in a limited sense, or without qualification, "personal effects" will be limited to personalty worn or carried about or attending the person, but where amplified by qualifying words or phrases, the term includes all personalty intimately associated with testator. Probate Code, §§ 101, 103.

3. Wills ⇨440

The intention to be sought for in will is not that which existed in testator's mind but that expressed by him in language of the will. Probate Code, §§ 101, 103.

4. Wills ⚷466

As used in will, "including" is not restrictive or exclusionary.

See Words and Phrases, Permanent Edition, for all other definitions of "Including".

5. Wills ⚷579

In will disposing of personal effects "including * * * my silver, * * * linens and china", "including" was a word of enlargement meaning "together with", "as well as", or "also", and did not restrict "personal effects" to personalty within the classification of silverware, linens, and china.

6. Wills ⚷579

Failure to itemize automobiles in bequest of personal effects "including" silverware, linens and china, did not negative intent to include automobiles which were purchased after execution of will.

PETERS, P. J., dissenting.

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Proceeding in the matter of the estate of Victoria A. Douglass, also known as Victoria Adams Douglass, also known as V. A. Douglass, deceased, wherein Eldridge A. Douglass and others appealed from that portion of a decree of partial distribution which concerned two automobiles, opposed by Earl S. Douglass and another, coexecutors.

Affirmed.

Crist & Beene, of Palo Alto, for appellants.

Williamson & Wallace, of San Francisco, for respondents.

KNIGHT, Justice.

This appeal was taken by Eldridge A. Douglass and Leon F. Douglass, Jr., two of the residuary legatees named in the will of their mother, Victoria A. Douglass, deceased, from that portion of a decree of partial distribution distributing two automobiles, a 1941 Cadillac touring sedan and a 1941 Ford station wagon, to Florence Douglass Langdon, the decedent's daughter. The controversy concerning the automobiles arose out of the question of the construction of the last sentence of the sixth clause of the will which reads as follows:

"I hereby give and bequeath all of my jewelry, with the exception of my wrist watch, to my beloved daughter, FLORENCE DOUGLASS LANGDON. My wrist watch, I give and bequeath to my beloved sister MARY ACKERMAN.

"I hereby give and bequeath all of my flat silverware to my son LEON F. DOUGLASS, JR. *All of the rest of my personal effects of every kind and description,* including all of the rest of my silver, and all of my linens and china, I give and bequeath to my beloved daughter FLORENCE DOUGLASS LANGDON." (Italics ours.)

[1] The probate court held that the automobiles were part of the "rest" of the personal effects of the testatrix, within the meaning of the last sentence of the sixth clause, and it is our opinion that the construction so placed thereon by the probate court is not only reasonable and entirely consistent with the other provisions of the will, but that the adoption of any other construction would be contrary to the intention of the testatrix as expressed by her in a subsequent clause of her will.

The appeal is presented on a clerk's transcript, and the following are among the facts appearing therefrom: The will, a copy of which is set out in the transcript, was executed on April 3, 1940; and the testatrix died on April 29, 1943. At the time she made the will she was married and the mother of six children, four of whom survived her. She was survived also by two grandchildren. The surviving children are adults. There are three sons, Leon, Eldridge A. and Earl S. Douglass, and one daughter, Florence Douglass Langdon. Prior to the execution of the will, the testatrix conveyed certain property in trust, and the will disposes of all other property of which she was the owner, which, so far as the record shows, did not include any real property. The only specific bequests made by her are those embodied in the sixth clause of the will; and by the seventh paragraph she bequeathed and devised the residue of her estate to her four children, share and share alike. The estate was of large value; it was but little indebted and part of it consisted of cash. As to the value of the estate the record shows that prior to the filing of the petition for partial distribution, the executors deposited the sum of $47,500 with the county treasurer to cover the payment of inheritance taxes which had not then been fixed, and that afterwards the court made an order "compromising and fixing" the tax in the sum of $28,386.69. Therefore, taking into consideration the statutory exemptions, and computing the tax at the statutory rates, the value of the estate is shown to be in excess of $400,000. Earl S. and Eldridge A. Douglass were named as executors of the will; and the seventh clause of the will provided, among other things, that if prior to filing the petition for the distribution of the estate the legatees could not agree in writing as to the division of the property devised and bequeathed to them under the seventh clause of the will, the executors, at their discretion, were authorized to divide it as equally as possible "in order to avoid the distribution of undivided interests * * *." An agreement was reached as to the division of all property except the automobiles, which Florence claimed under the last sentence of the sixth clause of the will, and her claim was supported by her brother Earl; whereas Leon and Eldridge took the position that the automobiles constitute part of the residue of the estate and, as such, should be distributed to the four children, share and share alike. Thereafter the executors filed a petition for partial distribution asking that the property thus divided by the four children among themselves be distributed to them in conformity with their agreement; and the executors having failed to agree as to the disposition of the automobiles, the four children joined in signing a written consent, which was filed with the probate court, that the automobiles "be distributed as the court may direct." However, appellants being dissatisfied with the probate court's decision have taken this appeal.

[2] With respect to the principal issue it may be stated that the general rule adhered to in most jurisdictions is, that where the testator uses the term "personal effects" in a limited sense, that is, without qualification, the term ordinarily will be construed as signifying an intention to limit the bequest to such personal property as is worn or is carried about or attends the person, but that where the testator has amplified the term by adding qualifying words or phrases thereto, the term will be construed as having been used by him in an unlimited and unrestricted sense, signifying an intention to include therein all personal property intimately associated with the testator; and some cases go even further in holding that such unlimited use of the term may include property other than of the character last mentioned.

In the present case it is manifest that the phrase "All of the rest of my personal effects of every kind and description" was not employed by the testatrix in any restricted sense so as to exclude from its broad scope and operation all personal property except such as is worn or carried on the person, because, as will be noted, immediately following the quoted phrase the testatrix expressly included therein personal property that could not be worn or carried on the person, namely, silverware, linens and china. That being so, it very properly may be held that the testatrix intended to include all personal property of "every kind and description" which had been intimately associated with her person; and, clearly, automobiles used by her for her own convenience and enjoyment fall within such classification as much so as the silverware, linens and china.

True, none of the evidence that was introduced before the probate court at the hearing of the petition for partial distribution has been brought before this court. However, the facts disclosed by the record on appeal are amply sufficient to support the inference that she maintained a home and that the automobiles were used by her for her convenience and enjoyment. In this regard the record shows that she was a resident of San Mateo County and a woman of large wealth; and that she was the owner of linens and china, and a large quantity of household silver. The articles of silverware are listed in the petition for partial distribution and it appears therefrom that nearly all of it consists of dining service silver. The two automobiles were of the type ordinarily used for enjoyment and convenience,—a Cadillac touring sedan, appraised at $1450, and a Ford station wagon, appraised at $865; and there is nothing whatever in the record indicating that the testatrix was engaged in any sort of a business enterprise, or that either automobile was utilized by any other person for business purposes.

In the state of the record above set forth there is no ground, legal or factual, upon which this court would be justified in holding as a matter of law, contrary to the conclusion reached by the probate court, that the automobiles should not be classified as part of the personal effects of the testatrix.

[3] Furthermore, the Legislature of this state has prescribed certain rules governing courts in the interpretation of wills, among which are: That a will is to be construed according to the intention of the testator, and that where his intention cannot have effect to its full extent, it must have effect as far as possible (Probate Code, sec. 101); that where the meaning of any part of a will is ambiguous or doubtful, it may be explained by any reference thereto or recital thereof, in another part of the will; that all parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole; but that where several parts are absolutely irreconcilable, the latter must prevail (Probate Code, sec. 103). However in this connection it is well to state that in construing a will the intention to be sought for is not that which existed in the mind of the testator, but is that which is expressed by him in the language of the will. In re Estate of Major, 89 Cal.App. 238, 264 P. 542; In re Estate of Ogden, 78 Cal.App. 412, 248 P. 680; In re Estate of Bourn, 25 Cal.App.2d 590, 78 P.2d 193.

Here, the result of sustaining appellants' contention, that the automobiles should be classified as part of the residue and distributed accordingly, would mean that the two automobiles would be distributed to the four children in undivided shares; and that is precisely what the testatrix did not want to happen, for, as declared by her in the seventh clause of her will, she authorized the executors to divide the property disposed thereunder among the four children "in order to avoid distribution of undivided interests."

In support of their position, the appellants seek to apply the doctrine of *ejusdem generis.* The substance of their argument seems to be that by adding the phrase "*including* all of the rest of my silver, and all of my linens and china" to the phrase immediately preceding, to wit, "All of the rest of my personal effects of every kind and description," the testatrix signified an intention to restrict the broad and comprehensive preceding phrase to such personal property as falls within the classification of silverware, linens and china. (Italics ours.)

[4, 5] With this argument we are unable to agree. Generally speaking, the word "including" is not construed as a restrictive or exclusionary word, and as here used it carries no restricted meaning. It clearly signifies a meaning just the opposite. It is a word of enlargement and expresses the idea that the thing in question constitutes only a part of a greater whole (In re Frey's Will, 154 Misc. 421, 277 N.Y.S. 269), and conveys the same meaning as the words "together with," "as well as," or "also." In re Link's Estate, 182 Misc. 966, 47 N.Y.S.2d 40. As said in In re Goetz's Will, 71 App.Div. 272, 75 N.Y.S. 750, 751: "'Including' is not a word of limitation, rather is it a word of enlargement, and in ordinary signification implies that something else has been given beyond the general language which precedes it. Neither is it a word of enumeration of the property which would pass by the express terms of the language of gift." And in that case it was held that in a bequest of all personal property, including furniture, plate, etc., the word "including" did not limit the bequest to the property enumerated after the wording, but covered all of the testator's personal property. In the present case, if the testatrix had intended to restrict the meaning of the term "personal effects," she could easily have done so by using some common word or words of restrictive meaning, for example, "consisting of" or "comprising" instead of the word "including."

[6] It has been suggested that if the testatrix had intended the automobiles to be included in the term "personal effects" it is inconceivable that she would not have itemized them in her "including" phrase. The difficulty with that suggestion is that the will was executed in April, 1940, whereas both automobiles were 1941 models,—from which it reasonably may be inferred that she did not acquire the automobiles until after the will was executed; and certainly as the owner of an estate of this magnitude she was not called upon to revise her will every time she acquired some additional personal effects, particularly since the unlimited phrase, "All of the rest of my personal effects of every kind and description" was obviously broad enough to include any after acquired personal effects.

As heretofore stated, many cases are to be found, particularly in outside jurisdictions, construing the meaning of the term "personal effects" as used in wills; but an examination of those cases clearly demonstrates that no fixed rule of construction can be laid down to fit all cases because of the difference in the wording of wills, and the duty imposed upon courts to construe the language of each will, as far as possible, in accordance with the testamentary plan or scheme of the testator as expressed by him in his will. It is evident, therefore, that while certain legal principles may be deduced from those previously adjudicated cases, the holdings therein are not decisive in construing wills involved in later cases, unless, of course, the wording of the wills is identical; and identical wills are seldom found. Among the cases dealing with the subject of "personal effects" is In re Estate of Sorensen, 46 Cal.App.2d 35, 115 P.2d 241, 243, wherein the question arose as to whether a clause in a will bequeathing "All jewelry and personal effects" included money received by the testatrix from the sale of her home; and it was held that the clause of the will embodying those words was not a general residuary clause and therefore did not include the money. In so holding the court went on to say that the term "personal effects" as there used in the will referred to clothing and ornaments or any small articles which usually attend the person. The court, in that case, cited and quoted from a Minnesota case (Barney v. May, 135 Minn. 299, 160 N.W. 790, 791) wherein it was held that the wording of the will there under consideration did not include money or securities. The portion of the decision quoted is as follows: "The word 'personal,' used with 'effects,' much restricts its meaning. In common understanding the expression 'personal effects,' without qualifying words, includes only such tangible property as attends the person, or, as variously stated, 'such tangible property as is worn or carried about the person' (Brandon v. Yeakle, 66 Ark. 377, 50 S.W. 1004; Lippincott's Estate, 173 Pa. 368, 34 A. 58), or 'goods and items of property having a more or less intimate relation to the person.' * * * But to hold that the term 'personal effects,' as used here, includes a large residue of money and securities, nothing of which she then owned, and which she evidently did not have in mind, would do violence to the language of the will."

Another case of interest is In re Estate of Lovejoy, 38 Cal.App.2d 69, 100 P.2d 547, 549. There the testatrix after providing that all her "property" was to be sold and disposed of in a certain manner, proceeded to describe her property, both real and personal, stating where the various items of property and some of the evidence of ownership could be found, and then in a subsequent paragraph she gave her "personal property" to a named person "for her to distribute." The court went on to say that under well-established rules the will was to be interpreted as a whole, to give effect to the testatrix' general scheme, and it was held that the words "personal property" as used in the subsequent paragraph of the will meant personal effects, such as clothing, ornaments and other articles which are usually considered as personal effects.

A later case worthy of mention is In re Estate of Duraind, 51 Cal.App.2d 206, 124 P.2d 330. There the entire will consists of several separate instruments executed at different times, all of which were holographic. In one of them, executed on October 27, 1939, the testatrix declared (51 Cal.App.2d at page 208, 124 P.2d at page 332): "I hereby appoint my cousins, Doretta Yoell and Rosalie Gardner, to take charge of my personal property and distribute it according to my instructions." The next day, October 28, 1939, she executed another instrument containing this bequest: "I give and bequeath my household furniture, bric-a-brac and personal effects to" certain named beneficiaries. The reviewing court held that the probate court was justified in construing the words "personal property" as used in the first instrument as meaning "personal effects" as that term was used in the latter. A case bearing closest analogy to the present one is In re Jones' Estate, 128 Misc. 244, 218 N.Y.S. 380, wherein a physician bequeathed to his wife "all household goods and furniture, personal effects"; and it was held that the term "personal effects" as there used included two automobiles of which the testator was the owner, "even though one automobile had been employed by the doctor very largely in making calls upon patients."

There are also cases holding that the term "household effects" as used in the wills under consideration in those cases included family automobiles, among them being In re Winburn's Estate, 139 Misc. 5, 247 N.Y.S. 584, wherein that term was held to include a Lincoln limousine and a Ford sport roadster. The court there said that the test as to what are household effects would appear to be whether the disputed articles are used in or by the household, or for the benefit or comfort of the family. In the case of Mathis v. Causey, 172 Ga.

868, 159 S.E. 240, 75 A.L.R. 111, the court held that an automobile used by a doctor in his profession was not included in that provision of his will bequeathing all his clothing, personal jewelry, library, furniture, works of art, silverware, household goods, "and other personal effects located at, and used or adapted for use in connection with, my residence on Sixth Street in said City of Vienna and at my office in the Forbes Building in said City of Vienna." But the decision therein is based mainly upon the restrictive words above quoted, the court saying: "The personal effects given in this legacy are those located at, or used or adapted for use in connection with, testator's residence, and his office. These words restrict and limit the meaning of the words 'other personal effects,' as used in this bequest."

The foregoing cases have been referred to merely as illustrative of the statement hereinabove made that because of the difference in the wording of wills and the duty of courts to construe the language used in each will as far as possible in accordance with the testamentary plan or scheme appearing from the will, no fixed rule of construction can be established to govern in all cases.

In the present case, being guided by the rules of construction prescribed by the Probate Code, and construing the will herein as a whole, it is our conclusion that the last sentence of the sixth clause of the will included the automobiles. Accordingly, that portion of the decree from which the appeal was taken is affirmed.

WARD, J., concurs.

PETERS, Presiding Justice.

I dissent.

As pointed out in the majority opinion, we are here called upon to interpret, without the benefit of any extrinsic evidence, a clause of a will. The Supreme Court in Re Estate of Platt, 21 Cal.2d 343, 131 P.2d 825, has adopted the rule that when a question of construction is presented to an appellate court, and the document alone is before the court without extrinsic evidence, it is the duty of the appellate court to exercise its independent judgment as to which of several constructions is the most reasonable, without reference to the construction given by the trial court. See, also, Moore v. Wood, Cal.Sup., 160 P.2d 772. The majority opinion does not disclose whether it has applied this rule or whether it has followed the rule of those cases impliedly overruled by In re Estate of Platt (see concurring opinion of Carter, J., 21 Cal.2d 352, 353, 131 P.2d 830, 831) which held that the construction of a document by the trial court will be upheld if reasonable, even though there is a more reasonable contrary construction. In my opinion, if the rule of In re Estate of Platt be applied, there can be no doubt but that the construction given the clause in question by the trial court, even if it be conceded that such construction was a possible one, is not as reasonable as the construction that the automobiles in question are not included within the phrase "personal effects." For that reason I believe the decree of partial distribution should be reversed.

The problem presented can be stated as follows: By the phrase "all of the rest of my personal effects of every kind and description, including all of the rest of my silver, and all of my linens and china" did the testatrix intend to include the two automobiles owned by her? The problem is really divided into two parts: First, what is the ordinary and usual meaning of the phrase "personal effects," and secondly, is there anything in the clause in question or in any other portion of the will that indicates that the phrase was used in other than its usual and ordinary meaning?

It must be kept in mind that the adjective "personal" has several meanings. When the term is used to modify the word "property" it is usually used in opposition to the adjective "real," and includes all property that is not real property. But when used in a will to modify the word "effects" it is obviously intended to be used in the sense of intimately connected with the person of the testator. While there is some confusion in the cases, largely caused by a failure to recognize this difference in the meaning of the word "personal," the overwhelming weight of authority is that the phrase "personal effects" appearing in a will, in the absence of an indication of a different intent, naturally and ordinarily includes only such tangible personal property as is worn or carried about the person, or is intimately associated with the person. Mathis v. Causey, 172 Ga. 868, 159 S.E. 240, 75 A.L.R. 111; Child v. Orton, 119 N.J.Eq. 438, 183 A. 709; In re May's Estate, 135 Minn. 299, 160 N.W. 790; In re Lippincott's Estate, 173 Pa. 368, 34 A. 58; Brandon v. Yeakle, 66 Ark. 377, 50 S.W. 1004; First Methodist Episcopal Church South v. Anderson, Tex. Civ.App., 110 S.W.2d 1177; In re Benson's Estate, 110 Mont. 25, 98 P.2d 868; Carr v. Railton, 66 R.I. 225, 18 A.2d 646, 20 A.2d 374.

We are not without express authority on this point in this state. In Re Estate of Sorensen, 46 Cal.App.2d 35, 115 P.2d 241, the court was interpreting a clause in a will providing that all jewelry and personal effects were bequeathed to a designated legatee, and the question was whether that clause included some money left by the deceased. In holding that it did not, the court stated (46 Cal.App.2d at page 38, 115 P.2d at page 243):

"* * * it is obvious that this clause refers to clothing and ornaments or any other small articles which usually attend the person, and is not a general residuary clause, [In re] Estate of Lovejoy, 38 Cal. App.2d 69, 100 P.2d 547.

"In Barney v. May, 135 Minn. 299, 160 N.W. 790, 791, the court said:

" 'The word "personal," used with "effects," much restricts its meaning. In common understanding the expression "personal effects," without qualifying words, includes only such tangible property as attends the person, or, as variously stated, "such tangible property as is worn or carried about the person" (Brandon v. Yeakle, 66 Ark. 377, 50 S.W. 1004; Lippincott's Estate, 173 Pa. 368, 34 A. 58), or "goods and items of property having a more or less intimate relation to the person." * * * But to hold that the term "personal effects," as used here, includes a large residue of money and securities * * * would do violence to the language of the will.' "

In Re Estate of Lovejoy, 38 Cal.App.2d 69, 100 P.2d 547, the court held that the words "personal property" as used in the will under construction meant "personal effects," and that those words (38 Cal. App.2d at page 74, 100 P.2d at page 549) meant: "clothing, ornaments and other small articles which are usually considered as personal effects."

The majority opinion suggests that automobiles may fall within this limited category. If an automobile is a "personal effect" so would a yacht, or a private railroad car, or a riding stable, or a carriage, be "personal effects." The phrase cannot thus be extended. If used without words of explanation the phrase must be held limited to tangible personal property worn or carried about the person, or intimately connected with the person. Automobiles do not fall within that category.

The next question is whether there is anything in the paragraph or in the entire will that indicates that the phrase "personal effects" was here used in other than its ordinary and usual meaning. Certainly the clause "of every kind and description" adds nothing to the phrase "all of * * * my personal effects." If the phrase "personal effects" only includes those things intimately connected with the person, then the phrase "personal effects of every kind and description" is likewise so limited—it is still limited to "every kind and description" of "personal effects."

When the balance of Paragraph Sixth is read the intent with which the testatrix used the phrase is made crystal clear. She was obviously fearful that the phrase "personal effects" might be given too limited a meaning. To obviate this difficulty what did she do? In the first sentence of the paragraph she gave her wrist watch to a named sister and the balance of her jewelry to her daughter. In the very next sentence she bequeathed her flat silverware to a named son. Then she bequeathed "all of the *rest* of my personal effects of every kind and description, *including* all of the rest of my silver, and all of my linens and china" (italics added) to her daughter. Words could hardly be used that would more clearly show that by this clause the testatrix had in mind her jewelry, her silverware, her linens, her china, and other articles of a personal and intimate nature. She was obviously fearful that the phrase "rest of my personal effects of every kind and description" would not include silverware, linens and china, so she added the phrase which specifically included those articles. There is grave doubt whether such articles of household use would be included within "personal effects" in the absence of language showing such an intent. She so carefully defined what she had in mind by "personal effects" that, had she intended impersonal articles such as automobiles to be included, she would have so specified.

The majority opinion points out that the will was drafted before these specific automobiles were acquired. Just what help that fact is in ascertaining the testatrix' intent is not clear. Certainly, it cannot be implied that by mentioning silverware, linens and china, she intended to include automobiles not yet purchased. By Paragraph Sixth she either carefully excluded all personal property except of the types mentioned (and this would exclude automobiles) or she entirely forgot about the fact that she then had, or might later acquire, automobiles. In either event, automobiles are not included.

There are other words in Paragraph Sixth that throw some light on the subject. After disposing of her jewelry and some of her silverware the testatrix stated that "all of the rest" of her "personal effects" should go to her daughter. By the use of the word "rest" the testatrix indicated with unusual clarity what she had in mind, namely, the other articles similar to the ones just mentioned. The rule of construction to be applied in such cases is clear. It is not unusual in construing a statute or a contract or a will to find, as here, general and specific words associated together. In such event it is the usual rule of construction that the general words take color from the specific ones and the general words will be restricted, in the absence of a contrary expressed intent, to a sense analogous to the specific words. This is the doctrine of *ejusdem generis*. It means simply that when the legislature, the contracting parties or a testator use general words in connection with an enumeration of particular things, in the absence of a contrary expressed intent, experience has shown that in most cases the general words were used to describe things of the same general nature or class as those specifically enumerated. The reason for this common sense rule of construction is obvious. If the general words were intended to prevail in their broadest sense the special words need not, and would not, have been employed at all. See, generally, 23 Cal.Jur. p. 755 § 130. The doctrine is, of course, applicable to the construction of wills. In re May's Estate, 135 Minn. 299, 160 N.W. 790; Brandon v. Yeakle, 66 Ark. 377, 50 S.W. 1004; In re Lippincott's Estate, 173 Pa. 368, 34 A. 58; In Campbell's Estate, 171 Misc. 750, 13 N.Y.S.2d 773; Carr v. Railton, 66 R.I. 225, 18 A.2d 646, 20 A.2d 374. In Richmond v. Rhode Island Hospital Trust Co., 46 R.I. 113, 125 A. 228, the court held that general words somewhat similar to those here involved could not be interpreted to include an automobile because the specific enumeration in the clause in question, which was a much broader specification than is here involved, limited the general words, under the rule of *ejusdem generis*.

This rule of construction should be followed in this case unless there is something expressed in the will itself to show that it is not applicable. In this case but one construction of the clause is reasonable. When the testatrix stated "all of the *rest* of my personal effects of every kind and description," she obviously was referring to things similar to jewelry and silverware—articles she had just mentioned. The word "rest" as there used is synonymous with "other," and it is the same as if she had said "all of my other personal effects." Had she used the word "other," there can be no doubt but that the doctrine of *ejusdem generis* would be applicable. Matter of Petition of Johnson, 167 Cal. 142, 138 P. 740; People v. Strickler, 25 Cal.App. 60, 142 P. 1121; see cases collected 50 Am.Jur. at p. 250, footnote 3; 59 C.J. at p. 982, footnotes 64 and 65.

There is another phrase in the paragraph in question that is of some assistance. After disposing of the "rest" of her "personal effects" the clause continues "including all of the rest of my silver, and all of my linens and china." I have no doubt that by this phrase the testatrix expanded the ordinary meaning of the phrase "personal effects." Normally, as already pointed out, it is very doubtful if silver, linens and china would be included within the meaning of the words "personal effects." The majority opinion is undoubtedly correct in holding that the word "including" is usually a word of "enlargement," and implies that something "has been given beyond the general language which precedes it." But the real question is not whether the word "including" is a word of "enlargement" or a word of limitation, but whether, assuming it is a term of enlargement, how far has the class been enlarged or opened up? On this point the testatrix left no doubt. She enlarged the meaning of "personal effects" to include silver, linens and china—articles, which, while not as intimate as the usual things included within the meaning of "personal effects," are still personal to a woman and to a homemaker. By no reasonable interpretation can it be said that the class was opened up to include such articles as automobiles.

The majority seek some support for their construction from a phrase appearing in Paragraph Seventh of the will. This is the residuary paragraph of the will. After bequeathing the residuum to her four living children, share and share alike, the testatrix states that in the event the legatees entitled to share in her estate "as provided in this paragraph number 'Seventh'" cannot agree to the division of the property, then the executors are authorized to partition the property "in order to avoid the distribution of undivided interests." A reading of the paragraph demonstrates to a certainty that the last-quoted phrase applies by specific limitation only to Paragraph Seventh, and has no application at all to Paragraph Sixth. To so construe it is a strained, unnatural and, in my opinion, an improper construction.

It is my view that the decree of partial distribution should be reversed.

70 Cal.App.2d 415

LOZANO et al. v. PACIFIC GAS & ELECTRIC CO.

COHN et al. v. SAME.

Civ. 7146, 7147.

District Court of Appeal, Third District, California.

July 31, 1945.

Rehearing Denied Aug. 28, 1945.

Hearing Denied Sept. 27, 1945.

1. Negligence 🔑2, 56(1)

To constitute actionable negligence, there must be legal duty to use due care, breach of such duty, and proximate causation between such breach and injury.

2. Electricity 🔑14(1), 15(1)

A corporation, owning, maintaining, and operating electric power line, over partnership's premises, owed every person rightfully on premises duty to use care to avoid injuries to persons or property, and such duty was obviated only as to trespassers and individuals unlawfully on premises.

3. Electricity 🔑15(2)

Employees' acts in pushing employer's portable floodlight tower against electric power line, constructed over employer's premises by electric company having easement for such purpose, did not constitute interruption of company's use and possession of premises and deprivation of electricity owned by it, so that it was not absolved from liability for employees' resulting deaths by electrocution, as such easement was not exclusive of employer's and its agents' or servants' ordinary use of property.

4. Electricity 🔑19(9)

In actions for deaths of employees, electrocuted as results of contact between employer's portable floodlight tower, being pushed by them, and electric power line constructed by electric company over employer's premises under contract with employer, whether such company fully discharged every duty owed such employees by it was a fact question for jury.

5. Electricity 🔑19(5)

In actions for deaths of employees, electrocuted when employer's portable floodlight tower being pushed by them came into contact with defendant electric company's power line over employer's premises, evidence warranted jury's finding of defendant's breach of duty to decedents in maintaining uninsulated wires at insufficient height.

6. Electricity 🔑14(1)

One maintaining wires carrying electricity must exercise care that person of ordinary prudence would exercise under circumstances, including well-known dangerous character of electricity and inherent risk of injuries to persons or property if it escapes, to prevent such injuries, and care used must be commensurate with such danger.

7. Electricity 🔑16(2)

Wires carrying electricity must be carefully and properly insulated by parties maintaining them at all places where there is reasonable probability of injuries to persons or property therefrom.

8. Electricity 🔑16(2)

An electric company was not under absolute duty to insulate electric wires installed and maintained by it over partnership's premises under contract, nor to make wires safe in any particular manner, but owed duty to make them safe under all exigencies offered by surrounding circumstances.

9. Electricity 🔑16(1)

An electric company's duty of due care to make electric wires installed and maintained by it safe, consisted not only in proper installation of such dangerous instrumentalities, but in maintenance thereof in safe condition at all times and places and under changing circumstances, and company's nonaction or failure to remedy hazardous condition arising after proper installation of such equipment would constitute culpable negligence.

10. Electricity 🔑16(4)

An electric company was not relieved of liability for deaths of partnership's employees, electrocuted as result of contact between partnership's portable floodlight tower being pushed by them and such company's elecric power line over partnership's premises, on ground that there was no reasonable probability of injury from installation of such line because company could not have been supposed to know that such towers would be used in area wherein accident occurred, where such area was not set apart or isolated from other parts of premises and was free of buildings.

11. Negligence 🔑59

To render corporation liable for deaths resulting from its negligence, its anticipation of precise accident which occurred was unnecessary, but only existence of circumstances, from which accident of general nature of such accident could reasonably have been anticipated, was necessary.

12. Electricity 🔑19(5)

In actions against electric company for deaths of partnership's employees, electrocuted as result of contact between partnership's portable floodlight tower being pushed by them and uninsulated electric power line installed by defendant over partnership's premises, evidence justified jury's finding that defendant had actual or constructive notice of unsafe condition of premises because of installation and maintenance of such lines at insufficient height.

13. Electricity 🔑16(5)

The duty of due care in installation and maintenance of electric wires and equipment requires reasonably prompt and frequent inspection thereof and electric company's failure to comply substantially with such rule charges it with notice of defective or dangerous condition which diligent inspection would have revealed.

14. Electricity 🔑16(4)

An electric company's substantial compliance with Railroad Commission's general orders in installing electric power line over partnership's premises did not establish company's due care relieving it of liability for deaths of partnership's employees electrocuted as result of contact between partnership's portable floodlight tower being pushed by them and uninsulated electric wires placed at insufficient height.

15. Electricity 🔑16(2)

The absence of statutory requirement, expressly imposing on electric company duty to insulate wires installed by it over partnership's premises or to remove them from harm's way, did not relieve company from liability for deaths of partnership's employees electrocuted as result of contact between partnership's portable floodlight tower and such wires.

16. Electricity 🔑19(5)

In actions for deaths of partnership's employees, electrocuted as result of contact between partnership's portable floodlight tower and uninsulated electric wires installed over partnership's premises by defendant electric company, evidence that insulation of power lines carrying loads of such wires was not customary practice was not evidence of company's freedom from fault in failing to insulate wires, and did not excuse such failure, unless it was consistent with due care necessary under circumstances.

17. Negligence 🔑136(25)

Whether original negligence was proximate cause of injuries is proper question for jury, unless evidence leaves no room for reasonable difference of opinion.

18. Electricity 🔑19(9)

Evidence was sufficient to take to jury question whether electric company's negligence in installing and maintaining uninsulated high voltage wires over partnership's premises at insufficient height was proximate cause of deaths of partnership's employees, electrocuted as result of contact between partnership's portable floodlight tower, being pushed by them, and such wires.

19. Appeal and error 🔑999(1)

A jury's determination of fact question, properly submitted thereto by trial court on sufficient evidence, will not be disturbed on appeal.

20. Electricity 🔑18(1)

A partnership's employees, undertaking to move partnership's portable floodlight tower, did not assume risk of death by electrocution because of resulting contact between tower and uninsulated electric wires installed and maintained by electric company over partnership's premises at insufficient height, in absence of evidence disclosing dangerous situation, which was either open, obvious, or notorious, or showing that employees had any knowledge of danger involved.

21. Evidence 🔑314(1)

In actions against electric company for deaths of partnership's employees, electrocuted as result of contact between partnership's portable floodlight tower and uninsulated electric wires installed and maintained by defendant at insufficient height over partnership's premises, testimony as to conversations between defendant's agents and partnership's managing agent when contract for installation of wires was entered into, offered by defendant to show that partnership did not contemplate use of such towers in area wherein accident occurred, was properly excluded as hearsay.

22. Appeal and error 🔑1058(1)

Exclusion of proffered evidence similar to admitted evidence was harmless to party offering excluded evidence.

23. Appeal and error 🔑1170(7)

In action for death of partnership's employees, electrocuted as result of contact between partnership's portable floodlight tower and uninsulated electric wires installed by defendant electric company over partnership's premises at insufficient height, exclusion of testimony, offered by defendant to show that partnership did not contemplate use of such towers in area wherein accident occurred, did not result in miscarriage of justice, in view of jury's finding of negligence in maintenance of such line. Const. art. 6, § 4½.

◆

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Actions by Mary Lozano and others and Pearl G. Cohn and another against the Pacific Gas & Electric Company for the deaths of Philip Lozano and Albert Cohn by electrocution when a portable floodlight tower being pushed by them came into contact with an electric power line installed over their employer's premises by defendant. Judgments for plaintiffs, and defendant appeals.

Affirmed.

Neumiller & Ditz, by George A. Ditz, all of Stockton and Thos. J. Straub and John J. Briare, both of San Francisco (W. R. Dunn, of San Francisco, of counsel), for appellant.

Gumpert & Mazzera, J. Calvert Snyder, Wainard G. Herrick, R. L. Gianelli, and J. B. Freeman, all of Stockton, for respondents.

PEEK, Justice.

Respondents by their complaints sought to recover for the alleged wrongful death of their respective husbands and fathers proximately caused by the negligence of appellant. Appellant in its answer to the complaints denied its negligence and charged that the deaths were caused by the contributory negligence of the decedents. The matters were tried before a jury which rendered verdicts for the respondents. Appellant's motion for a new trial was denied and it then perfected this appeal from the judgments entered upon the verdicts of the jury. By stipulation the appeals in both cases were consolidated and are presented on a single reporter's transcript.

On February 25, 1942, appellant Pacific Gas & Electric Company entered into a written contract with Hickinbothom Brothers Construction Division, a copartnership, whereby said company was to furnish electric energy for a shipyard to be constructed by the partnership on Banner Island, Stockton. Under the contract the company agreed to provide all electric energy for "welding crane power and lights for steel shipbuilding." A further provision stated that "customer hereby grants Pacific a right of way over the shortest practical route for any pole lines which it may be necessary to build over Customer's premises for the purpose of making delivery hereunder."

The power service installed by the company so far as is material here, consisted of what is termed a tap line composed of three uninsulated copper wires carrying a load of 11,000 volts and was connected with the company's main line which ran along a street adjoining the customer's shipyard. The tap line was carried into the premises on four poles which were approximately 100 feet apart. On the crossarms of the poles were "High Voltage" signs. At the point where the accident occurred the elevation of this line was approximately 43 feet above the ground. The tap line and transformers were the property of the company and were maintained and operated by it. For the most part the tap line ran along the west side of the customer's main building, some fifteen feet therefrom. A spur track, used to bring materials to the plant also ran along the same side of the building but removed from it at an average distance of twenty-five feet. Farther to the west of the spur-track, and obliquely under the power line, were work tables and large benches used for prefabricating and welding, as well as platforms for unloading the gondola cars.

On the day of the accident there were three portable flood light towers and three diesel engine cranes in operation in the yard. The forty-eight foot towers were mounted on rubber tired wheels and carried transformers and cords which could be plugged in at any one of the many socket outlets throughout the yard. The booms on the cranes varied in length from twenty-five to seventy-five feet. Both the cranes and light towers were made of steel but were not posted with warning signs. Ordinarily operations involving smaller and lower equipment only were conducted between the spur track and the building along which the power line ran. However, near the transformer bank and under the end of the line was a clear space where the light towers were frequently used to unload cars at night. According to the testimony it was difficult to tell from the ground whether the towers would clear the wires or not. Mr. E. T. Woodruff, appellant's commercial and industrial power engineer, testified he did not know that the towers were higher than the tap lines and that he made no examination to determine this question, while his brother, E. C. Woodruff, also an agent for the company, testified that during a visit to the plant in July or September he discovered the type of light towers that were being used and found they were higher than he had assumed them to be.

On the morning of the accident, November 13, 1942, Philip Lozano, a truck helper, and Albert Cohn, a leaderman flanger or welder, were working in the vicinity of the spur track. Cohn and his helper, one McCarty, were finishing work on a plate upon one of the welding tables to the west of the spur track and were in need of another steel plate. This plate was being brought to them by a large movable crane which was carrying the plate dangling from its boom. As the crane approached the spot where the men were working it became apparent that the light tower would interfere with the movement of the crane and that before the crane could come up to the table with the plate it would be necessary to move the tower. Several of the workmen, including Lozano and Cohn, took hold of the tower and started pushing it away. It had traveled ten or fifteen feet when it came in contact with the tap line to the east of the spur track, with the result that Lozano and Cohn received a charge of 11,000 volts of electricity, from the effects of which they died.

[1] It is well established that to constitute actionable negligence three elements must occur: (1) The legal duty to use due care; (2) a breach of that duty, and (3) proximate causation between the breach and the injury. Jackson v. Utica Light & Power Co., 64 Cal.App.2d 885, 889, 149 P.2d 748; Monroe v. San Joaquin Light & Power Co., 42 Cal.App.2d 641, 647, 109 P.2d 720.

[2] In the present case the duty of appellant to use care so as to avoid injury to persons or property was established by a clear showing that the company owned, maintained and operated the power line in question. Jackson v. Utica, etc., supra; Irelan-Yuba Gold Quartz Mining Co. v. Pacific Gas & Electric Co., 18 Cal.2d 557, 116 P.2d 611. Such duty extended to every person rightfully on the premises and was obviated only as to trespassers and individuals unlawfully there at the time of injury. Monroe v. San Joaquin, etc., supra; Fike v. San Joaquin Light & Power Corporation, 73 Cal.App. 712, 239 P. 344.

[3] Upon this qualification of the rule appellant predicates its first contention, arguing that as it admittedly had an easement over the owner's realty, therefore the acts of the decedents in pushing the tower against the tap line thereby diverting the energy from the line was an interruption of appellant's use and possession of the premises and a deprivation of the electricity which was its property. With such contention we cannot agree. Obviously if such were the case the very purpose for the installation of the line would be defeated. In other words it would prevent the very activity for which the line was admittedly

installed. The right of way granted to the company to construct, maintain and service its lines on or over the customer's private property was not exclusive of the ordinary use of the property by said owner and its agents or servants. Anderson v. Southern California Edison Co., 77 Cal.App. 328, 246 P. 559.

It is also established that where such contractual relationship is present a duty arises which otherwise would not exist. This rule is recognized with particularity in one of the cases relied upon by appellant. Hayden v. Paramount Productions, 33 Cal.App.2d 287, 91 P.2d 231, 235. There the court in affirming the judgment of nonsuit stated: "There was no contractual relation between the city and appellant or his employer. The work in which appellant was engaged at the time of his injury had no relation to the business of respondent city." That such relationship may be a determinative feature was also evidenced by the Supreme Court in a further case relied upon by appellant. Leslie v. City of Monterey, 139 Cal.App. 715, 34 P.2d 837. Furthermore all of the cases cited by appellant in support of this contention, including the two mentioned herein, were based upon facts which show that the questions therein at issue did not concern persons injured in the exercise of a lawful occupation in a place where they had a right to be and where they were liable to come in contact with high voltage wires.

[4-7] Appellant further urges that it fully discharged every duty it owed the decedents. The issue so presented was purely one of fact for the jury to determine, and we must conclude that under the evidence disclosed by the record the jury was warranted in finding that there was a breach of duty on the part of the company in maintaining its wires as it did. It is now well settled that:

"On the subject of negligence the standard of care is, that one maintaining wires carrying electricity is required to exercise the care that a person of ordinary prudence would exercise under the circumstances. Among the circumstances are the well known dangerous character of electricity and the inherent risk of injury to persons or property if it escapes. Hence, the care used must be commensurate with and proportionate to that danger. (Citing cases). Specific application of that standard requires that wires carrying electricity must be carefully and properly insulated by those maintaining them at all places where there is a reasonable probability of injury to persons or property therefrom." (Citing cases.) Polk v. City of Los Angeles, 26 Cal.2d 519, at p. 525, 159 P.2d 931, 934.

Here the wires were not insulated and the happening of the accident shows that they were not maintained at a sufficient height. Anstead v. Pacific Gas & Electric Co., 203 Cal. 634, 265 P. 487; Giraudi v. Electrical Imp. Co., 107 Cal. 120, 40 P. 108, 28 L.R.A. 596, 48 Am.St.Rep. 114.

[8] The record herein shows that there was ample evidence to permit the jury to conclude that the appellant company could have prevented the accident either by insulating the wires, by placing them at a greater height above the ground, by running them in an underground conduit or by guarding them in some other fashion. While the appellant was not under an absolute duty to insulate or make the wires safe in any particular manner it was "its duty * * * to make the wires safe under all the exigencies offered by the surrounding circumstances." Royal Indemnity Co. v. Midland Counties Public Service Corporation, 42 Cal.App. 628, 632, 183 P. 960, 961.

[9] The duty of due care with which the company was charged consists not only in the proper installation of the dangerous instrumentality but in the maintenance thereof in a safe condition at all times and places and under the changing circumstances of the particular case. Even if at the outset of the installation of the equipment the company may have been entirely free from fault, yet, if, under changing circumstances, a hazardous condition arose, non action or the failure to remedy such condition would constitute culpable negligence. Polk v. City of Los Angeles, supra; McCormick v. Great Western Power Co., 214 Cal. 658, 8 P.2d 145, 81 A.L.R. 678.

[10-13] Appellant has sought to remove the instant case from the rule of the Polk case and the cases cited therein on the ground that there was no reasonable probability of injury from the installing of overhead lines, and in support of such position contends that it could not have been supposed to know of the type of operation that would take place in close proximity to the line or that flood light towers would be used in the particular area where the ac-

cident occurred. The record does not bear out this contention. This area was not set apart or isolated from the other activities of the yard. In fact the very nature of the area being free of buildings rendered it, under the circumstances, a most obvious place to park light towers, cranes or similar equipment. It was not necessary for the defendant to anticipate the precise accident which did occur; it was only necessary that from all of the circumstances an accident of the general nature of the one which occurred could reasonably have been anticipated. Royal Indemnity Co. v. Midland Counties Public Service Corporation, 42 Cal.App. 628, 183 P. 960; Jackson v. Utica, etc., supra. In this regard the record discloses that both before and after the installation of the high tension line company agents had notice or knowledge of the fact that large portable equipment such as mobile cranes and flood light towers were to be used and later saw them in use. According to the testimony of Mr. E. C. Woodruff, he knew on April 14, 1942, that portable light towers were to be used; that he saw them when he was in the yard in July or September of that year but that he did not know they were to be used in the particular area where the accident later occurred. His brother, E. T. Woodruff, knew before the accident occurred that portable flood light towers were to be used and that motorized mobile cranes were to be part of the equipment but that he understood such equipment would be confined to the area where actual assembly or construction of boats and barges was taking place. E. C. Woodruff further testified he had been told that one inspection was made during the several months the plant was in operation and prior to the fatal accident, but apparently nothing ever came of that inspection. No report was made nor was any action taken except perhaps in respect to the placing of warning signs on the crossarms of the poles. Additional testimony shows that on their several visits to the yards the previously mentioned agents of the company and several others made no inspection to determine the safety of the line as related to the then existing conditions in the yard, or the kind of appliance used in the general vicinity of the line, yet its agents carefully examined the premises with a view of placing the line underground. Under such circumstances it cannot be said that the jury improperly found that the company had actual or constructive notice of the unsafe condition of the premises. The authorities are uniform in holding that the duty of due care with respect to electric wires and equipment requires reasonably prompt and frequent inspection, Polk v. City of Los Angeles, supra; Stasulat v. Pacific Gas & Electric Co., 8 Cal.2d 631, 67 P.2d 678; Irelan-Yuba, etc. v. Pacific, etc., supra; Dow v. Sunset Telephone & Telegraph Co., 157 Cal. 182, 106 P. 587, and want of substantial compliance with this rule charges the utility with notice of the defective or dangerous condition that diligent inspection would have revealed. In the case of Roberts v. Pacific Gas & Electric Co., 102 Cal.App. 422, 431, 283 P. 353, 356, this court stated as follows:

> "It is well settled that it is the imperative duty of such a company not only to install proper appliances, but also to make reasonable and proper inspection of such appliances, and to use due diligence to discover and repair defects therein, and a failure to do so constitutes negligence. Notice of a defect, in order to charge the company with liability therefor, need not be direct and express; it is enough that the defect has existed for such a length of time that it should have been known." And upon the question of time the court found that failure to inspect the line for a period of two and one-half months created a presumption of constructive notice.

[14] Evidence was offered by appellant to negative this rule by showing that it had substantially complied with the general orders of the Railroad Commission, and from this premise it is now argued that due care on the part of the company was thus established. At most such a showing would only relieve the company of the charge of negligence per se. It does not affect the question of negligence due to the acts or omissions of the company as related to the particular circumstances of the case. The rule has been stated thus: "It does not follow that merely because one has complied with the terms of a statute or ordinance that he is thereby absolved from negligence. One may act in strict conformity with the terms of an enactment and yet not exercise the amount of care which is required under the circumstances." 19 Cal. Jur. 634. See also Campbell v. Fong Wan et al. 60 Cal.App.2d 553, 141 P.2d 43; Sickles v. Mt. Whitney Power & Electric Co., 177 Cal. 278, 170 P. 599; Monroe v.

San Joaquin, etc., supra. In other words the question is whether under all of the circumstances negligence has been shown.

[15, 16] There is no merit in appellant's argument that there was no statutory requirement expressly imposing on it the duty to insulate the wires or to remove them from harm's way. The duty of care exists in the absence of any statute and if care is omitted and injury directly results therefrom liability arises. Polk v. City of Los Angeles, supra. While the company adduced some evidence to show that it was not customary practice to insulate power lines carrying loads of 11,000 volts this was not of itself evidence that the company was free from fault in following such practice and could not excuse defendant unless the practice was consistent with the due care necessary under the circumstances. Polk v. City of Los Angeles, supra.

Appellant next contends that as both ends of the tap line were securely fastened to poles it thus maintained a passive condition into which the decedents pushed the metal tower thereby producing the fatal injuries, and that obviously, therefore, such act on the part of decedents was the sole proximate cause of the accident.

[17] As we have previously stated, sufficient evidence was introduced to justify the jury in finding that the company was negligent. The question then remaining for the jury was whether such facts were the proximate cause of the fatal injuries. Like the other essential elements of actionable negligence, the question whether the original negligence is the proximate cause of an injury is a proper question for the jury, unless it may be said that the evidence is of such a character that there is no room for a reasonable difference of opinion. Jackson v. Utica, etc., supra; Fike v. San Joaquin, etc., supra.

[18, 19] Applying such rule to the facts and circumstances presented herein, we conclude there was ample evidence upon the question of proximate cause which the trial court properly submitted to the jury, and its determination thereon will not now be disturbed. Minter v. San Diego Consol. Gas & Electric Co., 180 Cal. 723, 182 P. 749.

[20] Nor do we find merit in appellant's further argument that decedents in engaging to move the tower thereby assumed the risk of the resulting contact and that such defense is separate and distinct from the defense of contributory negligence. Although respondents question the porpriety of raising such an issue at this stage of the proceedings, we are not convinced that there is such a clear line of demarcation between the two doctrines as contended by appellant, and therefore we have chosen to discuss the applicability of such principle on its merits. In the case of Schleif v. Grigsby, 88 Cal.App. 174, 182, 263 P. 255, 258, it is stated:

" * * * conceding that the theory underlying the doctrine of assumption of risk may have application to cases outside of this particular relationship of employment [master and servant], it goes no farther than the accepted standard of ordinary care under the circumstances. In other words, the doctrine of assumption of risk in other cases does not absolve the wrongdoer of all blame, but places upon the party injured a higher duty if he voluntarily enters a position of known danger." (Citing cases.)

The evidence herein does not disclose a dangerous situation which could be described as either open, obvious or notorious, nor is there any showing that decedents had any knowledge whatever of the danger involved. Though the tower obviously was higher than the tap line even defendant's own witnesses cast doubt upon the ability of one to note the difference from the ground level.

It is also appellant's contention that the judgments are contrary to the law of this state and it cites in support thereof what is said to be all of the decided cases in this state wherein injuries have resulted from an object similar to that herein coming in contact with power lines. While we agree with the conclusions reached in the cases cited by appellant, the factual situations therein set forth are entirely different than that which is presented in the instant case, and therefore are inapplicable to the questions herein presented.

[21-23] Lastly, appellant complains of the ruling of the trial court in excluding as hearsay, on objection by counsel for plaintiffs, certain proffered testimony relating to the substance of conversations at the time the contract was entered into between agents for the company and the customer's managing agent. Such offered proof was apparently designed to show that the customer did not contemplate using portable light towers or cranes in the area where

the accident occurred. We are convinced that the trial court was correct in excluding such testimony. The critical time in this case was not when the contract was made nor when the equipment was installed or the operations commenced, but it was any reasonable time prior to the happening of the accident when it could have been avoided. Dow v. Sunset, etc., supra. Even if the proffered evidence was admissible its refusal was harmless, as similar evidence was admitted in the testimony of the Woodruff brothers. 2 Cal.Jur. sec. 608, p. 1022. It cannot be said that the ruling of the trial court resulted in a miscarriage of justice. Sec. 4½, Art. VI, Const.; Anstead v. Pacific, etc., supra. If this court were to follow appellant's contention and send the case back for a retrial of the issue of negligence in the construction of the line, and the jury found that initially there had been no negligence on the part of the company, there would still remain the finding of negligence in the maintenance of the line, and the same verdicts and judgments would logically follow.

The judgments are affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

26 Cal.2d 753

COLUMBIA PICTURES CORPORATION
v. DE TOTH.

L. A. 19083.

Supreme Court of California.

July 30, 1945.

1. Frauds, statute of 🔑53

An oral contract of employment for a period of one year immediately next ensuing with rendition of service to commence on the day after agreement was entered was not within statute of frauds. Civ.Code, § 1624, subd. 1; Code Civ.Proc. § 1973, subd. 1.

2. Time 🔑9(1)

Under statute of frauds which requires agreements not to be performed within one year "from the making thereof" to be in writing, the quoted words exclude the day upon which agreement is made, and the year begins with the following day and ends at the close of the first anniversary of the day on which agreement is made. Civ. Code, § 1624 subd. 1.

See Words and Phrases, Permanent Edition, for all other definitions of "From the Making Thereof".

3. Frauds, statute of 🔑50(1)

A contingency which may extend period of employment for more than one year in option of employer does not bring oral employment contract for one year immediately next ensuing within operation of statute of frauds. Code Civ.Proc. § 1973, subd. 1; Civ.Code, § 1624 subd. 1.

4. Frauds, statute of 🔑144

If modification of oral employment contract entered into for one year, by postponement for a few weeks of commencement date and by temporary employment of employee in the interim, was induced by employee's fraudulent representations to employer that he desired postponement because of other business commitments and by employee's promise to reduce terms of agreement thus modified to writing and abide by it, employee would be estopped under such circumstances to assert that employment contract was void under statute of frauds. Civ.Code, § 1624, subd. 1; Code Civ.Proc. § 1973, subd. 1.

5. Contracts 🔑32

An oral understanding between the parties that the terms of their agreement will be reduced to writing is not binding and, until the writing is actually executed, no complete and binding contract comes into existence.

6. Action 🔑6

A complaint for declaratory relief is sufficient, if it sets forth facts showing existence of an actual controversy relating to the legal rights and duties of respective parties under a contract and requests that these rights and duties be adjudged by the court. Code Civ.Proc. §§ 1060–1062a.

7. Action 🔑6

Where, at time complaint was filed seeking a declaration of rights and duties of parties under an oral employment contract, contract had still about three months to run, an actual controversy between the parties was shown so as to warrant declaratory relief. Code Civ.Proc. §§ 1060–1062a.

8. Action 🔑6

To entitle a plaintiff to seek declaratory relief, it is not essential that he should establish his right to a favorable declaration. Code Civ.Proc. §§ 1060–1062a.

9. Action 🔑6

The purpose of declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation. Code Civ.Proc. §§ 1060–1062a.

10. Action 🔑6

The court is empowered to determine disputed questions of fact, and hence remedy by declaratory relief is not limited to cases involving a written instrument, and a disputed oral contract may properly be the subject of a declaratory judgment. Code Civ.Proc. §§ 1060–1062a.

11. Action 🔑6

The fact that oral contract is one of employment, involving personal services and hence not specifically enforceable, does not necessarily render declaratory relief improper or unnecessary, since such fact is merely a factor to be considered by the trial court in determining what declaration would be appropriate. Civ.Code, § 3390; Code Civ.Proc. §§ 1060–1062a.

12. Action 🔑6

The fact that a cause of action otherwise may have accrued, and that other adequate relief may be available to plaintiff at the time, do not render declaratory relief improper, but are factors to be considered by the court. Code Civ.Proc. §§ 1060–1062a.

13. Action ⚿6

The remedies provided by declaratory judgments statute are cumulative, and hence declaratory relief may be asked alone or with other relief. Code Civ.Proc. §§ 1060–1062a.

14. Action ⚿6

Before declaratory relief may be denied on ground of existence of other remedies, it must clearly appear that asserted alternative remedies are available to plaintiff and that they are speedy and adequate or as well suited to plaintiff's needs as declaratory relief. Code Civ.Proc. §§ 1060–1062a.

15. Action ⚿6

Where allegations in seeking declaration of rights and duties of parties under an oral employment contract did not necessarily show that remedy of declaratory relief might not have been better to plaintiff's needs than the traditional remedies otherwise disclosed, complaint was not insufficient because of other available remedies. Code Civ.Proc. §§ 1060–1062a.

16. Action ⚿6

Although under declaratory relief statute wide powers have been conferred upon trial court, its discretion is not unlimited, but it is a legal or judicial discretion, hardened by experience into rule, and its exercise is subject to appellate review. Code Civ.Proc. §§ 1060–1062a.

17. Action ⚿6
Appeal and error ⚿1178(1)

Where a case is properly before a trial court, under a complaint which is legally sufficient and sets forth facts and circumstances showing that a declaratory adjudication is entirely appropriate, trial court may not properly refuse to assume jurisdiction, and, if it does enter a dismissal, it will be directed by an appellate tribunal to entertain the action. Code Civ.Proc. §§ 1060–1062a.

18. Appeal and error ⚿843(4)

On appeal from judgment for defendant after sustaining general and special demurrer to complaint without leave to amend, Supreme Court, having concluded that complaint was good as against a general demurrer, was not required to pass on question whether trial court erred in sustaining special demurrer.

19. Pleading ⚿225(1)

Where a complaint seeking declaratory relief was good as against a general demurrer, it was error to sustain a special demurrer without leave to amend because of defects in the form of pleading. Code Civ.Proc. §§ 1060–1062a.

20. Appeal and error ⚿1197

Where Supreme Court held that trial court in rendering judgment for defendant after sustaining a general and special demurrer to complaint erred in sustaining general demurrer, trial court upon remanding of cause could require in its discretion the clarification of uncertainties in the pleading.

SPENCE and EDMONDS, JJ., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action by Columbia Pictures Corporation against Andre De Toth for a declaration of rights and duties of parties under an oral contract of employment. From a judgment of dismissal entered after a demurrer was sustained without leave to amend, plaintiff appeals.

Reversed.

Prior opinion 154 P.2d 420.

Mitchell, Silberberg & Knupp, of Los Angeles, and Samuel V. Cornell, of Merced, for appellant.

Bautzer, Ryan, Ford & Silbert, Robert E. Ford, and Bernard M. Silbert, all of Hollywood, for respondent.

SHENK, Justice.

Plaintiff appeals from a judgment of dismissal entered upon sustaining defendant's general and special demurrer to the complaint without leave to amend.

In substance the pleading discloses the following: Plaintiff is seeking a declaration of the rights and duties of the parties under an unwritten contract of employment. On June 6, 1943, plaintiff orally engaged the services of defendant as a motion picture director for a term of one year "immediately next ensuing," at a salary of $250 a week for each week of service actually rendered, with the privilege of a maximum twelve week lay-off during the contract term. Plaintiff was granted the option of renewing or extending the contract for additional terms of one year each for six successive years at rates of compensation gradually increasing from $350 a week for the second year to $1,500 a week for the sixth year. Each exercise of the option for a succeeding year was to be made prior to expiration of the current year.

On June 7th, the day after the oral contract was made, defendant represented to plaintiff that because of certain business commitments he desired to defer the commencement of his services under the contract to a date subsequent to July 19, 1943. He declared that if plaintiff would consent to this modification of the agreement and would give him work on a temporary basis during the period of deferment, he would at any time after July 20th, and after the completion of the temporary employment, enter into a written contract with plaintiff evidencing the extension of time for commencement of his services under the oral contract.

In reliance upon these statements plaintiff consented to the extension of time and employed defendant to direct the photoplay "Nine Girls." But by mutual consent this arrangement was replaced on July 26th by a temporary agreement under which plaintiff employed defendant at a compensation of $350 a week to direct the photoplay "None Shall Escape." The stated rate of compensation for a single picture contract, $100 a week in excess of that provided by the oral agreement, was paid by plaintiff solely in reliance upon defendant's representations that his services would be available to plaintiff for a considerable time thereafter pursuant to the oral agreement of June 6th, as modified and extended on June 7th.

The photoplay "None Shall Escape" was one of unusual merit, the direction of which would ordinarily have been assigned to directors then under term contracts with plaintiff. But plaintiff, in reliance upon defendant's representations, assigned him to direct it, and in connection with the production and filming gave him every possible assistance in the way of exceptional talent and necessary facilities in order to increase and enhance his professional reputation and standing. Such reputation and standing and the value of defendant's services as director were in fact greatly increased through these efforts of plaintiff.

Between July 26th and October 25th, 1943, defendant discharged all of his duties in connection with production of "None Shall Escape." Plaintiff then requested that the oral agreement be reduced to writing. From time to time defendant deferred and postponed the execution of any agreement. Nevertheless he continued to abide by and perform the terms of his engagement and rendered services for persons to whom plaintiff loaned his services pursuant to the provisions of the contract. About December 24, 1943, defendant refused and has ever since refused to perform any services for plaintiff or to reduce the agreement to writing and sign it.

An actual controversy between the parties is asserted. Arbitration of the dispute by the Screen Directors Guild was sought but it is Conciliation Committee could not reach the required unanimous decision and made no findings. Defendant declares that he is no longer bound by the contract; that plaintiff is not entitled to his services; and that the agreement is void and unenforceable by reason of the statute of frauds. Code Civ.Proc. § 1973, subd. 1; Civ.Code, § 1624, subd. 1. Plaintiff asserts that the agreement as made on June 6th and modified on June 7th is valid and enforceable, and that defendant by his conduct is estopped to rely upon the statute of frauds.

The complaint was filed March 2, 1944. The prayer is for a decree fixing the rights and duties of the parties under the contract and renewal options as modified and extended, declaring it to be a valid and subsisting obligation, and granting such further relief as may be just and proper.

The order sustaining the general and special demurrer to the complaint without leave to amend does not indicate upon what ground the trial court based its ruling. From the allegations as a whole it is apparent that plaintiff sets forth facts which entitle it to seek relief. Although there is some uncertainty in the allegations, the pleading on its face does not reveal any defect impossible of cure by amendment nor does it show conclusively that the cause is barred by the statute of frauds.

[1-3] An oral contract of employment for a period of one year "immediately next ensuing," with rendition of service to commence on the day after the agreement is

entered into, is not within the statute of frauds. In applying that provision of the statute, Civ.Code, § 1624, subd. 1, requiring an agreement to be in writing which by its terms is not to be performed "within a year from the making thereof," the words "from the making thereof" are now uniformly construed to exclude the day upon which the agreement is made; that is, the year is considered to begin with the following day and to end at the close of the anniversary of the day on which the agreement is made. Nickerson v. President, etc., of Harvard College, 298 Mass. 484, 11 N.E.2d 444, 114 A.L.R. 414, note, p. 416; 49 Am.Jur. § 24, p. 385, § 54, p. 411; Rest., Contracts (vol. 1) § 198, comment d. A contingency which may extend the period of employment for more than one year, such as that created by the option provisions here alleged, does not bring a contract within the operation of the statute. Swift v. Swift, 46 Cal. 266; Hollywood Motion Picture Equipment Co. v. Furer, 16 Cal.2d 184, 105 P.2d 299, 12 Cal. Jur. § 5, p. 858; 49 Am.Jur. § 25, p. 387; 111 A.L.R., note p. 1105.

[4, 5] If a modification of the oral agreement here alleged, by postponement of the commencement date and temporary employment of defendant in the interim, was in fact induced by defendant's fraudulent representations to plaintiff concerning his other business commitments and by his promise to reduce the terms of the agreement as modified to writing, and to abide by it, the circumstances may establish an equitable estoppel. The situation alleged is not one of a mere understanding between the parties that the terms of their agreement will be reduced to writing, for in such case, as defendant contends, it is well established that until the writing is actually executed, no complete and binding contract comes into existence. Spinney v. Downing, 108 Cal. 666, 41 P. 797, Burr v. Pacific Indemnity Co., 56 Cal.App.2d 352, 133 P.2d 24, 6 Cal.Jur. § 33, p. 58. Rather does plaintiff attempt to assert that after a valid oral contract came into existence, plaintiff was induced to consent to its modification by defendant's fraudulent promise of a writing, coupled with his other representations, temporary employment, and part performance; that in reliance upon these fraudulent promises, plaintiff changed its position to its detriment in that it relinquished the valid contract for the less favorable modification and also gave defendant the temporary employment he requested at a higher rate of compensation than he would otherwise have received. The facts set forth indicate that plaintiff may be able to properly and sufficiently plead an estoppel on the part of defendant to rely upon the statute of frauds. Halsey v. Robinson, 19 Cal.2d 476, 122 P.2d 11; Vierra v. Pereira, 12 Cal.2d 629, 86 P.2d 816; Wilson v. Bailey, 8 Cal.2d 416, 65 P.2d 770; Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88, 134 Am.St.Rep. 154; 12 Cal. Jur. §§ 102–106, p. 933 et seq.; 37 C.J.S., Frauds, Statute of, § 246, p. 752.

[6, 7] The plea for declaratory relief is not improper. A complaint for declaratory relief is legally sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the respective parties under a contract and requests that these rights and duties be adjudged by the court. Maguire v. Hibernia Savings & Loan Soc., 23 Cal.2d 719, and cases cited at page 728, 146 P.2d 673, 151 A.L.R. 1062. The allegations here leave no doubt of the asserted existence of an actual controversy between the parties. At the time the complaint was filed, the period of the original oral contract still had about three months to run, and the parties attempted to secure an immediate arbitration of their dispute; failing in this, the present action was filed.

[8-11] It is not essential to entitle a plaintiff to seek declaratory relief, that he should establish his right to a favorable declaration. The purpose of the declaratory judgment is to "serve some practical end in quieting or stabilizing an uncertain or disputed jural relation." Maguire v. Hibernia S. & L. Soc., supra, and cases cited 23 Cal.2d at pages 728–731, 146 P.2d at page 678, 151 A.L.R. 1062; Anderson, Declaratory Judgments, p. 275; 8 So.Cal.L. Rev. 57. The court is empowered to determine disputed questions of fact and hence the remedy is not limited to cases involving a written instrument. Hess v. Country Club Park, 213 Cal. 613, 2 P.2d 782; R. G. Hamilton Corporation v. Corum, 218 Cal. 92, 95, 21 P.2d 413; Ætna Life Ins. Co. v. Haworth, 300 U.S. 227, 242, 57 S.Ct. 461, 81 L.Ed. 617, 108 A.L.R. 1000; Zimmer v. Gorelnik, 42 Cal.App.2d 440, 109 P.2d 34. A disputed oral contract may properly be the subject of a declaratory judgment (Corporation of America v. Durham Mut. Water Co., 50 Cal.App.2d 337, 342, 343, 123 P.2d 81; Herrlein v. Tocchini, 128 Cal.App. 612, 18 P.2d 73; Zimmer v. Gorel-

nik, supra; Wollenberg v. Tonningsen, 8 Cal.App.2d 722, 48 P.2d 738, 742; 5 Cal. Jur.Supp. § 7, p. 113.) The fact that the oral contract may be one of employment, involving personal services and hence not specifically enforceable, Civ.Code, § 3390; Poultry Producers of Southern California v. Barlow, 189 Cal. 278, 208 P. 93, does not necessarily render declaratory relief improper or unnecessary. This is merely a factor to be considered by the trial court in determining what declaration would be appropriate. Universal Sales Corporation v. California, etc., Mfg. Co., 20 Cal.2d 751, 774, 128 P.2d 665; Blakeslee v. Wilson, 190 Cal. 479, 213 P. 495; Coykendall v. Jackson, 17 Cal.App.2d 729, 62 P.2d 746.

[12-14] That a cause of action otherwise may have accrued and that other adequate relief may be available to plaintiff at the time are also factors to be considered by the court. The remedies provided by the statute are cumulative and declaratory relief may be asked alone or with other relief, Code Civ.Proc. §§ 1060–1062. Hence a plaintiff's right to proceed is not barred by the fact that the contract sued upon may have already been breached and that traditional or statutory (see Civ.Code, § 3423 (5); Code Civ.Proc., § 526) alternative remedies are available. In Maguire v. Hibernia S. & L. Soc., supra, 23 Cal.2d at page 732, 146 P.2d at page 680, 151 A.L.R. 1062, this court, in reversing judgments entered on demurrers to complaints sustained without leave to amend, stressed the point that before declaratory relief may be denied on the ground of the existence of other remedies, "it must clearly appear that the asserted alternative remedies are available to the plaintiff and that they are speedy and adequate or as well suited to the plaintiff's needs as declaratory relief. See Ermolieff v. R. K. O. Radio Pictures, 19 Cal.2d 543, 549, 122 P.2d 3; Henderson v. Oroville-Wyandotte Irr. Dist., 207 Cal. 215, 216, 277 P. 487; Welfare Investment Co. v. Stowell, 132 Cal.App. 275, 278, 22 P.2d 529; Borchard, Declaratory Judgments, p. 293 et seq."

[15] Testing the present pleading by the standards set forth in the cited cases, its allegations do not necessarily show that the remedy of declaratory relief may not have been better suited to plaintiff's needs than the traditional remedies otherwise disclosed. Furthermore, as stated in Ermolieff v. R. K. O. Radio Pictures, supra, 19 Cal.2d at page 547, 122 P.2d at page 5, "Ordinarily, the alternative remedy, such as damages, injunctive relief and the like would be more harsh, and if he chooses the milder remedy, declaratory relief, the court is not required for that reason to compel him to seek a more stringent one." See, also, Wollenberg v. Tonningsen, supra, and Tolle v. Struve, 124 Cal.App. 263, 12 P.2d 61, where declaratory judgments were affirmed despite assertions of other available remedies; and Phelps v. Loop, 53 Cal. App.2d 541, 128 P.2d 63, where judgment of nonsuit was reversed and the cause remanded for trial on the issues joined by the pleadings.

[16, 17] Although under the declaratory relief statute, Code Civ.Proc. §§ 1060–1062a, wide powers have been conferred upon the trial court, its discretion is not unlimited. It is a legal or judicial discretion, hardened by experience into rule, and its exercise is subject to appellate review. Borchard, Declaratory Judgments, p. 299. As said by a text-writer (Anderson, Declaratory Judgments, p. 525, § 172): "It would seem to be a self-evident principle that this discretion is not an arbitrary one, and is not one that may be granted as a special favor, or one that may be exercised personally by the court; but is a sound judicial discretion and one that is controlled in a great measure by legal principles; and in consonance with the rule that the discretion exercised in these cases by the courts is a judicial or legal one, and must be bottomed upon good reason, it may be generally stated that such discretion is subject to review at the hands of appellate tribunals." Where, therefore, a case is properly before the trial court, under a complaint which is legally sufficient and sets forth facts and circumstances showing that a declaratory adjudication is entirely appropriate, the trial court may not properly refuse to assume jurisdiction; and if it does enter a dismissal, it will be directed by an appellate tribunal to entertain the action. Declaratory relief must be granted when the facts justifying that course are sufficiently alleged.

[18-20] In view of the conclusion that the complaint is not vulnerable to general demurrer, it is unnecessary to pass upon the grounds of special demurrer. When a complaint is good as against a general demurrer, it is erroneous for the trial court to sustain the demurrer without leave to amend because of defects in the form of pleading. This is not to hold that the complaint is not subject to special demurrer.

Upon the remanding of the cause the trial court may in its discretion require the clarification of uncertainties or ambiguities in the pleading. Maguire v. Hibernia S. & L. Soc., supra, 23 Cal.2d at page 737, 146 P.2d at page 682, 151 A.L.R. 1062, Wennerholm v. Stanford University School of Medicine, 20 Cal.2d 713, 128 P.2d 522, 141 A.L.R. 1358; Olivera v. Grace, 19 Cal.2d 570, 122 P.2d 564, 140 A.L.R. 1328; Guilliams v. Hollywood Hospital, 18 Cal.2d 97, 114 P.2d 1.

The judgment is reversed.

GIBSON, C. J., and CARTER, TRAYNOR, and SCHAUER, JJ., concurred.

SPENCE, Justice (dissenting).

I dissent. The question presented here is not whether the trial court would have been justified, under the facts alleged, in overruling the demurrer and in granting declaratory relief, but whether the trial court was compelled, under the facts alleged, to overrule the demurrer and to grant such relief.

Section 1061 of the Code of Civil Procedure provides: "The court may refuse to exercise the power granted by this chapter in any case where its declaration or determination is not necessary or proper at the time under all the circumstances." The majority opinion fails to give effect to the provisions of this section and fails to consider numerous authorities dealing with the discretionary power thereby vested in the trial court, such as City of Alturas v. Gloster, 16 Cal.2d 46, 104 P.2d 810; Rapaport v. Forer, 20 Cal.App.2d 271, 66 P.2d 1242; Sunset Scavenger Corporation v. Oddou, 11 Cal.App.2d 92, 53 P.2d 188; Welfare Inv. Co. v. Stowell, 132 Cal.App. 275, 22 P.2d 529; Hamburger & Sons v. Kice, 129 Cal. App. 68, 18 P.2d 115; and Stenzel v. Kronick, 102 Cal.App. 507, 283 P. 93.

In my opinion, the trial court was not compelled to overrule the demurrer and grant declaratory relief under the allegations of the complaint before it. It affirmatively appeared from said allegations that plaintiff's cause of action, if any, had fully accrued by reasons of defendant's alleged breach of the contract. Assuming the validity of the alleged contract, plaintiff had the alternative remedies of an action for damages or of an action for injunctive relief. Civ.Code, § 3423(5); Code Civ.Proc. § 526. These alternative remedies were clearly available; were both speedy and adequate; and were equally, if not better, suited to plaintiff's needs than the remedy by way of mere declaratory relief. The question of the validity of the alleged contract could have been determined in any action brought in pursuit of any of the traditional remedies, and the trial court was therefore justified in determining that a preliminary action for mere declaratory relief was wholly unnecessary. To entertain an action for mere declaratory relief under the circumstances would encourage a multiplicity of actions where but one action would suffice.

The case of Maguire v. Hibernia Savings & Loan Society, 23 Cal.2d 719, 146 P.2d 673, 151 A.L.R. 1062, cited in the majority opinion, recognized the existence of discretionary power in the trial court but on page 732 of 23 Cal.2d, at page 679 of 146 P.2d, 151 A.L.R. 1062, the court said: "Defendants do not point out, nor are we able to ascertain, upon what theory the suggested alternative remedies would be available to plaintiffs, or, if available, that they would be speedy or adequate or serve as well or better than the remedy invoked." Such is not the situation here.

In my opinion, the trial court properly exercised the discretionary power vested in it and the judgment should therefore be affirmed.

EDMONDS, J., concurred.

26 Cal.2d 772

INDUSTRIAL INDEMNITY EXCHANGE v. STATE BOARD OF EQUALIZATION et al.

S. F. 16980.

Supreme Court of California.

July 30, 1945.

Rehearing Denied Aug. 27, 1945.

1. Taxation 🔑387

The statute requiring interinsurance exchanges to pay taxes on all sums paid by their subscribers because of insurance exchanged after deducting premium deposit returns, consideration for reinsurance, and all amounts returned to subscribers or credited to their accounts as savings, imposes taxes on gross amounts so paid, except such portions thereof as are not parts of necessary premiums, but excess over cost of insurance, in view of constitutional provision requiring insurance companies to pay taxes on amounts of gross premiums, less return premiums, received by them. St.1935, p. 573, § 1530; Const. art. 13, § 14¾.

2. Taxation ⚷387

The purpose and aim of gross premium tax on insurance companies is to arrive at true value of thing taxed. Const. art. 13, § 14¾.

3. Taxation ⚷387

The percentage of interinsurance exchange subscribers' savings, payable under agreement with their attorney in fact as compensation for services in exchanging insurance contracts, was not part of such savings within statute requiring exchange to pay tax on all sums paid by subscribers because of insurance exchanged after deducting premium deposit returns, consideration for reinsurance, and all amounts returned to subscribers or credited to their accounts as savings, but was part of cost of participation in reciprocal insurance arrangement. St.1935, p. 573, § 1530.

4. Taxation ⚷387

The use of word "credited", as well as word "returned", in statute requiring interinsurance exchange to pay tax on all sums paid by subscribers after deducting amounts returned to them or credited to their accounts as savings, did not render percentage of such savings, agreed to be paid to subscribers' attorney in fact as compensation for services in exchanging insurance contracts, a part of such savings, for word "credited", as differentiated from "returned", covers situation in which there is lack of actual payment and savings, to be credited to subscribers, must be so set aside for them as to preclude further claims against exchange for current expenses, including such compensation. St.1935, p. 573, § 1530.

See Words and Phrases, Permanent Edition, for all other definitions of "Credited" and "Returned".

5. Insurance ⚷12½

An interinsurance exchange is not a corporation, but is an organization which may sue and be sued and is treated under some circumstances, such as liquidation, as an entity distinct from its subscribers and their attorney in fact.

6. Taxation ⚷387

An interinsurance exchange's subscribers, agreeing to payment of 5 per cent. of their savings to attorney in fact as compensation for services in exchanging insurance contracts, have no "savings" within statute requiring exchange to pay tax on all sums paid by its subscribers because of insurance exchanged, less amounts returned to them or credited to their accounts as "savings", until all insurance costs, including such compensation, are paid. St.1935, p. 573, § 1530.

See Words and Phrases, Permanent Edition, for all other definitions of "Savings".

SCHAUER, SHENK, and EDMONDS, JJ., dissenting.

◆

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by the Industrial Indemnity Exchange, an interinsurance exchange, against the State Board of Equalization and others to recover the amount of a tax paid under protest. Judgment for plaintiff, and defendants appeal.

Reversed.

Prior opinion, 152 P.2d 37.

Robert W. Kenny, Atty. Gen., and T. A. Westphal, Jr. and Harold B. Haas, Deputy Attys. Gen., for appellants.

Burbank & Laumeister and Daniel W. Burbank, all of San Francisco, for respondent.

CARTER, Justice.

According to the stipulation of facts in this case plaintiff is an organization called an interinsurance exchange dealing in workmen's compensation insurance pursuant to sections 1280–1530 of the Insurance Code, St.1935, p. 564 et seq. The subscribers to the organization exchange insurance contracts with each other. The subscribers have executed contracts appointing Industrial Underwriters, Inc., a corporation, as their attorney in fact to exchange the contracts of insurance between them. The latter corporation generally speaking is in charge of the business of the exchange. Mitchell v. Pacific Greyhound Lines, 33 Cal.App.2d 53, 91 P.2d 176. In the agreement with the attorney in fact each subscriber agreed to deposit a sum, "computed as required by the terms and conditions of his policy. * * *" The agreement also stated that "Except as otherwise herein provided, all 'savings accruing to the subscribers shall be returned annually, unless otherwise determined by the Advisory Committee' * * *"; and "As compensation for the services to be performed hereunder, said Attorney after first deducting the cost of any reinsurance, may withhold seventeen and one-half percent of all compensation premium deposits received and in addition the Attorney is to receive a sum equal to five percent of the subscriber's savings; * * *."

In 1936 the exchange received from the subscribers premium deposits amounting to $1,604,514.45. By resolution of the advisory committee of the exchange, $197,702.04 was declared as savings returnable to the subscribers as a refund of distributable surplus and directed the accounts of the subscribers to be credited therewith. Pursuant to the resolution the exchange credited on its books the latter amount to the subscribers' accounts, but paid to such subscribers only 95 per cent thereof (the sum of $187,817.04). The balance of 5 per cent ($9,885.10) was paid to the attorney in fact pursuant to the clause in the agreement last above-quoted. Deducting the sum of $197,702.04 from the sum of $1,604,514.45 leaves a balance of $1,406,812.41. Defendant Board of Equalization assessed as taxable to the exchange the balance remaining after deducting 95 per cent of the $197,702.04 or the sum of $187,817.04 from $1,604,514.45, asserting that inasmuch as the 5 per cent was paid to the attorney in fact and not the subscribers, the mere crediting of the 5 per cent on the books to the subscribers did not bring it within the deductions allowed in computing the tax. Plaintiff having paid the tax assessed under protest recovered judgment and defendants appeal. Plaintiff contends that under the statute involved it is sufficient that the full $197,702.04 was credited as savings to the subscribers to make that sum not subject to the tax, and that it is immaterial that 5 per cent thereof was not paid to the subscribers, for the payment of the latter to the attorney was the discharge of the individual obligation of the subscribers to the attorney with which the exchange had nothing to do.

[1, 2] The taxing statute reads: "In lieu of all other taxes, licenses or fees whatever, State or local, each exchange shall pay * * * an annual tax upon all sums paid in the preceding calendar year by subscribers in this State by reason of the insurance exchanged, whether termed premium deposit, membership fee, or otherwise, *after deducting therefrom* premium deposit returns or cancellations, consideration for reinsurance and *all amounts returned to subscribers and/or credited* to their accounts as savings; * * *." (Emphasis added.) Insurance Code, § 1530.

We take it that the foregoing section should be considered as fitting within the wording of the constitutional provision on the taxation of insurance companies or associations which provides that every insurance company or association "shall annually pay to the State a tax, * * * of two and six-tenths per centum upon the amount of the gross premiums, less return premiums, received upon its business done in this State, * * * provided, that there shall be deducted from said two and six-tenths per centum upon the gross premiums the amount of any taxes paid by such companies on real estate owned by them in this State." Cal.Const., art. XIII, § 14¾. The term companies is declared to include "persons, partnerships, joint stock associations, companies and corporations." It is apparent from that provision that the tax is upon *gross premiums* rather than net premiums. The only deductions or amounts that are not a part of the gross premiums are expressly mentioned as return premiums and reinsurance. The only deduction is taxes paid on real estate. However, such dividends, or savings as are present in the instant case, payable because of the excess of the payment stated in the policy over the cost of insurance, are really not a part of the gross premium. See Mutual Benefit L. Ins. Co. v. Richardson, 192 Cal. 369, 219 P. 1003. Harmonizing section 1530 of the Insurance Code with that provision it appears that the tax on inter-insurance exchanges is on *all* sums (gross amount) paid by subscribers by reason of insurance exchanged whatever term may be used to describe such sums. The sums mentioned are similar to gross premiums and the tax is on such gross amount. Likewise, to render any portion of that amount nontaxable, it should appear that such portion of the sums was in effect not a part of the necessary premium or stated amount paid by the subscribers but was the excess over the cost of the insurance, that excess being described in section 1530 as savings to the subscribers. That portion being of such a character it was really not a part of the gross premium. Hence, in the instant case in determining whether or not the 5 per cent involved should be considered a part of the savings within the words "returned to subscribers and/or credited to their accounts as savings" used in section 1530, we should consider whether or not this item made up a part of the cost of the insurance or was really not a part of the sums paid by reason of insurance exchanged. Moreover, the purpose and aim of the gross premium tax is to arrive at the true value of the thing taxed. See Camden Fire Ins. Ass'n v. Johnson, 42 Cal. App.2d 528, 531, 109 P.2d 447.

[3, 4] It is clear that the 5 per cent is in the same category as the 17½ per cent mentioned in the last above-quoted excerpt from the agreement with the attorney in fact, which was also paid to the attorney. Both were compensation for its services. Merely because the 17½ per cent was based upon a different figure (the total sums paid) rather than the savings is unimportant. It was nothing more than a different *method* of calculation to arrive at the same thing, compensation, not a payment for a different purpose. The word "savings" in section 1530 must be viewed from the standpoint of the subscribers, that is, were there savings as to them? No other corporation, person or association of persons is concerned. Certainly there were no savings to the subscribers when the 5 per cent yet remained to be deducted. That was a part of the cost of its participation in a reciprocal insurance arrangement as much as any other item of expense. The use of the word "credited" as well as "returned" with reference to the savings does not alter the situation. The word "credited" as differentiated from "returned" must cover a situation where there was a lack of actual payment. To be "credited" it must have been so set aside for the subscribers that there would be no further claims against it for the current expenses including the compensation of the attorney. To say to the subscribers in one breath you have a savings credit of a certain amount, and in the next, but we are taking 5 per cent away to meet other existing and binding obligations, is sham and pretence. They have no *savings* credited in reality until all of such items have been deducted. The gross sum paid by the subscribers less the savings is not truly reflected until the savings are fairly ascertained.

[5] Plaintiff argues that the language of section 1530 is clear and needs no interpretation; that a tax statute may not be extended by interpretation; and that the tax provided for by section 1530 is imposed upon the exchange rather than upon the subscribers. But applying the statute to the particular facts before us it is obvious that the savings are not in truth such until the 5 per cent compensation to the attorney has been deducted. It is true that the exchange must pay the tax. Insurance Code, § 1530. It is also true that while an exchange is not a corporation, it is an organization that may sue and be sued and is treated under some circumstances, such as liquidation, as an entity distinct from the subscribers and attorney. Mitchell v. Pacific Greyhound Lines, 33 Cal.App. 2d 53, 91 P.2d 176. But it does not follow that the 5 per cent agreed to be paid to the attorney by the subscribers is a matter entirely separate from the transactions of the exchange as an entity in determining what are savings. Realistically viewed, the exchange does not have savings. There may be strings attached to the payment of the surplus to the subscribers in case of insolvency or in other situations. While the organization represents the subscribers and controls the funds, we must look at the subscribers' side of the picture to ascertain what constitutes savings. The subscribers must act through the governing board of the exchange organization. The status of an exchange and its subscribers is discussed in Mitchell v. Pacific Greyhound Lines, supra, at page 59 of 33 Cal.App.2d at page 180 of 91 P.2d where the court said: "From what has been said, it is apparent that a reciprocal 'organization' differs in many respects from the ordinary stock or mutual insurance company. It has no stock and no capital as such. Its operating fund consists of the premiums paid for its policies and the earnings on any investment of those premiums. The contingent liability of the subscribers, Sec. 2, to pay sums in addition to their premiums stands in the place of the capital of the stock company and the liability of the subscribers to meet such contingent liability may be likened in some respects to the liability to pay unpaid stock subscriptions to a stock company. The plan appears to be designed *for those who desired to assume the positions of both the insurer and insured* with a view to eliminating that part of the ordinary insur-

ance premium which goes into profit." The agreement between the subscribers and the attorney speaks of the savings as belonging to the subscribers rather than to the exchange. It states: "all savings *accruing to the subscribers* shall be returned annually, unless otherwise determined by the Advisory Committee." If the 5 per cent compensation to the attorney was considered an individual and separate obligation of the subscribers with which the exchange had nothing to do in computing the savings, then by the same reasoning the ultimate result would be no gross premium to tax. All of the expenses of the exchange of insurance including losses would be the independent liability of the subscribers, and the exchange as an organization, having no expenses, could claim that all of the premiums paid were savings. There would be no obligations to deduct therefrom because there would be none. We do not believe it was the intention of the Legislature that its act could be rendered so ineffective by a mere bookkeeping procedure. The relation between and status of the attorney, subscribers and exchange cannot be so segregated that the payment of the tax imposed may be avoided in whole or in part.

[6] It is urged that the payment of the 5 per cent is contingent upon there first being savings in existence, and once they exist, they are deductible even though the subscribers must pay 5 per cent of them to the attorney. Looking beyond that situation however, it cannot be doubted that as to the subscribers there are no savings until all of the expenses in connection with the insurance have been met. There are savings before the 5 per cent is deducted to pay the attorney but only in the sense that there is a sum left over after meeting all expenses *except the 5 per cent compensation to the attorney*. The 5 per cent must still be paid, and to the subscriber, there is no saving until all the costs of his insurance have been met.

For the foregoing reasons the judgment is reversed.

GIBSON, C. J., TRAYNOR, J., and PETERS, J. pro tem., concurred.

SCHAUER, Justice.

I dissent. The taxing statute (Insurance Code, § 1530) is applicable to the *exchange* as an entity, not to the individual subscribers. It provides that the "exchange shall pay * * * an annual tax upon all sums paid in the preceding calendar year by subscribers in this State by reason of the insurance exchanged, whether termed premium deposit, membership fee, or otherwise, *after deducting therefrom* premium deposit returns or cancellations, consideration for reinsurance and *all amounts returned to subscribers and/or credited to their accounts as savings* * * *." (Italics added.) The stipulation of facts upon which the case is presented recites that "plaintiff exchange *did credit* * * * apportioned amounts as savings to subscribers' accounts on the books of plaintiff exchange; that the aggregate of such sums credited was $197,702.04; that thereafter plaintiff paid by check to subscribers, 95 per cent of the sum credited to each subscriber and paid to said attorney in fact five per cent thereof." (Italics added.)

It is upon this five per cent of the savings that the controversy centers. Plaintiff claims that such five per cent is exempt as a part of the duly credited savings while defendants contend that it is not a part of the savings.

It appears to me that the five per cent so paid to the attorney in fact was paid for the accounts of the respective subscribers. It was, in effect, a payment to them. The obligation was their obligation, not that of the exchange. The payment was a disposal of the subscribers' money; the exchange had completed its function and effected the savings. The savings had been duly credited to the subscribers and under the unambiguous terms of the statute such savings, so credited, were deductible from the taxable base.

Accordingly it is my view that the trial court reached the proper conclusion. I am satisfied that the opinion of the District Court of Appeal, First Appellate District, Division Two, prepared by Mr. Presiding Justice Nourse (reported in 152 P.2d 37) in affirming the judgment, correctly disposes of the issues involved. Reference is made to that opinion for its more complete statement of the essential facts and discussion of the applicable principles of law and logic.

SHENK and EDMONDS, JJ., concurred.

Rehearing denied; SHENK, EDMONDS, and SCHAUER, JJ., dissenting.

26 Cal.2d 780

PEOPLE v. LINDLEY.

Cr. 4614.

Supreme Court of California.
July 30, 1945.

1. Criminal law ⚷625

The certification of superintendent of state hospital for insane as to sanity of defendant in criminal case before he can be tried for alleged offense is not required to be made in any particular form or to be produced in court as a prerequisite to right to proceed to trial, but is at most merely a formal statement made to sheriff and district attorney that defendant is not insane, and there is no specific requirement that such certification be filed. Pen. Code, § 1372.

2. Criminal law ⚷625

Where superintendent of state hospital for insane notified sheriff and district attorney that defendant in murder prosecution who had been committed to state hospital, was sane, and no point to contrary was mentioned until on motion for new trial, claim that there was no evidence of defendant's sanity because of sheriff's failure to produce certificate signed by superintendent showing that defendant had been discharged from hospital could not be considered, in absence of showing that sufficient certification of sanity was not duly made, or if demanded it could not have been produced. Pen.Code, § 1372.

3. Criminal law ⚷322

The presumption, in absence of contrary evidence, is that duties of superintendent of state hospital for insane and other officials in connection with certification of sanity of defendant in murder prosecution were properly performed, that defendant was duly discharged from hospital, and that he was brought into court for trial as prescribed by statute. Pen. Code, § 1372.

4. Criminal law ⚷625

The "doubt" mentioned in statute requiring trial judge, in case of doubt as to accused's sanity, to order question as to accused's sanity to be determined, is a doubt arising in mind of trial judge rather than in mind of counsel for defendant or third person. Pen.Code, § 1368.

See Words and Phrases, Permanent Edition, for all other definitions of "Doubt".

5. Criminal law ⚷625, 1148

The determination of a motion for hearing on issue of defendant's sanity at time of trial rests within trial court's sound discretion, and appellate court cannot measure to a nicety the basis for trial court's ruling and trial judge must be allowed a wide latitude. Pen.Code, § 1368.

6. Criminal law ⚷625

In murder prosecution, evidence established that trial judge did not abuse his discretion in denying motion for inquiry at trial into question of defendant's sanity and in proceeding with the trial. Pen. Code, § 1368.

7. Homicide ⚷235

Evidence was sufficient to sustain conviction for murder in the first degree for a homicide committed in perpetration or attempted perpetration of rape. Pen.Code, § 189.

8. Homicide ⚷268, 332(6)

The weight to be accorded testimony of witnesses in prosecution for first-degree murder based on homicide allegedly resulting from perpetration or attempted perpetration of rape was a question exclusively for determination of jury, as against defendant's categorical denial of guilt, and verdict of conviction approved by trial judge on denial of motion for new trial could not be disturbed on appeal for insufficiency of evidence. Pen.Code, § 189.

9. Homicide ⚷18(1)

Where murder is committed in perpetration or attempted perpetration of any of felonies enumerated in statute, offender is guilty of murder in first degree by force of the statute regardless of absence of independent proof of premeditation or deliberation. Pen.Code, § 189.

10. Homicide ⚷332(2)

Even if evidence does not conclusively establish that homicide was committed in perpetration or attempt to perpetrate one of enumerated felonies so as to constitute murder in first degree, nevertheless, if record affords substantial support for conclusion that one of enumerated felonies was perpetrated or attempted, and that killing was committed in such perpetration or attempt, a first-degree murder conviction must be affirmed. Pen.Code, § 189.

11. Criminal law ⚷1144, 1159(2)

After conviction, all intendments are in favor of judgment, and verdict will not be set aside unless record clearly shows that on no hypothesis is verdict supported by sufficient substantial evidence.

12. Homicide ⚿18(4)

In prosecution for murder in first degree based on homicide resulting from perpetration or attempt to perpetrate rape, it was not essential to establish bleeding, since evidence of any sexual penetration, however slight, is sufficient to complete the crime. Pen.Code, §§ 189, 263.

13. Criminal law ⚿778(5)

In murder prosecution, court should not have given instruction, based on statute, that commission of homicide by defendant being proved, the burden of providing circumstances of mitigation or to justify or excuse homicide devolved on defendant unless proof of prosecution tended to show that crime committed only amounted to manslaughter or that defendant was justifiable or excusable, even though court added thereto the correct statement that defendant is only required to produce evidence of circumstances of the killing to raise reasonable doubt of his guilt. Pen.Code, § 1105.

14. Criminal law ⚿1172(2)

Any error in giving instruction based on statute as to when burden of proof shifts to defendant in murder case as to circumstances in mitigation, justification, or excuse, did not prejudice defendant's rights, where only crime of which he could have been found guilty was a killing in perpetration or attempted perpetration of rape which, under statute, is first-degree murder. Pen.Code, §§ 189, 1105.

15. Homicide ⚿311

Giving an instruction that, if jury found defendant guilty of first-degree murder and also found extenuating circumstances, it was within their discretion to pronounce such sentence as would relieve defendant from extreme penalty, but that, if evidence showed no such circumstances, it was jury's duty to find simple verdict of first-degree murder and leave with the law the responsibility of fixing punishment, was not error. Pen.Code, § 189, 1105.

16. Homicide ⚿308(2)

Where trial judge, by four instructions, fully and correctly explained essential elements of first and second degree murder, complaint that jury was not adequately informed concerning such difference was unwarranted. Pen.Code, § 189.

In Bank.

Appeal from Superior Court, Sutter County; Arthur Coats, Judge.

William Marvin Lindley was convicted of murder in the first degree, and an appeal was taken under the automatic appeal statute.

Affirmed.

Desmond A. Winship, of Yuba City, for appellant.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

EDMONDS, Justice.

When he was charged with having murdered a 13-year-old girl, William Marvin Lindley pleaded not guilty, but before the date set for trial it was brought to the attention of the court that a doubt had arisen concerning his sanity. Following a hearing upon that issue he was committed to the Mendocino State Hospital. Ten months later he was released to the sheriff and brought to trial upon the murder charge. The case is now before this court upon an automatic appeal from the judgment imposing the death penalty which was entered upon the verdict of the jury which found him guilty and the order denying a new trial.

The record discloses that on August 16, 1943, two days before Jackie Hamilton, the victim of the tragedy, was found under conditions which resulted in her death shortly afterward, she had arrived at Yuba City with her father and mother and three sisters, Willa Mae, Barbara, and Shirley, who were then 17, 15, and 3 years of age, respectively. The family established a camp at a place which was between the levee of the Feather River and the stream. Clumps of trees dotted the area and the terrain was irregular. Some 200 yards to the northeast, built directly on the stream, was a boathouse inhabited by William Owens, his nine-year-old son, a man called Shorty, and Lindley. Owens had known Lindley for about five years and had always called him "Red." The men maintained a store in the boathouse, selling soft drinks and merchandise to the riders and campers who frequented the vicinity.

The Hamilton family made camp about noon on Monday but did not go to the boathouse that day. On Tuesday, Barbara went down to find out where they could get water, and visited the boathouse several other times. The next day, a little boy took the three older girls, Willa Mae, Barbara and Jackie, across the river in a boat. On the opposite bank they saw a sheepherder and his flock. When they returned Barbara and Jackie went in swimming, and later Willa Mae joined them.

Meanwhile Mr. Hamilton had become acquainted with the men at the boathouse. He agreed to drive Owens and "Red" to a place a few miles outside the city where they could collect wages due them for peach picking. The three men left in the automobile shortly after noon. Some time later Barbara and Jackie left the water. They went up to the boathouse to change to dry clothing. Shorty was the only man there, and he told Jackie to wrap herself in a blanket and get her clothes from a tub in which she had placed them. She did so, and Barbara helped her dress in the men's restroom. Jackie then said she would go back to camp.

Willa Mae, still in the water, saw "quite a ways off," "a man with a brown hat and khakis * * * in the willows. * * * It looked like he was shaking a pole going back and forth. Shaking the willows." About this same time, which was probably around 2 o'clock, the three men had returned from town after completing their errands and making grocery purchases, and within five minutes after their arrival "Red" had taken some ale which they had bought and walked with it in the direction of the boathouse. Owens had stayed in camp to visit with Mr. and Mrs. Hamilton.

"Red" was wearing a khaki suit, a "kind of brown khaki," shirt and pants, and a brown hat. It was a brown hat, or one similar to it, that had been given to him by Owens.

When Jackie reached the camp, 200 yards from the boathouse, her father, Owens, her mother and Shirley were there but "Red" had left. Owens was drinking from a jug of wine bought in town; Mr. Hamilton had about two tablespoons of it. Jackie did not mention having seen "Red" on the way. She stayed only about five minutes and then walked back toward the river. During this brief interval Barbara was at the boathouse; Willa Mae had left the water and started back to camp for dry clothes. The man was still in the willows when she left the river, so she took the trail to the house, without passing the place where he was. "He was there when I got through swimming," she testified, "in the willows and I just went on to the house. I kind of got scared and went to the house." She did not recognize the man as anyone she had seen and she had never met "Red." After reaching camp she stayed there quite a while, then changed her clothes and took Shirley down to the boathouse. On the way there, she did not see or look for the man in the willows.

Meanwhile at the boathouse "Red" had come in and joined Barbara and Shorty about 15 or 20 minutes after Jackie left for camp. He did not mention having stopped in the willows on the way, or having met and injured Jackie, if he did so. His whereabouts over the period of 15 minutes is not accounted for unless he was the man in the willows. He sat around drinking beer and smoking one cigarette after another.

Five or six minutes after "Red's" arrival, Willa Mae came in with Shirley, and about 15 or 20 minutes after that two boys, Richard and Lawrence, who were riding horses, stopped at the boathouse. The group talked for 20 or 25 minutes and then the two boys went to get their horses. Willa Mae, the baby and Barbara started to walk toward the camp. A period of 60 or 70 minutes had then elapsed since Jackie left the boathouse and paid her five-minute visit to the camp.

The group of young people came upon Owens sitting on a hump of bermuda grass on the hill. He had left the camp after sitting around with Mr. Hamilton for an hour or an hour and a quarter. He said he was taking sand out of his shoe. That took him three or four minutes, and he then went on down to the boathouse and joined Shorty and "Red." Three or four minutes after he reached the boathouse, and while Barbara, Willa Mae, and the baby were watching the two boys mount their horses, they heard Jackie call out "help, I am drowning," and similar cries. Willa Mae and Barbara were not alarmed as Jackie had been fooling them all morning by calling for help and pretending that she was drowning. Willa Mae went on to camp with the baby and told her mother she guessed her sister had fainted. She knew Jackie had not been well because of successive bouts with rheumatic fever and its effect upon her heart, but she was "gaining and getting very stout. A very healthy looking little girl."

Barbara remarked to the boys, "She is fooling; she has been fooling all day like that," but the boys said they would go down and see. Richard went part way on his horse and called, "you are not going to drown in the sand." But Jackie had recognized Barbara's voice and said "help, Barbara, help." Then Barbara also cried out for help and the father went to the aid of the girls. He placed the time of the cry as 10 minutes or less after Owens left the camp. It was estimated as 3:15 or 3:20, or an hour and a quarter after the men returned from town.

Jackie was lying outside the willows on the sand. She was on her side with her face turned partly into the sand. There was a little spot of blood on her cheek, dry blood in her nose and "great big reddish blue purple spots on her little throat like somebody had hold of her throat." According to her father's testimony, she said, "Daddy, that old red headed man; that dirty liar at the boathouse." Barbara testified that in suggesting to her father, "Daddy, let's take her to the boathouse," Jackie replied, "No, that old man at the boathouse, he did it, the dirty liar." The father also told the jury that she kept saying, "The old red headed man, the dirty liar, did it."

The clothing on the child was torn in front. She had on only the waist and skirt in which Barbara had helped dress her with no shoes, stockings or panties. The dress had not been torn when she put it on after her swim. She was so weak and bruised she could not walk. With the help of the boys the automobile was brought near and she was placed in it.

The men at the boathouse had heard Barbara scream and holler "Bill" (Owens). Shorty was in the house; "Red" was sitting in front on a box; and Owens was lying on a pad or mattress he had thrown on the floor. Owens jumped up and ran to the automobile, arriving as they were getting Jackie into the car. He asked to ride to the hospital with them. En route they stopped at the sheriff's office for directions and the sheriff, in his car, cleared the road for them to the hospital. The little girl passed away on the operating table about 15 minutes after arrival. This was between 3:45 and 4:15.

The physician who examined her testified: "When she was brought to the hospital she was in very poor condition. As a matter of fact she was breathing her last. She was quite blue and you might say she was shocked to death. * * * The cause of death was asphyxiation. * * * It can occur from a variety of causes"; it could come from being choked. He said the girl bore no evidence of drowning. But coming to consciousness after being choked and left with her face in sand might induce the same sensation as drowning.

An autopsy revealed marks on the girl's body, those on the throat not deep enough to bleed, such as might have been caused by fingernail scratches. There were two abrasions on the lower part of the abdomen inside the pelvic bone, and an abrasion just within the vaginal wall, inside the vagina. The abrasions near the groin were about the size of a quarter each, where the skin had been rubbed off, and they could have been caused by a hard object such as a knee being pressed upon that portion of the body. The abrasion inside the vaginal wall was "Just where the skin had been rubbed off," and could have been caused by the "insertion of anything." The physician testified that the girl's heart condition, caused by rheumatic fever, was not the cause of her death.

In further explanation of the cause of death, the doctor said that if a person "were actually strangled and oxygen prevented from getting in," death would occur right away but that it was hard to tell how long before arrival at the hospital Jackie was choked; that if she were strangled but not completely choked to death and became unconscious, she might live until enough fluid collected in her lungs to kill her. "It might be quite a period of time." A heart attack, he stated, would not have caused the girl to grab her own throat, and there was no evidence of such an attack or of self-inflicted wounds.

A deputy sheriff who was immediately dispatched to the scene of the crime testified that the ground showed some evidence of a struggle there but "not a great deal"; that "it is pretty heavy sand." In walking in the neighborhood he picked up a pair of torn panties like the pair Barbara had helped Jackie put on after the swim. None of the clothing in which Jackie dressed at the boathouse was then torn.

The sheepherder whom the girls had seen across the river was a 16-year-old grammar school boy, then in the seventh grade. At the trial he gave testimony which, along certain lines, such as that regarding the color of bathing suits, showed a tendency to give an affirmative answer to each question asked, although his answers were inconsistent. But on certain basic points, under cross-examination and recross-examination, he was unshakable.

He testified positively that while sitting under a tree he had watched two girls swimming. He saw them leave the water and enter the boathouse. He later noticed one of them go toward home and then observed a girl come down to the water and wash her feet. When she went back toward the levee, he said, she started fighting with "Red" and they went down behind the willows. He positively identified "Red" as one of two men he had seen around the boathouse during the previous two weeks, and said that on the afternoon Jackie died he saw "Red" walking back and forth in the willows, wearing a brown hat, brown pants, and brown shirt. He picked "Red" out in the jail, there learning his name, and recognized him in the courtroom, even against suggestions of other identity.

In his account of what he saw, the boy said that he heard the cries for help about 15 minutes after the fight. He had then left his position under the tree and walked 200 or 300 feet toward a tomato patch. He told his father and mother when they came down to see the sheep that afternoon of all he had witnessed, and later told the sheriff. His position on the east side of the river gave him a clear view of the willows area; he could have seen a man above the height of the willows and distinguished colors and persons.

At the time of Lindley's arrest, George Main was in the county jail on a charge involving a girl slightly under 20 years of age. Main was assigned to cook for the other inmates and had opportunity for conversation with them. He told the jury that in talking with Lindley a week or so before the trial, the man seemed to be in a normal state of mind and said to him: "You are a mind reader; I am guilty and you know it. I might as well tell you I followed this little girl to the river and grabbed her and choked her and throwed her in the bushes and went back to the bunk house for an alibi." Main reported the remark to the sheriff, but, he testified, not for the purpose of securing any advantage for himself.

Lindley is a man who has had little, if any, education. He can write his name but is unable to read. He is a native of Texas and was convicted of burglary in that state. At the time of his trial he was 49 years of age. As a witness in his own behalf, he recalled seeing Jackie down on the river, but claimed that when he returned from town he went directly from the camp to the boathouse, joining Shorty, Barbara and the others there. He denied any confession to a fellow prisoner. He also told the jury that when Jackie was found and the call for help came he went up to the car and made inquiry as to what had occurred.

The judgment based upon this testimony is challenged upon four grounds. First, it is said, the record shows no evidence that Lindley had regained his sanity. The second point relied upon for reversal is the asserted insufficiency of the evidence to establish that Lindley committed the homicide. As also justifying a new trial, counsel points out that the evidence is insufficient to establish the crime as murder of the first degree. Finally, complaint is made of certain instructions to the jury.

[1-3] The contention that there is no evidence tending to prove Lindley's sanity at the time of the trial is based upon the sheriff's failure to produce a certificate signed by the superintendent of the state hospital showing that he had been discharged from that institution. This point, however, was mentioned for the first time on the motion for a new trial. Although at the opening of the trial, Lindley's counsel stated that he still doubted defendant's sanity, and he unsuccessfully moved the court to determine the question, no further objection was made then or at any time prior to the verdict and judgment.

Section 1372 of the Penal Code reads: "If the defendant is received into the state hospital he must be detained there until he becomes sane. When he becomes sane, the superintendent must certify that fact to the sheriff and district attorney of the county. The sheriff must thereupon, without delay, bring the defendant from the state hospital, and place him in proper custody until he is brought to trial or judgment, as the case may be, or is legally discharged."

The Legislature has made no requirement that the certification of sanity be in any particular form or that it be produced in court as a prerequisite to the right to proceed to trial. It is, as stated in People v. Superior Court, 4 Cal.2d 136, 147, 47 P.2d 724, 729, "at most, merely a formal statement made to the sheriff and district attorney that the defendant is not insane, and there is in fact no specific requirement that it be filed, nor does there appear to be great reason why it should be." In the case of Lindley, it appears that the sheriff received a notice from the hospital, as did also the district attorney. There is nothing to indicate that a sufficient certification of sanity was not duly made or that, if demanded, it could not have been produced. At the commencement of the trial the judge remarked in open court that "the man has been returned to this court as sane." The presumption, in the absence of evidence to the contrary, is that the duties of the superintendent and other officials were properly performed, that the defendant was duly discharged from the hospital and that he was brought into court in the manner prescribed by statute. Maloney v. Massachusetts, etc., Co., 20 Cal.2d 1, 123 P.2d 449; People v. Superior Court, supra; People v. McGee, 24 Cal.App.2d 391, 75 P.2d 533; People v. Howard, 134 Cal.App. 441, 25 P.2d 498.

[4-6] Section 1368 of the Penal Code provides: "If at any time during the pendency of an action and prior to judgment a doubt arises as to the sanity of the defendant, the court must order the question as to his sanity to be determined * * *." The "doubt" mentioned is one that must arise in the mind of the trial judge, rather than in the mind of counsel for the defendant or in that of any third person (People v. Perry, 14 Cal.2d 387, 399, 94 P.2d 559, 124 A.L.R. 1123, and cases there cited), and the determination of a motion for a hearing upon the issue of a defendant's sanity at the time of trial is one which rests within the sound discretion of the court. Necessarily, an appellate court cannot measure to a nicety the basis for the ruling, and the trial judge must always be allowed a wide latitude. People v. Perry, supra, 14 Cal.2d at pages 397-399, 94 P.2d 559, and authorities there reviewed, 124 A.L.R. 1123; People v. Cramer, 21 Cal.2d 531, 133 P.2d 399; People v. Croce, 208 Cal. 123, 131-134, 280 P. 526; People v. Gilberg, 197 Cal. 306, 311, 312, 240 P. 1000; People v. Keyes, 178 Cal. 794, 801-802, 175 P. 6; People v. Fountain, 170 Cal. 460, 467, 150 P. 341; People v. Hettick, 126 Cal. 425, 58 P. 918; People v. Geiger, 116 Cal. 440, 48 P. 389; People v. Kirby, 15 Cal.App. 264, 269, 114 P. 794; 8 Cal.Jur. § 270, p. 195; 4 Cal.Jur. 10-Yr.Supp. (1943 rev.) 721; 142 A.L.R. note, p. 961, at p. 983. Certainly there is nothing in the record of the present case indicating an abuse of discretion. On the contrary, it appears that the trial judge was well aware of his statutory duty, for in denying the motion for an inquiry into Lindley's sanity at that time he ruled: "The question has once before been raised and the man has been returned to this Court as sane. The Court has no other discretion but to proceed with the criminal case and if it should develop during the trial the Court may stop proceedings at any time." Moreover, Lindley took the witness stand and gave perfectly lucid testimony in his own behalf and the reporter's transcript shows nothing which occurred during the course of the trial tending to raise any "doubt" whatever as to the defendant's then sanity.

[7] Concerning the sufficiency of the evidence to support the verdict of the jury, the testimony of the witnesses for the People shows no material inconsistencies or contradictions. All of them frankly admit to taking no account of time in their movements during the day. Every time estimate given was qualified as being only an approximation, yet much more than a thread of consistency runs through the evidence presented by the prosecution. As the events of the day of Jackie's death were related to the jury, before reaching the boathouse "Red" had ample opportunity to attack the little girl and leave her unconscious at the point where she was found in response to her cries. Unquestionably this testimony and the physical facts are reasonably susceptible of the inference that Lindley went directly from the camp to the willows and was there when Jackie arrived five minutes later. The testimony of Main may have been induced by self-interest, and the sheepherder and Willa Mae were of dull mentality, but the accounts given by Barbara and her father are full and clear, and each of their statements is consistent with the recital of events given by the other witnesses.

[8] There is nothing to indicate that there was any person in the vicinity of the boathouse other than those who were named by the witnesses, and Lindley is the only one described as being dressed in brown clothes and a brown hat. Also, one may conclude with more than reasonable

certainty that he is the person to whom Jackie referred as "the red headed man at the boathouse." Moreover, Lindley was positively identified by the shepherd boy as the man whom he saw "fighting" with the little girl. He said: "They went down behind the willows. * * * Red got up and then he started back to the boathouse. * * * I started off to the tomato patch. I got just around the curve and heard them yell and went back * * * the little girl was yelling for help. * * * I saw a man and lady come over the levee and take this little girl up towards the road." It was the duty of the jury to consider this evidence as against Lindley's categorical denial of guilt and his testimony that upon returning from the automobile trip, he walked down the road directly to the boathouse. The weight to be accorded the statement of each of the witnesses was a question exclusively for the determination of the jury and the verdict, which received judicial approval upon denial of the motion for a new trial may not, therefore, be disturbed upon appeal. People v. Farrington, 213 Cal. 459, 463, 2 P.2d 814; People v. Erno, 195 Cal. 272, 278, 232 P. 710.

Lindley also asserts that the evidence is insufficient to establish murder of the first degree. There is no proof, whatever, he argues, of the commission of that crime.

[9-11] Section 189 of the Penal Code defines as murder of the first degree, "all murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem * * *." Where the murder is committed in perpetration or attempted perpetration of any of the enumerated felonies, the offender "is guilty of murder of the first degree by force of the statute." People v. Cabaltero, 31 Cal.App.2d 52, 57, 87 P.2d 364, 366; see People v. Murphy, 1 Cal.2d 37, 41, 32 P.2d 635; People v. Howard, 211 Cal. 322, 329, 295 P. 333, 71 A.L.R. 1385; People v. Sutton, 17 Cal. App.2d 561, 62 P.2d 397. If the evidence establishes conclusively that the murder was so committed, then only a verdict of murder of the first degree may properly be rendered. And even where the showing is not conclusive, if the record affords substantial support for the conclusion that one of the enumerated felonies was perpetrated or attempted, and the killing was committed in such perpetration or attempt, the judgment must be affirmed. People v. Diaz, 26 Cal.2d 318, 158 P.2d 194; People v. Brown, 22 Cal.2d 752, 141 P.2d 1; People v. Waller, 14 Cal.2d 693, 96 P.2d 344; People v. Green, 13 Cal.2d 37, 87 P.2d 821; People v. Martin, 12 Cal.2d 466, 85 P.2d 880; People v. Anderson, 1 Cal.2d 687, 37 P.2d 67; People v. Miller, 121 Cal. 343, 347, 53 P. 816; People v. De La Roi, 36 Cal.App.2d 287, 97 P.2d 836; People v. Meyers, 7 Cal.App.2d 351, 46 P.2d 282. After conviction all intendments are in favor of the judgment and a verdict will not be set aside unless the record clearly shows, that upon no hypothesis whatsoever is there sufficient substantial evidence to support it. People v. Latona, 2 Cal.2d 714, 43 P.2d 260; People v. Green, supra; People v. De La Roi, supra.

Lindley contends that here the evidence fails to sufficiently establish either rape or attempted rape; that there is no proof of lying in wait, as distinguished from the mere fact that the murderer was concealed by the willows (see People v. Miles, 55 Cal. 207; People v. Thomas, 25 Cal.2d 880, 891, 156 P.2d 7); and that there is no evidence that the killing was willful, deliberate, or premeditated. But unquestionably the jury reasonably could have drawn from the evidence the inference that the girl was killed in the perpetration or attempted perpetration of rape. When found, she was weak, choking, bruised, and close to death. Her clothing was torn and she told those who came to her aid that she had been attacked by the "old red headed man" at the boathouse. Wounds revealed by the autopsy corroborated her charge.

[12] In establishing rape, evidence of any sexual penetration, however slight, is sufficient to complete the crime. Pen.Code, § 263; People v. Howard, 143 Cal. 316, 76 P. 1116; People v. Britt, 62 Cal.App. 674, 217 P. 767; People v. Stangler, 18 Cal.2d 688, 117 P.2d 321. Counsel argues that none of the abrasions caused bleeding and there was no proof as to when they might have been made. However, it was not essential to establish bleeding and an inference which could reasonably be drawn from the medical testimony is that the abrasions were as newly inflicted as the throat marks. The girl's physical condition, and the marks on her body, coupled with all of the other evidence, amply support the conclusion that death resulted

from injuries sustained either in a rape or an attempt to rape committed by Lindley. People v. Diaz, supra; People v. Brown, supra. Under such circumstances, the absence of independent proof of premeditation or deliberation is immaterial. The jury, once satisfied that a rape was perpetrated or attempted and that Lindley was the assailant, had no alternative but to return a verdict of murder of the first degree.

The last point presented concerns two instructions which, it is claimed, are erroneous. By them, counsel argues, the jury was instructed that the homicide by Lindley being proved, the burden of proving circumstances of mitigation or that justified or excused it, then devolved upon him unless the proof on the part of the prosecution tends to show that the offense only amounted to manslaughter. Also, the argument continues, the jurors were told that if they found Lindley guilty of murder in the first degree, then in the absence of some extenuating fact or circumstance they should impose the extreme penalty of the law. By these instructions the jury had no alternative but to find Lindley guilty of murder in the first degree or of manslaughter or to acquit him. If they found him guilty of murder in the first degree, according to the instructions, the burden of proving facts and circumstances of mitigation or that justified or excused the homicide was upon Lindley and in the absence of such proof it was the duty of the jury to not relieve him from the extreme penalty of the law. Moreover, it is contended, the jurors were not adequately instructed as to the difference between murder in the first degree and murder in the second degree.

[13, 14] The first of the challenged instructions is based upon section 1105 of the Penal Code. It reads: "Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation or that justify or excuse it, devolves upon the defendant, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter or that the defendant was justifiable or excusable, *but the burden of proof thus placed on the defendant is discharged and satisfied if it raises in your minds a reasonable doubt as to the defendant's guilt.*" Although the court added to the statute the italicized words correctly stating that a defendant is only required to produce enough evidence of the circumstances of the killing to raise a reasonable doubt of his guilt (People v. Wells, 10 Cal.2d 610, 76 P.2d 493; People v. Madison, 3 Cal.2d 668, 46 P.2d 159; People v. Post, 208 Cal. 433, 281 P. 618), the instruction should not have been given. But the error, if it may be properly characterized as such, did not prejudice the rights of Lindley. Under the evidence the only crime of which he could have been found guilty was a killing in the perpetration or attempted perpetration of rape, and the degree of that crime is fixed by statute.

[15] By the second instruction relied upon as justifying a reversal of the judgment, the jurors were told that if they found the defendant guilty of murder in the first degree and also that there was some extenuating fact or circumstance in the case, it was within their discretion to specify a sentence which would relieve him from the extreme death penalty. But this discretion, said the court, "is not an arbitrary one, and is limited to determining which of two punishments shall be inflicted, and is to be employed only when the jury is satisfied that the lighter penalty should be imposed. If the evidence shows the defendant to be guilty of murder in the first degree, but does not show some extenuating fact or circumstance, it is the duty of the jury to find a simple verdict of murder in the first degree, and leave the law the responsibility of affixing the punishment." In the recent case of People v. Kolez, 23 Cal.2d 670, 145 P.2d 580, this court adhered to a long line of decisions holding that the giving of such an instruction does not constitute error.

[16] Nor is the appellant's complaint that the jury was not adequately informed concerning the difference between murder of the first and of the second degree well founded. By four instructions, the trial judge fully and correctly explained the essential elements of each of these offenses.

An examination of the entire cause, including the evidence, shows no error which has resulted in a miscarriage of justice. The evidence quite unerringly points to Lindley as perpetrator of a revolting crime, and he had a fair and impartial trial fully protecting him in every substantial right. After less than two hours of deliberation, the jury returned its verdict requiring that a sentence of death be imposed upon him as punishment for his commission of murder of the first degree. The verdict is amply justified by the law and the evidence.

The judgment and the order denying a new trial are, and each of them is, affirmed.

GIBSON, C. J., and SHENK, CARTER, SCHAUER, and SPENCE, JJ., concurred.

TRAYNOR, Justice (concurring).

I concur in the judgment. The instruction in terms of Penal Code, section 1105, was erroneous for reasons set forth in People v. Thomas, 25 Cal.2d 880, 894-896, 156 P.2d 7, and in my concurring opinion in People v. Albertson, 23 Cal.2d 550, 586-589, 145 P.2d 7. It is doubtful whether such an instruction should be given even if accompanied by a proper explanation, but in any event the sentence that the court added in its instruction to the text of the section did not explain adequately the meaning of the section. I do not believe, however, that the error was prejudicial in this case; it is improbable that a reasonable jury properly instructed would have rendered a different verdict.

I believe that People v. Kolez, 23 Cal.2d 670, 145 P.2d 580, should be overruled for the reasons set forth in my dissenting opinion therein. Until it is, however, an instruction like the one there involved is not erroneous.

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70 Cal.App.2d 478

OPP v. FRYE et al.

Civ. 3340.

District Court of Appeal, Fourth District, California.

Aug. 9, 1945.

Hearing Denied Oct. 4, 1945.

1. Husband and wife 🔑264

In action by widow against deceased husband's executors for an accounting, evidence supported finding that funds deposited in husband's bank account opened in 1920, and on which wife was allowed to draw checks were not owned by husband and wife as tenants in common but were either the separate property of the husband or community property of the parties.

2. Joint tenancy 🔑5

Personal property acquired with joint tenancy funds retains the character of joint property unless by some agreement between the parties its character was changed, but such agreement need not be in writing and intention may be shown by circumstantial as well as by direct evidence and by inferences reasonably to be drawn therefrom.

3. Wills 🔑6, 800

A will whereby testator placed all his property in trust and gave all the net income to wife for life, and document whereby wife acquiesced in will and waived all claim to any interest in the property, was sufficient evidence of an agreement changing character of joint tenancy property so as to permit property to be disposed of by husband's will.

4. Wills 🔑788

Evidence supported finding that waiver which wife executed contemporaneously with execution of husband's will giving her net income from all the property for life, and under which waiver she waived all claims to any share of property, was not procured by undue influence or fraud, that wife received sufficient consideration therefor, that husband took no advantage of wife and made no misrepresentations and that wife was fully advised of nature and effect of waiver and executed it freely and voluntarily.

5. Wills 🔑785

Where husband in original will bequeathed $2,500 to employee and in a codicil eliminated such provision, codicil did not release wife's waiver whereby she acquiesced in will giving her net income of all the property for life and waived any claim she might have to any interest in the property, and did not cause a failure of consideration for waiver which recited as a consideration the provisions made for wife in will.

Appeal from Superior Court, San Diego County; Edward J. Kelly, Judge.

Action by Augusta Opp against Frank A. Frye, and another, as executors of the last will of Fred Opp, deceased, for an accounting, the purpose being to establish that part of the property in the hands of the executors was the separate property of the plaintiff, the widow. From the judgment, plaintiff appeals.

Affirmed.

Dempster McKee, of San Diego, and Henry T. Moore, of Los Angeles, for appellant.

Gray, Cary, Ames & Driscoll and John M. Cranston, all of San Diego, for respondents.

BARNARD, Presiding Justice.

This is an action brought in the name of the widow against the executors of her deceased husband's estate. While in form it is one for an accounting its real purpose is to establish that all or a large part of the property in the hands of the executors is, in fact, the separate property of the widow.

Augusta Opp and Fred Opp were married in 1880, and lived together in complete harmony for about 60 years, until he died on November 15, 1940. Prior to their marriage Mr. Opp was earning $150 a month as a salesman. Mrs. Opp had saved $1,565.59 from teaching school, which she turned over to her husband, in whom she "had supreme confidence." Some two years after their marriage Mr. Opp went into the wholesale tobacco business for himself. Mrs. Opp testified that throughout their married life she attended strictly to the housekeeping and that her husband attended to all business affairs. That they were both successful in their respective spheres abundantly appears. Her husband's original capital, aside from any possible savings from his salary, consisted of the $1,565 he received from his wife and $1,000 which he borrowed from his father, which he later repaid with interest. When he died he left, in addition to a home in San Diego, the title to which stood in both their names as joint tenants, personal property which was appraised in the estate at $641,318.64. This consisted entirely of municipal bonds, made payable to bearer, with the exception of about $6,700 in cash, an automobile appraised at $250 and his interest in the household furniture appraised at $2,500.

Mr. and Mrs. Opp lived in St. Louis, where his business was, until 1913, when they bought the home in San Diego and Mrs. Opp has since resided there. The court found that Mr. Opp continued to reside in St. Louis until 1919. In any event, during these six years, he spent considerable time in St. Louis looking after his business. He sold his interests there in 1919, and thereafter resided in San Diego until his death. In 1920, he opened a bank account in San Diego and sometime subsequently he authorized the bank to honor checks on this account drawn by Mrs. Opp. In 1931 a new joint account with this bank was created, both Mr. and Mrs. Opp signing the usual joint tenancy card. In 1937 Mr. Opp withdrew the balance in this joint account, amounting to $24,132.76, and opened a new account in his own name which was continued until his death. Large amounts were deposited and withdrawn by Mr. Opp from these respective accounts and some checks were drawn by Mrs. Opp on the first two of them. Some of the securities here in question, of the value of $115,000, were traced to withdrawals from the joint tenancy account during its existence.

In 1935, Mrs. Opp inherited from her brother an interest in real property in Kansas City. While this was at all times recognized as Mrs. Opp's separate property, income therefrom to the amount of $3,809.66 was, with her consent, deposited in the husband's bank account and judgment for that amount was given to the plaintiff. No question with respect to that property or the income therefrom is here raised.

Mr. and Mrs. Opp had only one child, a son. To put it charitably, they were greatly disappointed in his inability to understand the value of money. In 1936 Mr. Opp made a will in which he provided that all of the income from the entire estate should go to Mrs. Opp as long as she lived, and that after her death a $50,000 life insurance policy should be purchased for the son and the remainder of the estate should go to the son's four children, a boy and three girls. In connection with that will, Mrs. Opp signed a waiver similar to the one here involved.

Mr. Opp later told his attorney that he had found that his grandson had no more regard for the value of money than his own son had, that he had already given his son a fortune, that he wanted to treat the son and the grandson alike and provide an annuity for each, and that he wanted to change his will accordingly.

On October 6, 1938, the will here in question was executed. This will gave $2,500 to an old employee, provided he survived the testator, and gave all of his personal effects, his interest in the household furniture and any automobile he might own to his wife. The will then gave "the entire rest, residue and remainder of my estate, of whatsoever kind and character and wheresoever situated, which I may own or in which I may have an interest at the time of my death," in trust to Louis Almgren and Frank A. Frye, who were also named as executors. The trustees were directed to pay all of the net income from the trust estate to Mrs. Opp as long as she lived. It was then provided that upon the death of Mrs. Opp the trustees should purchase certain annuities which would provide an income of $150 per month each to the trustor's son and grandson, so long as they live, and that the remainder of the trust estate should go in certain designated ways to the testator's three granddaughters.

On the same day, Mrs. Opp signed before witnesses a waiver which reads as follows:

"Waiver of Wife to Community and Separate Property, Rights, and Election to Take Under Will.

"I, Augusta Opp, wife of Fred Opp, maker of the foregoing Will dated October 6th, 1938, clearly understanding that my said husband by his said Will disposes not only of all of his separate estate but also all of our community property, in case there is such, including the share thereof which I am entitled to take and receive by law upon his death, as well as his own share or interest therein, being fully convinced in my own mind of the reasonableness and equity of said Will and the wisdom of its provisions, and in consideration of the provisions made for me therein, I hereby elect to and do accept, acquiesce in and consent to said Will and all of its provisions, including disposition at the death of my said husband of all of our community property thereunder, and I hereby waive all claims to my share of any community property, and all and any other claims, rights, interests and estates which I may have at the time of the demise of my said husband upon or in all of his separate property and all of our community property, including all of his property exempt from execution and my right to a probate homestead, but not including, however, and expressly excepting therefrom my right to a family allowance out of the estate of my said husband during the probate administration thereof, and I hereby accept such of said provisions of said will as apply to or concern me, except as above expressly excepted."

On October 2, 1939, Mr. Opp executed a codicil to his will, which revoked the $2,500 bequest in favor of the old employee and which otherwise confirmed, ratified and republished the will of October 6, 1938. Mr. Opp told his attorney in this connection that this employee had had a leg amputated and was severely ill and that he wanted to provide for him during his lifetime. It appears that this provision in the original will would have been ineffective, in any event, as this employee predeceased the testator.

On November 7, 1939, Mrs. Opp executed a will in which she left everything that she might own or in which she might have an interest to her husband should he survive her. This will then referred to the trust provision of her husband's will of October 6, 1938, and provided that in the event her husband predeceased her all of the property which she owned or in which she had any interest should be added to and become a part "of the residuary trust estate created for the benefit of my said granddaughters by Article Five of my husband's said will" and that "I purposely make no bequest to my said son Harold B. Opp or to my grandson Fred Opp, Jr., since adequate provision has been made for them in my husband's will."

After the death of Mr. Opp an action, similar in purpose to the present action, was brought in the name of Mrs. Opp as plaintiff. Mrs. Opp's testimony at the trial of that action was read in evidence at the trial of this action. She then testified that she did not start that action; that she had had nothing to do with it; that she did not read the complaint therein and had no recollection of signing it; that "I was not the plaintiff that did that"; that she had never talked with anyone about bringing or filing that action; that "I haven't been suing anybody"; and that she had not retained any lawyers to bring suit against the executors of her husband's will. She further testified that she did not contend that her husband had taken any unfair advantage of her in connection with the disposition of his estate and that it was not her desire to change any of the plans her husband had for the disposition of his estate on his death, and that "Whatever he did was right." That action was dismissed and a few days later the present action was brought. It not only appears that the former action was brought without the knowledge of Mrs. Opp and contrary to her desires, but it also rather clearly appears that the moving spirit in bringing that action was the son of Mr. and Mrs. Opp.

Circumstances which here appear justify the inference that he is the real plaintiff in this action.

Briefly stated, the complaint herein alleged that shortly after their marriage the plaintiff turned over an unknown amount of money to her husband to manage for her; that the bank account maintained from 1920 to 1931, with all securities purchased therefrom, were the property of herself and her husband as tenants in common; that the securities purchased from the joint tenancy account, opened in 1931, remained as joint tenancy property; that in 1937, her husband closed this account and opened one in his own name without her knowledge; and that her husband had received and deposited in these accounts certain income from property she inherited from her brother. The prayer was for an accounting and for judgment for all amounts found due. The answer raised an issue as to all these matters and pleaded the waiver and election to take under the will above referred to; that plaintiff had accepted partial distribution under the will and was estopped to maintain the action; and that the action was barred by laches.

The court found that the money turned over to the husband after the marriage was given to him by the plaintiff as a gift; that during the marriage the plaintiff had no separate property other than that which she inherited from her brother; that Mr. Opp had received $3,809.66 in income therefrom for which he had not accounted; that while Mr. Opp authorized the plaintiff to draw checks on the bank account opened in 1920 that account was never owned by the parties as tenants in common; that a joint tenancy account was opened in 1931 and that seven items of the securities listed in the inventory came from that source; that in 1937, with the knowledge of the plaintiff, Mr. Opp withdrew the balance in this joint account and opened a new account therewith in his own name; and that he was entitled to dispose of all of the personal property listed in the inventory, and that all this property is a part of his estate with the exception of the $3,809.66. The court then found that the waiver above referred to was executed contemporaneously with the execution of the will and was attached thereto; that this waiver was not procured by undue influence or fraud; that the plaintiff received sufficient consideration therefor; that Mr. Opp took no advantage of the plaintiff in that connection and used no adverse pressure of any kind; that he made no misrepresentations and there was no concealment; that the plaintiff was fully advised of the nature and effect of this waiver and executed the same freely and voluntarily; that the same is in all respects valid and binding; that the plaintiff has accepted certain articles through a partial distribution under the will; that by reason of the foregoing the plaintiff has elected to take under the terms of the will and is estopped to assert any other claim to any of the property in question other than the said sum of $3,809.66; and that the plaintiff at no time prior to the death of Fred Opp repudiated or attempted to rescind this waiver or indicated any dissatisfaction with the terms of the will or with the terms and conditions of the waiver. Judgment was entered awarding the plaintiff $3,809.66 and this appeal followed.

Appellant's contention, that the money turned over to Mr. Opp by Mrs. Opp shortly after their marriage constituted a loan, or at least a trust for which Mr. Opp was expected to and bound to account, may be first considered. Mrs. Opp at no time testified that she lent the money to her husband, or that she gave it to him to hold for her or to invest for her, or that she expected him to account for it. At the first trial, when asked whether, after their marriage, she had turned over to her husband what money she had she replied: "Yes, I felt he was a capable business man, and could best take care of my funds so I gave it all to him." And when further asked for what purpose she had turned the money over to her husband she replied that she "felt he could do more with it, than I could or the bank." At the trial of this action Mrs. Opp, who was then between 85 and 90 years of age, was questioned at her home. Because of her condition, the doctor had ordered that only one person ask her questions and, by stipulation, this was left to the judge. Very few questions were asked. She then testified that after her marriage she had turned over the money she had to her husband, that he handled her affairs, that she had supreme confidence in him, and that he was honest and would not take anything belonging to another. She was then twice asked whether, when she gave this money to her husband, she did it as a loan or whether she expected him to return it, and she replied: "I never thought of it again." After a few questions about the property in Kansas City which she inherited from her brother, and which are not material here, the court asked her whether she "intended to establish a trust when you gave your savings to your husband." She replied "No."

Two witnesses testified that in late years Mr. Opp had told them that he used the money he got from his wife in starting a business of his own. Another witness testified that in 1938 Mr. Opp told her "Mrs. Opp had about $7,000 and I took it and invested it and that is where we got our start in the first place. You know great trees from little acorns grow." The amount saved by the plaintiff and turned over by her to her husband was conclusively fixed at $1,565.59. Assuming that a part of the testimony, and possible inferences therefrom, would support a contrary finding the court's finding in this regard is amply supported by the evidence.

[1] There is no merit in the contention that one of the findings, that funds deposited in the bank account opened in 1920 were not owned by these parties as tenants in common, is not supported by the evidence. While Mrs. Opp's name appears on the signature card that card contained no statement that she was a co-owner of the account and it sufficiently appears that her signature was placed there sometime after the account was opened. A notation on the back of the card refers to Mr. Opp only. Moreover, the first three of the bank's ledger sheets in this account, covering a period of more than a year, contained only the name of Mr. Opp except that on the first one Mrs. Opp's name had been written in with a pen or pencil. A number of subsequent sheets contained only the name of Mr. Opp. There is no evidence that Mrs. Opp ever deposited any funds in this account and the evidence justifies the inference that all deposits therein were made either from Mr. Opp's separate property or from their community property. The court's finding is sufficiently supported. Denigan v. Hibernia, etc., Society, 127 Cal. 137, 59 P. 389.

Appellant's main contentions are that certain of these securities were purchased with funds taken from the joint tenancy account and that property so acquired remains joint tenancy property (see In re Estate of Harris, 169 Cal. 725, 147 P. 967; In re Estate of Harris, 9 Cal.2d 649, 72 P. 2d 873); that the waiver signed by Mrs. Opp attached to the will is invalid; and that, in any event, it was not intended to cover Mrs. Opp's joint tenancy interest in some of these securities.

[2] The rule announced in the Harris cases is that personal property acquired with joint tenancy funds retains the character of joint property "unless by some agreement between the parties its character was changed." None of the cases hold that such an agreement must be in writing and it is well settled that an agreement affecting such rights may be oral, and that the intention of the parties with respect thereto may be shown by circumstantial, as well as by direct, evidence and by inferences reasonably to be drawn therefrom. In re Estate of Sehabiague, 47 Cal.App. 2d 793, 119 P.2d 30; Williamson v. Kinney, 52 Cal.App.2d 98, 125 P.2d 920.

[3] Aside from some other evidence we think this will and waiver are sufficient evidence of such an agreement, and of the intention of the parties to change the character of any joint tenancy property here in question so as to permit the same to be disposed of by the will.

No attempt was made in the will to dispose of the Opps' home in San Diego. They knew and recognized, and Mrs. Opp was told before she signed the waiver, that this property, being held in joint tenancy, would go to her outside of the will. After the bequest to the old employee and one giving the household furniture and the automobile to Mrs. Opp, the will gives "the entire rest, residue and remainder of my estate of whatsoever kind or character and wheresoever situated, which I may own or in which I may have any interest at the time of my death," to the trustees on certain trust conditions. The title of the waiver not only includes all the separate property rights of the wife but the body thereof includes the statement that she clearly understands that the will disposes of all of the husband's separate estate, all of their community property and also "including the share thereof which I am entitled to take and receive by law upon his death." There is then the statement that she accepts all of the provisions of the will which apply to or concern her, with the sole exception that she reserves the right to a family allowance.

All, or nearly all, of the property here in question was originally the community property of these parties or would have been had they resided in this state at all times. To them, it was property they had accumulated together. If, as the appellant contends, nearly all of this property was actually the separate property of the wife, if it were so considered by the wife, and if the husband was merely attempting to dispose of the remainder, the trust created by the will would have been entirely insufficient to provide for the purposes sought to be accomplished, and the making of the main provisions of the will would have been an idle act. The language used in the will and the waiver, and the facts surrounding their execution, fully support the inference and justify the conclusion that the parties no longer intended to be governed by any legal relationship arising from any joint tenancy status with respect to this personal property, and that they were dealing with and treating all of the property which they had accumulated during their married life as a whole, aside from the home property, and as being the estate of the husband. It appears that the attorney who prepared the will did not know that any of this personal property had ever been held in joint tenancy, and it clearly appears that neither Mr. nor Mrs. Opp were relying or acting on such a fact.

The facts here are essentially like those in Security-first Nat. Bank v. Stack, 32 Cal.App.2d 586, 90 P.2d 337, 341, and similar principles should be applied. In that case the court said: "The term 'estate' is comprehensive, and as has been hitherto declared, 'One of the most common uses in which the word "estate" is used is to denote and describe in a most general manner the property composing the assets of a deceased,' and, 'During the lifetime of the husband, he is the owner and entitled to the possession of all the community property.' In re Estate of Sayre, 114 Cal.App. 649, 300 P. 833, 834. It is likewise evident as heretofore noted in effect that upon the death of the husband the property purchased with funds from the joint bank account, by agreement of the parties, became and was a part of the 'entire community estate' referred to in the will, and hence 'property disposed of by said will' as provided in the election and waiver. Any other construction would in effect extend legal sanction to the unwarranted repudiation of a valid contract, and would as well defeat the obvious intent of the testator."

In Estate of Stewart, 74 Cal. 98, 15 P. 445, 446, the court said: "Every clause in the will bears a clear and indisputable badge of that intention. He dealt with the property just as he had been accustomed to deal with it through a long, active, and successful business life; just as he had in accumulating and disposing of the property during his lifetime, without consulting his wife, or asking her to join with him in any conveyance. He uses the phrase 'my estate' in the sense that he had been accustomed to use it all of his life."

The trial court has construed the will and waiver as an agreement, and as indicating an intention that these bearer bonds, which were purchased with joint tenancy funds, should constitute a part of the estate covered by the will, and this interpretation is a reasonable one even though it be conceded that another is possible. It sufficiently appears that these parties intended the will and waiver to cover and dispose of all of this personal property which they had accumulated together, and that they referred to the estate of the husband in this sense.

The appellant contends that the fact that Mrs. Opp was told that their home, being held in joint tenancy, was not covered by the will, and the fact that joint tenancy property was not otherwise mentioned, conclusively proves that there was no intention to change the status of any personal property held in joint tenancy. This creates no more than a conflict and the other evidence is sufficient to support the court's interpretation and conclusion. If the parties had any ideas in this connection they may have thought, as was then generally understood, that a joint tenancy in real property could not be changed except by deed. The fact that they did not mention any joint tenancy property other than the home is, under the circumstances, more consistent with the idea that they then had no intention of treating any of the personal property as being in joint tenancy, than with the idea that they did not intend the will to affect this large part of their accumulations. In any event, the evidence, as a whole, supports the inference that these parties intended to deal with all of this personal property as a unit and irrespective of its kind or character.

There is also other evidence supporting the court's conclusions in this regard. Mrs. Opp had signed a similar waiver two years before and the matter was one which she had ample time to consider. A year after this waiver was signed she quite effectively ratified and confirmed this disposition of the property, and disclosed her own intentions in this regard, by the provisions of her own will. Moreover, she testified at the first trial that she had never claimed any interest in these securities which Mr. Opp purchased. She further testified that it was not her desire to change any of the plans her husband had for the disposition of his estate, that she did not contend that her husband had taken any unfair advantage of her in this regard, and that "He couldn't do that. He wouldn't do that." When asked if her husband had ever abused the confidence she had in him, she replied: "Oh no, no, no." After repeatedly denying that she had any part in this litigation she exclaimed: "Oh, I am getting so tired, Mr. McKee, of this drama, I wish it were in Halifax." Even after the first action was brought, when she was presumably advised of her possible rights by counsel supposed to be representing her, she still asserted that she had not been imposed upon, and that she was satisfied with and had no desire to change her husband's disposition of the estate. At no time did she testify that she intended anything to the contrary when she signed the waiver.

It is further contended that this waiver must be held invalid because of various presumptions of undue influence arising from the marriage relation, inadequacy of the consideration, failure to disclose all of the facts and the absence of independent advice. It is argued that this case closely parallels the case of Gaines v. California Trust Co., 48 Cal.App.2d 709, 121 P.2d 28. In that case a judgment sustaining a waiver was reversed because the judge had assumed that the property was separate property when he was required to assume that it was community property, and because there was no evidence to overcome a presumption of undue influence.

In addition to the information given her when she signed the former waiver, it appears that Mrs. Opp was thoroughly informed of the provisions of this will and the waiver before she signed the latter, that her husband took no part in this, and that she apparently understood completely what was being done and expressed herself as in agreement therewith. The attorney who drew the will testified that he considered he was acting as attorney for both Mr. and Mrs. Opp, and that he prepared the will and gave it to Mr. Opp some two weeks in advance; that he went to their home and sat down at a table with Mrs. Opp while his partner and Mr. Opp were looking at art objects; that he went over the will with Mrs. Opp paragraph by paragraph; that when he explained the trust provision providing for an annuity of $150 a month to the son and grandson Mrs. Opp stated she understood it and that she considered it for the best; that he read the waiver word for word, including the title, explaining it as he read it; that he told her that the law was uncertain and that it would be difficult in this case, because of the manner in which the property had been acquired, to determine what part was separate property and what part community property, but that whatever it was the waiver covered the entire estate; that he told her that if she signed the waiver she would receive the income from the entire estate while she lived, and that after her death annuities would be purchased for her son and grandson and the rest of the estate would go to the three granddaughters; that he told her that this "would be a waiver of all her interest in the estate, whether it was separate property or whatever kind of property it was" and that "if she signed this, it covered the entire estate, both Mr. Opp's interest in it and any interest which she might have in it", except for the home and the right to a family allowance; that he then asked her if she understood this and if it met with her approval and she replied in the affirmative; and that Mr. Opp then executed the will and Mrs. Opp then signed the waiver, which was witnessed by the same persons.

[4] Not only does it appear that Mrs. Opp signed this waiver voluntarily and with the intention to accept the provisions of the will as covering all of the property owned by herself and her husband, with the exception of the home and that which she had inherited from her brother, but the testimony of Mrs. Opp herself rather completely dispels any presumption of undue influence which could have existed. Any possible conflict which may be said to arise from isolated portions of the evidence has been resolved by the trial court and the evidence is entirely sufficient to support the findings in this regard.

[5] Some contention is made that the execution of a codicil by Mr. Opp in 1939 released the waiver. In Re Estate of Johnston, 197 Cal. 28, 239 P. 397, which is relied on, a bequest which was the sole consideration for the execution of the waiver was changed by a codicil. A quite different situation here appears. As a matter of fact, the codicil here had no actual effect as the old employee, who had been given $2,500 in the event he survived the testator, died before Mr. Opp's death. Moreover, the waiver declares that the

consideration for its execution is "the provisions made for me therein" and it clearly appears that an additional consideration was Mrs. Opp's desire to protect her son and grandson to the extent of assuring them something to live on, and to provide for her granddaughters through the trust. Mr. Opp had already taken care of this old employee in his lifetime, there is no failure of consideration, and no such alteration appears as would upset and release the waiver.

It is unnecessary to discuss a further point relied upon by the respondents. The material findings are not only supported by the evidence but it would be peculiarly inequitable to reverse this judgment under the circumstances which appear to justify the inference that the only advantage taken of this aged and infirm lady is being taken by others and was not taken by her husband.

The judgment is affirmed.

MARKS, J., concurs.

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70 Cal.App.2d 517

HYDE et al. v. HAGEN et al.

Civ. 12876.

District Court of Appeal, First District, Division 2, California.

Aug. 17, 1945.

Rehearing Denied Sept. 15, 1945.

Hearing Denied Oct. 15, 1945.

1. Master and servant 🔑80(10)

In action for damages for alleged breach of promoters' contract providing that plaintiff should be elected vice president and be employed as saleswoman at $100 per month salary, plaintiff was not entitled to recover $100 per month for period which included date on which she took a leave of absence and date on which she subsequently made demand to be reemployed and was refused, where neither date was proved.

2. Judgment 🔑251(1)
Trial 🔑396(2)

Where complaint for money judgment for alleged breach of promoters' contract did not allege payment of increased salaries voted to certain officers of defendant corporation, and answer did not affirmatively introduce that issue, finding of such issue was not responsive to pleadings or evidence and judgment for plaintiff on such issue could not be sustained. Code Civ. Proc. § 580.

◆

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action by Alex Hyde and another against P. O. Hagen and others to recover damages from alleged breach of contract. Judgment for plaintiffs, and defendants appeal.

Reversed.

J. W. Coleberd, of South San Francisco, for appellants.

Clarence E. Todd, of San Francisco, for respondents.

STURTEVANT, Justice.

The plaintiffs Alex Hyde and Mae Sewell commenced an action against the defendants P. O. Hagen, Margery Hagen, his wife, Robert P. Hagen, his son, and Hagens, Inc., to recover damages for an alleged breach of contract. The defendants answered and the action was tried before the trial court sitting without a jury. The court made findings in favor of the plaintiffs and from the judgment entered thereon all of the defendants have appealed.

Prior to August 1, 1940, the defendant P. O. Hagen was the owner and operating a store in San Mateo. For a few months prior thereto Mrs. Mae Sewell occupied space in the store and was engaged in selling corsets. Shortly prior to August 1, 1940, Mr. Hagen and Mrs. Sewell commenced conversations regarding the investment by Mrs. Sewell in the business so conducted by the defendant Hagen. In those conversations the matter of opening other stores was mentioned and discussed. Mrs. Sewell advised Mr. Hagen that she had financial backing by the plaintiff Alex Hyde, and at times Mr. Hyde appeared and took part in said conversations. Prior to said conversations Mr. Hagen from time to time wrote down certain memoranda and afterwards the parties met and discussed said memoranda. The first document discussed by them was as follows: "Officers of Corporation would be as follows P. O. Hagen, Pres. Mae Sewell V. Pres. Robert Hagen Secy. & Treas. Suggested salaries P. O.H. 200.00 pr. mo. Mrs. Sewell 150

Robert No salary until needed. These could be changed as profits would permit. The reason I want Robert in, is to train him to be able to take charge of the business in the future and would take him in when we could and when the buying and managing would be too much for one. P.O.H."

Mr. Hyde was dissatisfied with said document, claiming it was incomplete. The parties met later and Mr. Hagen produced a document in words and figures as follows:

"Mr. Hyde Proposed Plan for incorporating—Stock to P. O. Hagen for net worth of present store and good will ($1000) should be about $4500 Mr. Hyde and Mrs. Sewell to subscribe for $4000 to be issued and paid for as needed—Salaries until profits would permit increases P.O.H. 150 Mrs. Sewell 100 Mae Hagen 100. Stock in present store to be taken at cost value (It is practically all new) and fixtures at cost."

At a later meeting Mr. Hagen produced another document which is as follows:

"Suggested plan for expansion Incorporate (100 shares @ 100 ea. $10,000. Issue stock as follows—Take in San Mateo store in which mds. and fixtures would be

about .... net.	$3500
Good will	1000
Stock to P. O. Hagen	$4500
Would sell to Mrs. Sewell or others	4000
	$8500

Leaving 15 shares open."

Later the parties formed a corporation having a capital stock of 100 shares of the par value of $100 each. Forty shares were issued to Mr. Hagen, twenty-five shares to Mr. Hyde, and five shares to Mrs. Sewell. That left thirty shares of stock unissued. After the corporation was formed a meeting of the stockholders was held at which Mr. Hagen, Mrs. Hagen, and Mrs. Sewell were elected directors. The directors met and chose Mr. Hagen as president, Mrs. Sewell as vice president, and R. P. Hagen as secretary and treasurer. As so organized the corporation proceeded to conduct business.

Mrs. Sewell stopped her corset business and commenced to work for the corporation immediately after it was formed and continued until the latter part of June, 1941. The exact date is not stated in the record. At that time she stated to Mr. Hagen that she was going to take a leave of absence. Mrs. Sewell acted as a director until the 6th day of January, 1942, when, as alleged in the answer of defendants, "she was deposed and deprived of her said position as director and vice president." On a date not stated in the record she reported for work and Mr. Hagen stated to her that he had all of the help that the business needed and could not employ her at that time.

Prior to Christmas in the year 1941 Mr. Hyde and Mrs. Sewell went to Oregon on a visit. While there and on December 24, 1941, Mr. Hyde wrote to Mr. Hagen giving the latter his post office address as Harbor, Oregon. In that letter he stated: "Believe your stockholders meeting is the *second Tuesday in January*. I'll be back before that time." On the 27th of December Mr. Hagen wrote Mr. Hyde acknowledging receipt of that letter. Among other things he stated: "Received your letter, hope you are having a good time—yes our meeting is as you state." Later Mr. Hyde left Oregon and returned. On January 2, 1942, Mr. Hagen wrote Mr. Hyde as follows: "Just discovered that our meeting is the *first Tuesday in January at 2 p.m.*" That letter was mailed to Harbor, Oregon. The first Tuesday in January, 1942, was January 6. The letter was not received by Mr. Hyde until after that date. Neither Mr. Hyde nor Mrs. Sewell attended the stockholders meeting.

After the organization of the corporation on the 28th day of August, 1940, a resolution was adopted fixing the salary of P. O. Hagen as president at $150 per month and the salary of Mrs. Sewell as vice president at $100 per month. At a meeting of the board of directors on the 24th day of March, 1942, a motion was duly carried "that the salary of P. O. Hagen, President, be increased to $250 per month beginning April 1st, 1942." Later, at a meeting of the board of directors on the 5th day of January, 1943, a motion was duly carried "to elect Mr. P. O. Hagen to continue as president of the corporation at a salary of $3000 for the year 1943." As a part of the same resolution it was ordered that Mrs. M. B. Hagen be elected vice president for the year 1943 with salary of $1500.

At the same meeting of the stockholders held January 5, 1943, Mrs. C. Todd appeared as a proxy representing Mr. Hyde and Mrs. Sewell as stockholders. At a proper time and in a proper manner she made a motion that Mrs. Sewell be elected a director. In support of her motion she cumulated the shares held by her under her said proxy and offered to vote the cumulated shares in favor of Mrs. Sewell. Her offer was refused and the stockholders purported to elect P. O. Hagen, M. B. Hagen and R. P. Hagen.

The plaintiffs pleaded a cause of action seeking a money judgment. As to the payment or non-payment of said increased salaries to P. O. Hagen and Margery Hagen the pleadings contain no allegations or denials. No evidence thereon was offered by either party. The trial court rendered a judgment in favor of the plaintiffs and against the defendants (1) that Mae Sewell to have judgment against P. O. Hagen and Hagens Inc. in the sum of $100 for each month after June, 1941; (2) that defendant P. O. Hagen repay to Hagens Inc. $100 per month beginning with the month of April, 1942; (3) and that Margery Hagen repay to said Hagens Inc. the sum of $25 per month beginning with the month of January, 1943.

The defendants contend that the findings are not supported by the evidence and that the findings do not support the judgment.

It was the theory of the plaintiffs that the parties entered into a promoters contract agreeing to organize a corporation, distribute the corporate stock among them, elect Mr. Hagen president, elect Mrs. Sewell vice president, and to fix the salary of Mr. Hagen at $150 per month, the salary of Mrs. Sewell at $100 per month, and the salary of Mrs. Hagen at $100 per month. Each and all of those steps were duly taken. No evidence was tendered by either party as to what salaries or the amount thereof was paid to any one of said persons. It was also the theory of the plaintiffs that the contract provided that Mrs. Sewell should be elected vice-president and that she should be employed as a saleswoman and that such contract was a continuing contract.

[1] As recited above Mrs. Sewell left her position in the latter part of June, 1941. The exact date does not appear. Later she returned and asked to be reemployed. The date of that request is not shown in the record. Manifestly she could not recover for the period between the date when she took the leave of absence and the date when she made a demand to be reemployed. Neither date having been established any right to recovery by her cannot be ascertained. Therefore, the judgment in favor of Mrs. Sewell must be reversed.

[2] The judgment in favor of the corporation must also be reversed because the matters on which it was based were not within the issues made by the amended complaint and answer thereto. The amended complaint does not allege the payment of the increased salaries. The answer did not affirmatively introduce that issue. The finding thereon was not responsive to the pleadings or the evidence. Therefore that part of the judgment must also be reversed. Morrow v. Morrow, 40 Cal.App.2d 474, 485, 105 P.2d 129; Code of Civil Procedure, sec. 580; 14 Cal.Jur. 975, Judgments, sec. 62; 2 Cal.Jur. 1031, Appeal & Error, sec. 613; 24 Cal.Jur. 983, Trial, sec. 212.

The judgment appealed from is reversed.

NOURSE, P. J., and DOOLING, Justice pro tem., concur.

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70 Cal.App.2d 339

PEOPLE v. KEITH RY. EQUIPMENT CO.

Civ. 7119; Sac. 5670.

District Court of Appeal, Third District, California.

July 27, 1945.

Rehearing Denied Aug. 27, 1945.

Hearing Denied Sept. 24, 1945.

1. Taxation 🔑594

Under provision of Private Car Tax Act that certificate of tax delinquency shall be prima facie evidence of levy of tax, of delinquency, and of Equalization Board's compliance with act, defendant's motion for nonsuit was properly denied in state's action to recover delinquent taxes allegedly due under the act where certificate of delinquency was introduced in evidence. St. 1937, pp. 621–624, §§ 4, 6, 11, 18.

2. Trial 🔑419

Even if trial court erred in denying defendant's motion for nonsuit, such error would not justify reversal of judgment where defendant did not rest on its motion but proceeded to introduce evidence, which cured any defect in plaintiff's case.

3. Taxation 🔑587

A foreign corporation engaged in business of furnishing private railroad cars to shippers for transportation of property, which failed to file the report with State Board of Equalization required by Private Car Tax Act, failed to petition for reassessment, and failed to exhaust or even take advantage of administrative remedy, could not secure judicial relief and have court, in state's action to recover taxes allegedly due from such corporation, review and condemn method by which board arrived at its conclusion in assessing tax. St.1937, pp. 621–623, §§ 4, 6, 11.

4. Officers 🔑103

One complaining of administrative action, before seeking judicial relief, must exhaust his remedies before the administrative body of whose action he complains.

5. Taxation 🔑587

Though, in California, findings of fact of purely administrative agencies may be reviewed by courts in proper proceedings, litigants may not, by refusing or neglecting to submit issues of fact to such agencies, by-pass them, and call upon courts, in a suit by state to recover delinquent taxes, to determine matters properly determinable originally by such agencies.

6. Evidence 🔑75

Where corporation, engaged in furnishing private railroad cars to shippers, failed to produce its own records to show exact number of its cars used in California during taxable years involved in state's action to recover taxes allegedly due under the Private Car Tax Act, though it could have done so, such failure warranted trial court's conclusion that if produced such records would not have been favorable to such corporation's claim that tax assessed was excessive. St.1937, pp. 621–623, §§ 4, 6, 11.

7. Constitutional law 🔑229(1)
Taxation 🔑37

That apportionment of taxes under Private Car Tax Act on basis of average number of private cars owned in state and furnished to shippers for transportation of property by corporation engaged in such business may not result in mathematical exactitude is not a constitutional defect, but rough approximation rather than precision is as practical matter the norm in such tax system. St.1937, p. 621 et seq., § 1 et seq.; Const. Cal. art. 11, § 12; art. 13, §§ 10, 14; U.S.C.A. Const. art. 6, § 2; Amend. 14.

8. Taxation 🔑593(3)

In action to recover taxes, testimony that defendant corporation furnished private cars to shippers, that shipper paid railroads the regular freight charges, that railroads paid defendant 1½ cents for each mile the car traveled, and that generally no charge was made by corporation directly to shipper, justified conclusion that corporation's cars were not leased to railroads and hence were not excluded from operation of Private Car Tax Act. St.1937, p. 621 et seq., § 1 et seq.

9. Taxation 🔑166

The constitutional provision imposing tax on actual valuation of property of car loaning companies applied to foreign corporation engaged in business of furnishing its privately owned railroad cars to shippers, as against contention that such constitutional provision as amended in 1933 applied only to public service corporations. Const. art. 13, § 14, as amended in 1933.

10. Constitutional law 🔑26

The Constitution is not a grant of power, but rather a limitation on powers of Legislature, which limitation must be strictly construed, and unless there is some constitutional provision prohibiting a legislative enactment it cannot be said that Legislature was without power to enact it.

11. Taxation 🔑37, 38, 40(3), 253

The Private Car Tax Act is not violative of constitutional provision that all property shall be assessed in county, city, town or township, or district in which it is situated, or constitutional provision that Legislature shall have no power to impose taxes on inhabitants of counties, cities, or towns for county, city, town, or other municipal purposes, in view of constitutional provision empowering Legislature to tax all forms of tangible personal property and to classify all kinds of personal property for taxation in proportion to value different from any other property subject to taxation. St.1937, p. 621 et seq., § 1 et seq.; p. 623 § 13; Const. art. 11, 12; art. 13, §§ 10, 14.

12. Taxation 🔑40(7)

The Constitution does not require complete uniformity of taxation, since it exempts some property from taxation altogether, provides that solvent credits shall be taxed at a lower rate than that imposed on other classes of property, and provides that property on the unsecured rolls shall be taxed at rate for previous year and that on the secured rolls at current rate. Const. art. 13, §§ 1, 9a.

13. Taxation ⟹42(1)

Taxpayers may be treated differently if they are of different classes, and the law sufficiently meets constitutional requirement of uniformity of taxation if it acts uniformly upon the whole of any single class of individuals or objects and the classification is founded on some natural, intrinsic, or constitutional distinction. Const. art. 13, §§ 1, 9a.

14. Constitutional law ⟹46(2)

In action by State to recover taxes claimed to be due from taxpayer under Private Car Tax Act, argument of corporate taxpayer, that tax imposed on freight cars owned by railroads was lower than tax imposed on taxpayer's freight cars which it furnished shippers, and that such tax therefore violated Constitution, could not be sustained as assuming something not in evidence for failure to show that rates applied to taxpayer exceeded rates applied to similar property of railroads or that counties and school districts containing no railroads have very high rates of taxation. St.1937, p. 623, § 13.

15. Taxation ⟹40(1)

Exact equality is not possible under any system of taxation notwithstanding constitutional requirement of equality and uniformity.

16. Constitutional law ⟹229(1)
Taxation ⟹42(1)

The Private Car Tax Act is not violative of state or federal constitutional mandate regarding equality and uniformity of taxation, on theory that it attempts to classify cars belonging to private owners in a separate class from cars of same kind owned by railroads and because cars belonging to railroads are taxed only in taxing districts in which they are used and at rates applicable in such taxing districts, whereas cars belonging to private owners are taxed for state purposes at average rate of taxation computed as provided therein, and that such differentiation is unreasonable and arbitrary, in absence of proof that this results in a higher tax rate on privately owned cars. St.1937, pp. 621–623, §§ 1 et seq., 2(a), 13; Const.Cal. art. 11, § 12; art. 13, §§ 10, 14; U.S.C.A. Const. art. 1, § 8, cl. 1; art. 6, § 2; Amend. 14.

17. Taxation ⟹42(1)

The inequality which necessarily results to some degree in every selection of persons for regulation does not place classification of such persons for taxation within constitutional prohibition against inequality or lack of uniformity in taxation, but the prohibited inequality or lack of uniformity must be arbitrary. Const. Cal. art. 13, § 1; U.S.C.A. Const. art. 1, § 8, cl. 1.

18. Constitutional law ⟹48

When legislative classification is questioned, if any state of facts can reasonably be conceived that would sustain it, such facts are presumed to exist and burden of showing arbitrary action rests on one who assails the classification. U.S.C.A. Const. Amend. 14.

19. Constitutional law ⟹70(1)

The question of propriety of classification in statute is generally one for legislative power, determined in light of its knowledge of all the circumstances and requirements, and Legislature's discretion will not be overthrown unless palpably arbitrary. U.S.C.A. Const. Amend. 14.

20. Constitutional law ⟹48

In determining reasonableness of classification in statute, it will be presumed that Legislature inquired whether there were evils to be remedied and that classification made was based on result of such inquiry. U.S.C.A. Const. Amend. 14.

21. Taxation ⟹42(1)

Property may be classified for purposes of taxation as long as classification is reasonable.

22. Constitutional law ⟹48

The Private Car Tax Act is presumed to be constitutional. St.1937, p. 621, § 2(a).

23. Constitutional law ⟹48

All presumptions and intendments are in favor of constitutionality of a statute, and all doubts are to be resolved in favor of validity of statute, and before a statute may be declared unconstitutional any such conflict with Constitution must be clear, positive, and unquestionable.

24. Constitutional law 🔑70(3)

In absence of a record of consideration which moved Legislature to enact laws, court cannot assume that action of Legislature was capricious or that, with its informed acquaintance with local conditions to which the legislation was to be applied, Legislature was not aware of facts affording reasonable basis for its action.

25. Trial 🔑45(1)

In state's action to recover taxes allegedly due under Private Car Tax Act, defendant's purported offer of proof that, if records of State Board of Equalization demanded by subpoena duces tecum had been produced, defendant would have been able to show thereby the imposition on defendant's property of a tax rate higher than that imposed on property of identical nature owned by others, was not an "offer of proof", but mere conclusion which called for no ruling by court. St.1937, p. 621, §§ 1 et seq., 2(a).

See Words and Phrases, Permanent Edition, for all other definitions of "Offer of Proof".

26. Witnesses 🔑16

Demands for production of records in subpoenas duces tecum must be reasonable and must be direct and specific in their terms and not couched in general terms, and the relevancy and materiality of documents requested must be made to appear.

27. Witnesses 🔑16

In state's action to recover taxes claimed to be due under Private Car Tax Act, defendant's request that state be served with subpoena duces tecum requiring production of records of State Board of Equalization and of state showing all tax rates of counties, cities, and school districts and all general and special taxes used in computing the private car tax rate for certain years, and books and records of board and of state showing tax rate fixed for railroads operating freight cars of same kind, etc., was too broad and sought information which defendant could have obtained from railroads. St.1937, p. 621 et seq., § 1 et seq.

◆

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by the People of the State of California against Keith Railway Equipment Company to recover taxes claimed to be due from defendant for the years 1937 and 1938 under the Private Car Tax Act. Judgment for plaintiff, and defendant appeals.

Affirmed.

Leon S. Hirsh, of Chicago, Ill., and Jerome L. Schiller and John D. Costello, both of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., and A. A. Kragen & John L. Nourse, Deputy Attys. Gen., for respondent.

ADAMS, Presiding Justice.

This action was brought by the state to recover taxes claimed to be due from defendant for the years 1937 and 1938, under the Private Car Tax Act, Stats.1937, p. 621. The amended complaint alleged that defendant, an Illinois corporation, during 1937 and 1938 owned private cars which were furnished to shippers for the transportation of property; that defendant did not file a report with the State Board of Equalization as required by Section 4 of aforesaid act; that the Board, from information in its possession, estimated that defendant, during 1937, had habitually within this state an average of 56 private cars which were operated during that year upon railroads in California; that the Board assessed said cars at $29,600 and, pursuant to Section 6 of the Act, added a penalty of 10%; that defendant was served with written notice of the action of the Board, but that defendant failed to petition for a reassessment pursuant to Section 11 of the Act; that thereafter the Board fixed a tax rate of $3.60 for $100 of assessed valuation, and duly levied a tax of $1,172.60 upon defendant's cars; that notice of this action was mailed to defendant with a demand for payment, but that defendant failed to pay same, whereupon an additional penalty was added. The prayer was for judgment for $1,289.38 with interest.

Defendant answered and admitted that during 1937 and 1938 it had tank and refrigerator cars operating upon railroads in California, which were not carrying defendant's own property, but denied that it offered to furnish same to anyone. It admitted that the Board had assessed it, as alleged in the complaint, but denied that the assessment was based upon information which was pertinent, and alleged that the Board's determination of the number of cars and their value was "wholly arbitrary, grossly unreasonable, and fraudulently excessive." It denied that it habitually had "any where near" 56 cars in California during 1937-1938 or that the value of its cars would "even approximate $29,600.00." As a special defense it alleged that the Private Car Tax Act is repugnant to the 14th Amendment and Article VI, Section 2, of the United States Constitution and violates Article XI, Section 12, Article, XIII, Sections 10 and 14, of the Constitution of California. Also it alleged that it owns private cars which it rents to common carrier railroads at a specified rate of compensation fixed by the Interstate Commerce Commission, and that it is not engaged in the transportation of commodities for hire, or otherwise. It further alleged that the several common carrier railroad companies operating in California and certain "Equipment companies" own and operate freight cars of the same kind and that there is no difference in the nature, kind, basic classification and utilization between their cars and defendant's; that the cars of the common carrier railroads and the equipment companies are assessed in a different manner, and that the situs of same for taxation is fixed in the taxing districts within which their cars are actually utilized, and only in proportion to the extent of such utilization and track mileage of the railroad therein, and that tax rates applied thereto are solely for local purposes. It further alleged that the Board's action as to defendant results in a tax burden in excess of that placed upon real property by the state; that many taxing divisions have no railroads and that in those where railroad equipment is utilized there is great variance in the amount of such utilization; also that it comes within certain exemptions provided in the act, that the act discriminates against defendant, denies to it the equal protection of the laws, and deprives it of its property without due process.

The trial court found the facts to be substantially as alleged by plaintiff; that defendant's cars were furnished to shippers for the transportation of various commodities upon railroads in California, and elsewhere; that the shippers did not pay any sum directly to defendant for the use of the cars but paid the regular freight charges to the railroad companies which paid defendant 1½¢ per mile; that defendant did not engage in transportation for hire or otherwise, and did not hold itself out to the public as being ready to furnish cars to whomever might require them without reserving the right to refuse to those considered undesirable; that there was no mileage or through-line contract arrangement between defendant and any railroad company operating in California, nor were defendant's private cars leased to any such railroad company. There were findings as to the action taken by the Board as alleged by plaintiff, and the failure of defendant to report to the Board, to petition for reassessment, or to pay the tax. Further it was found that railroad companies operating within this state own cars of approximately the same character as those owned by defendant, that certain railroads lease similar private cars from owners other than defendant, and that certain of such railroads operate similar cars owned by railroad companies not operating in this state and compensate the owners thereof either upon a per diem or upon a mileage basis in amount identical with that paid to defendant. Judgment for plaintiff followed.

Defendant has appealed from said judgment, contending that the Private Car Tax Act is unconstitutional; that it does not apply to the cars of defendant; that it imposes a different and higher tax upon cars owned by defendant than is applied to identical cars owned by others; that the method of computing taxes under the act used by the Board violates constitutional mandates in that it is without relation to benefits conferred upon the property, and without consideration of the situs and use of the cars; that the method of computing the number of defendant's cars in California was not reasonably suited to achieve a correct result; that plaintiff did not make a prima facie case at the trial, because it merely introduced the certificate of delinquency as provided by section 18 of the act, and that a motion for a nonsuit made by defendant should have been granted; and, finally, that the trial court erred in sustaining plaintiff in its refusal to produce the records of the Board of Equalization upon demand by defendant.

[1, 2] Appellant's contention that its motion for a nonsuit should have been granted will be disposed of first. Respondent relies upon People v. Mahoney, 13 Cal. 2d 729, 91 P.2d 1029, wherein a certificate of sales tax delinquency was relied upon as making a prima facie case. The provisions of section 18 of the Private Car Tax Act are the same as those contained in section 30 of the Retail Sales Tax Act, St. 1935, p. 1265, and the decision in the Ma-

honey case is controlling here. But even if the trial court had erred in denying the motion for a nonsuit, such error could not be relied upon to justify a reversal of the judgment, since defendant did not rest upon its motion, but proceeded to introduce evidence which cured any defects in the state's case. Peters v. Southern Pacific Co., 160 Cal. 48, 52, 116 P. 400; Parra v. Cleaver, 110 Cal.App. 168, 170, 294 P. 6; Huston v. Schohr, 63 Cal.App.2d 267, 272, 146 P.2d 730.

[3] Regarding appellant's complaint of the method used by the Board in determining the average number of defendant's cars in the state during the taxing period, we are of the opinion that appellant is not entitled to have that method questioned on this appeal. Under the terms of the act, section 4, appellant was required to report to the Board setting forth specifically information to enable it to make the assessment prescribed by the act, and where no report is made the Board is required to make an estimate "based upon any information available to it * * * of the matters required to enable the board to complete the assessment required." Section 6. Provision is then made for notice to the owner of the property assessed, who is thus given an opportunity to protest the correctness of the estimate. After the assessment is made it is open to inspection between the first and third Mondays in August of each year, during which time the owner of the property assessed may be heard by the Board upon a petition for reassessment. Also it is provided that after the tax is levied the Board shall mail a notice to each person against whom it is levied. Appellant made no report to the Board, and, though forms for returns and the notices provided for as above set forth were mailed to it, it did not petition the Board for a reassessment. Having failed to avail itself of the remedy provided by the act and failed to exhaust or even to take advantage of its administrative remedy, it cannot secure judicial relief and seek to have the court, in an action such as this is review and condemn the method by which the Board arrived at its conclusions, and secure a determination by a court of matters properly determinable by the Board.

[4, 5] One complaining of administrative action must, before seeking judicial relief, exhaust his remedies before the administrative body of whose action he complains. Abelleira v. District Court of Appeal, 17 Cal.2d 280, 109 P.2d 942, 132 A.L.R. 715. This rule involves a policy of procedure which favors a preliminary sifting process by the established administrative agency which is authorized to take evidence and determine facts; and while in this state it is held that the findings of fact of purely administrative agencies may be reviewed by the courts in proper proceedings, nevertheless litigants may not, by refusing or neglecting to submit issues of fact to such agencies, by-pass them, and call upon the courts to determine in a suit such as this, matters properly determinable originally by such agencies. Universal Consol. Oil Co. v. Byram, 25 Cal.2d 353, 361, 362, 153 P.2d 746; Dawson v. County of Los Angeles, 15 Cal.2d 77, 81, 98 P.2d 495; Los Angeles Gas & Elec. Co. v. County of Los Angeles, 162 Cal. 164, 165, 121 P. 384, 9 A.L.R. 1277; Miller & Lux, Inc., v. Richardson, 182 Cal. 115, 187 P. 411; City of Los Angeles v. Glassell, 4 Cal.App. 43, 48, 87 P. 241; Gorham Mfg. Co. v. State Tax Comm., 266 U.S. 265, 45 S.Ct. 80, 69 L.Ed. 279, 282; First Nat. Bank v. Board of County Com'rs, 264 U.S. 450, 44 S.Ct. 385, 68 L.Ed. 784; Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638.

In Gorham Mfg. Co. v. State Tax Comm. and in First Nat. Bank v. Board of County Com'rs, above cited, where appellants contended that taxes had been assessed and collected in contravention of the due process and equal protection clauses of the 14th Amendment, it appeared that they had not availed themselves of the provisions of state laws providing for applications for relief to administrative bodies, and, therefore, had not exhausted the administrative remedies available to them. The Supreme Court refused to consider whether or not the tax was vulnerable to the challenge in respect to its validity on any of the grounds set forth. Myers v. Bethlehem Shipbuilding Corp. and the Gorham Mfg. Co. case are both cited in the Abelleira case in support of the decision that the rule of exhaustion of administrative remedies is jurisdictional.

[6, 7] But whether or not appellant was entitled to attack at the trial the method used by the Board in determining the number of cars it had in the state during the taxing period, appellant failed to show the actual number of such cars, or their actual value, or to produce any testimony to show that the method used by the Board resulted in an incorrect conclusion. It produced none of its records. Its witness Clifford

stated that he "would estimate" that they had twenty or thirty cars at the most in California in the period toward the end of 1937, "waiting, loading"; that it would be very difficult to determine the average number of cars in the state in 1937; that he did not have his records with him, but that he would say he had 25 to 30 cars "throughout the state at all times during the month at or in loading position." It is apparent that appellant, had it desired to do so, could have produced its own records to show the exact number of its cars; and its failure to do so warranted a conclusion by the trial court that if produced they would not have been favorable to appellant's contentions. It was said in Illinois Central R. Co. v. Minnesota, 309 U.S. 157, 161, 60 S.Ct. 419, 422, 84 L.Ed. 670, 674: "That the apportionment may not result in mathematical exactitude is certainly not a constitutional defect. Rough approximation rather than precision is, as a practical matter, the norm in any such tax system."

[8] Appellant also contends that the Private Car Tax Act does not apply to it because its cars are *leased* to railroads, and under the terms of the act cars leased to any railroad operating in the state are excluded. The answer to this is that the trial court found to the contrary. Appellant produced no evidence that any lease arrangements were made by it with any railroad operating in the state. The only testimony produced by defendant in this connection was given by John J. Clifford, who stated that he was Pacific Coast representative of defendant, and also acted as a broker for other private car owners. He testified as to the manner in which business for defendant was secured by him, stating that he would be contacted by shippers of such products as were transported in cars such as were owned by the private car companies, and that he then furnished such cars as the shippers required; that the cars were sent to the shippers who loaded them, and they were then hauled by the railroad company over whose lines they were routed by the shipper; that the shipper paid to the railroad companies the regular freight charges on the products shipped, and the latter paid defendant 1½¢ per mile for each mile the car moved; that "generally speaking" no charge was made by the Keith Company directly to the shipper. There was no testimony regarding any contract between any railroad company and appellant, and it is clear from Clifford's testimony that the railroad companies did not control appellant's cars as a lessee would have a right to do. He (Clifford) furnished the cars to shippers, and *the shippers* routed them as they desired; appellant and not the railroad companies determined whether its cars were to be used for certain purposes, and it refused to furnish them if a haul was not remunerative; they did not permit their cars to go into Mexico because Mexican lines were slow payers, etc. This testimony fully justified the conclusion of the trial court that appellant's cars were not leased to railroads.

[9] Appellant next argues that it is not within the provisions of Article XIII, Section 14, of the Constitution because that section is applicable only to public service companies, and that the trial court found that it is not a common carrier. It relies upon Cudahy Packing Co. v. Johnson, 12 Cal.2d 583, 86 P.2d 348, which held that Section 14 of Article XIII, as enacted in 1910, was not intended to and did not apply to property of a private corporation such as plaintiff in that action which owned certain livestock, refrigerator and tank cars used exclusively for the transportation of its own products. The conclusion of the court in that case, however, was based upon the history of the amendment, and the fact, appearing from the report of the commission appointed by the Governor which drafted and sponsored it, that it was intended to apply only to public service corporations which should be assessed for state purposes upon the basis of their gross receipts. The decision was also influenced by the fact that the state had not, for nineteen years, assessed the plaintiff company for state purposes, during which period defendant had paid an ad valorem tax on its tangible property within the state.

However Article XIII, Section 14, was amended in 1933, at which time its provisions were substantially changed, a tax based upon the actual valuation of the property instead of one based upon gross receipts being provided for therein. It is not shown here, as it was shown in the Cudahy Packing Company case, that the sponsors of the amendment had under consideration only public service corporations, and we find nothing in the measure itself so limiting it.

[10-16] Appellant next attacks the validity of the Private Car Tax Act on the ground that it violates constitutional man-

dates both state and federal regarding equality and uniformity of taxation. Const. Cal. art. 13, § 1; Const. U.S. art. 1, § 8, cl. 1. It argues that the act attempts to classify cars belonging to private owners in a separate class from cars of the same kind owned by the railroads, and that this results in lack of uniformity; that the cars belonging to the railroad companies are taxed only in the taxing district in which they are used, and at the rates applicable in such taxing districts, while cars belonging to private owners are taxed for state purposes at the average rate of taxation computed as provided by section 13 of the act; that such a differentiation is unreasonable and arbitrary; and it asserts, though it did not prove, that this results in a higher tax rate on its cars.

We find nothing in the provisions of the Constitution of this state which prohibits the enactment of such a statute as the Private Car Tax Act. As pointed out by the Supreme Court in Collins v. Riley, 24 Cal. 2d 912, 152 P.2d 169, and restated in Delaney v. Lowery, 25 Cal.2d 561, 568, 154 P. 2d 674, the Constitution is not a grant of power, but rather a limitation or restriction upon the powers of the Legislature, which restrictions or limitations must be strictly construed against the limitation; and unless there is some constitutional provision that prohibits a legislative enactment, it cannot be said that the legislature was without power to enact it. Appellant purports to find such prohibitions in Section 12 of Article XI and Section 10 of Article XIII; but in citing these sections appellant ignores the fact that section 10 of Article XIII contains the words "except as otherwise in this Constitution provided," and that Section 12 of Article XI was amended in 1933 by the addition of the words "Except as otherwise provided in this Constitution." These sections therefore cannot be said to conflict with Section 14 of Article XIII, which provides that "The Legislature shall have the power to provide for the assessment, levy and collection of taxes upon all forms of tangible personal property" and "may classify any and all kinds of personal property for the purposes of assessment and taxation in a manner and at a rate or rates in proportion to value different from any other property in this State subject to taxation * * *."

Obviously our Constitution does not require complete uniformity of taxation, since it exempts some property from taxation altogether, provides that solvent credits shall be taxed at a lower rate than that imposed on other classes of property, and provides that property on the unsecured rolls shall be taxed at the rate for the previous year and that on the secured rolls at the current rate. Art. XIII, sec. 9a. As stated in Abrams v. San Francisco, 48 Cal.App.2d 1, 7, 119 P.2d 197, 200: "But taxpayers may be treated differently if they are of different classes and a law sufficiently meets the constitutional requirement if its acts uniformly upon the whole of any single class of individuals or objects, and the classification is founded upon some natural, intrinsic or constitutional distinction. Fullerton Oil Co. v. Johnson, 2 Cal.2d 162, 39 P.2d 796; In re Weisberg, 215 Cal. 624, 12 P.2d 446; Heron v. Riley, 209 Cal. 507, 289 P. 160; People v. England, 140 Cal.App. 310, 35 P.2d 565."

Appellant's argument that the tax imposed on freight cars owned by railroads is lower than the tax imposed upon its freight cars and that the act therefore violates constitutional mandates requiring equality and uniformity of taxation, is that the act (sec. 13) subjects private cars to "the average rate of taxation * * * computed by adding the county, city, school district or other general or special taxes, not including special assessments, and dividing the amount so obtained by the total assessed valuation" in the state as shown by the county tax rolls for the same year, etc., and that inasmuch as this disregards the existence of railroad mileage in some taxing districts, and because with it go the rates levied in districts having the highest tax rates though such high rate taxing subdivisions have but a small proportion of the railroad and track mileage and hence would have but a small proportion of the time that such transient rolling stock was present in the state, and because with this average go the "very high rates of taxation in the outlying counties and school districts which contain no railroads whatsoever," the effect is to subject appellant's property to a higher rate than that imposed upon rolling stock of the railroad companies, and thus to discriminate against it.

Appellant's argument, however, assumes something not in evidence, for appellant failed to show that the rates applied to it exceed the rates applied to similar property of the railroads, or that the rates of taxation in counties and school districts which contain no railroads have very high rates of taxation. But even if it were so there would not necessarily be a violation of constitutional mandates. Exact equality is not possible under any system of taxation. Adams Express Co. v. Ohio State Auditor, 165 U.S. 194, 17 S.Ct. 305, 41 L.Ed. 683.

In Michigan Central Railroad Co. v. Powers, 201 U.S. 245, 26 S.Ct. 459, 50 L.Ed. 744, a statute of Michigan provided that the board of tax commissioners should assess the railroad and certain other corporate property in the state, and that the rate applicable to such property should be the rate which such board should ascertain and determine was the average rate levied upon other property upon which ad valorem taxes were assessed for state, county, township, school and municipal purposes. One of the grounds for urging that this statute violated constitutional prohibitions, both state and federal, was that it resulted in requiring the railroad company to pay at a rate determined in part by rates in portions of the state where it had no property and whose benefits it did not enjoy. But the court said that such considerations appealed to the discretion of the legislature and did not make against its power; that unless there was some provision in the State Constitution compelling other action the state might treat its entire territory as comprising a single taxing district, and deal with all property as within the district and subject to taxation accordingly; that sometimes a portion of the taxes thus collected is distributed pro rata to the counties along the lines of the roads, but that the power of the state to apply the taxes from railroad property to state purposes only could not be doubted and is often exercised. It added that, so far as the restraints of the Federal Constitution are concerned, it is within the power of a state to separate a particular class of property, subject it to assessment and taxation in a mode and at a rate different from that imposed upon other property, and apply the proceeds to state rather than to local purposes. It quoted from Kentucky Railroad Tax Cases, (Cincinnati, N. O. & T. P. R. Co. v. Commonwealth of Kentucky) 115 U.S. 321, 327, 6 S.Ct. 57, 29 L.Ed. 414, 419, to the effect that:

"But there is nothing in the Constitution of Kentucky that requires taxes to be levied by a uniform method upon all descriptions of property. The whole matter is left to the discretion of the legislative power, and there is nothing to forbid the classification of property for purposes of taxation and the valuation of different classes by different methods. The rule of equality, in respect to the subject, only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances." [201 U.S. 245, 26 S.Ct. 465.]

In General American Tank Car Corp. v. Day, 270 U.S. 367, 46 S.Ct. 234, 70 L.Ed. 635, plaintiff sued to enjoin the collection of a tax assessed by the State of Louisiana under a statute imposing a tax of 5½ mills on the dollar on all property within the state, but which imposed an additional tax of 25 mills on the dollar of the assessed value of rolling stock of nonresident corporations operated over any railroad in the state. This additional tax was contested on the ground that it violated the provision of the Louisiana Constitution that all taxes should be uniform, that it violated the Federal Constitution by imposing a burden on interstate commerce, and that it denied equal protection of the laws and discriminated against nonresidents. The Louisiana Constitution provided that nonresident owners of rolling stock should be taxed for state purposes only, and at a rate not to exceed 40 mills on the dollar of assessed value. The court said that the Louisiana state courts had upheld the constitutionality of the 25 mill tax (Union Tank Car Co. v. Day, 156 La. 1071, 101 So. 581), and that disposed of the objection to the tax under the state constitution. Regarding the contention that the United States Constitution was violated it said that since all local taxes throughout the state averaged approximately 25 mills and the tax imposed on appellant was substantially the equivalent of the local tax in lieu of which it was assessed, there was no unjust discrimination against nonresidents—that such a classification was not necessarily discriminatory; that "Where the taxing statute, which is in lieu of a local tax assessed on residents, discloses no purpose to discriminate against nonresident taxpayers, and in substance does not do so, it is not invalid merely because equality in its operation as compared with local taxation has not been attained with mathematical exactness. In determining whether there is a denial of equal protection of the laws by such taxation, we must look to the fairness and reasonableness of its purposes and practical operation, rather than to minute differences between its application in practice and the application of the taxing statute or statutes to which it is complementary. Travellers' Ins. Co. v. Connecticut, supra [185 U.S. 364, 22 S.Ct. 673, 46 L.Ed. 949]; and see [In re] State R. Tax Cases, 92 U.S. 575, 612, 23 L.Ed. 663 [673]; Shaffer v. Carter, 252 U.S. 37, 56, 40 S.Ct. 221, 64 L.Ed. 445, [458]." [270 U.S. 367, 46 S.Ct. 235]

It was further argued by appellant in that case that the finding of the district court that the local tax throughout the state would average about 25 mills was erroneous; that it would average only about 21 mills. But the court said that in the absence of a purpose to discriminate, disclosed by the legislation itself, it would not say that a 4 mill variation would be unconstitutional. Also it said that appellant's contention was not borne out by the record, which showed that in some parishes the total of all state and local taxes exceeded 30¼ mills, etc.; and it concluded by saying that appellant had failed to show that the tax was discriminatory either in principle or in its practical operation, and had laid no foundation for assailing its constitutionality.

From Union Tank Car Co. v. Day, supra, it appears that appellant was taxed the 5¼ mills plus the 25 mills. It sought to enjoin only the 25 mills, urging that no such tax was levied upon any real or personal property, or upon rolling stock or cars owned by residents, and that the tax was discriminatory and arbitrary. The court there said that under the state constitution all property in the state was subject to the 5¼ mills tax; also that it was subject to the payment of local, municipal and district taxes by other provisions of the organic law; that the only difference in the manner of assessment and collection of local taxes levied on the rolling stock of nonresidents, and that levied on rolling stock owned in the state, was that the one was collected by and for the state only, in the form of an additional lieu tax, and the latter was collected by local tax collectors, and apportioned to the locality in which the owners were domiciled; that the constitution and statutes had for their purpose the fixing of a general average rate of local taxation as to the rolling stock of nonresidents so as to make such rate conform, as nearly as practicable, to the local tax rate paid by residents and thereby approximate a general equality of the burden that should fall upon the two classes of property, and that plaintiff had failed to prove that the additional tax was in excess of what would be legitimate as a general average local tax. Also it said that: "The validity of legislation of this character depends, not upon the ability of courts to indicate some other form of taxation which might result in greater equality of burden, but upon judicial determination whether the necessary operation of such legislation results in an unjust discrimination." [156 La. 1071, 101 So. 584] And as to appellant's contention that the uniformity of taxation provision of the Lousiana Constitution was violated, the court said that it would be difficult to conceive a more uniform state tax in lieu of local taxes than that which is based upon the general average of local taxes, widely varying in rates, and which is imposed upon all tank cars owned by nonresident owners throughout all local districts in which such cars are operated; that (citing 26 R.C.L. 93, 167) it is not required that the tax on nonresidents and residents with respect to the same property be identical, and if substantial equality is provided it can make no difference that in particular cases a nonresident is taxed higher than a resident with respect to the same property. It concluded that plaintiff was taxed in "substantial uniformity" with other property holders in the state and that was all the law required.

Also in Nashville, C. & St. L. Railway v. Browning, 310 U.S. 362, 368, 60 S.Ct. 968, 972, 84 L.Ed. 1254, under a Tennessee statute the property of public service corporations was assessed by a state commission; all other property by local officials; and it was contended that as the property assessed by the commission was assessed at its full value, and that assessed by county officials at less than its full value, there was an unlawful discrimination which violated the 14th Amendment. The court said that petitioner's property was not shown to have been assessed differently from other properties in the same *class;* that none of the cases relied upon by petitioner denied power to the state to apply different yardsticks to different classes of property; "That the states may classify property for taxation; may set up different modes of assessment, valuation and collection; may tax some kinds of property at higher rates than others; and in making all these differentiations may treat railroads and other utilities with that separateness which their distinctive characteristics and functions in society make appropriate—these are among the common-places of taxation and of constitutional law."

The wide discretion that may be exercised by legislative bodies in classifying property for taxation without overstepping constitutional limitations, is also pointed out in New York Rapid Transit Corp. v. City of New York, 303 U.S. 573, 58 S.Ct. 721, 82 L.Ed. 1024, and in Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 509, 510, 57 S.Ct. 868, 81 L.Ed. 1245, 1253, 109 A.L.R. 1327.

Appellant relies heavily upon the decision of the Supreme Court of South Dakota in Ewert v. Taylor, 38 S.D. 124, 160 N.W. 797, 802. But in that state the constitution provided that "all taxes shall be uniform on all property." In Puget Sound Power & Light Co. v. King County, 264 U.S. 22, 27, 44 S.Ct. 261, 263, 68 L.Ed. 541, the court, commenting on Ewert v. Taylor and similar cases which were there relied upon by appellant, said that they "involved the application of somewhat stringent provisions of state Constitutions as to equality of taxation on all kinds of property which left but little room for classification"; that "Such restrictions have much embarrassed state Legislatures because actual equality of taxation is unattainable."

In the Puget Sound P. & L. case plaintiff was a street railroad company. Under a statute of the State of Washington, the properties of street railroads were assessed and taxed as personal property, though this was not done as to the property of other railroads. This, it was contended, violated the requirements of uniformity of both the State and the Federal Constitutions. The Supreme Court of the State in Puget Sound Power & Light Co. v. City of Seattle, 117 Wash. 351, 201 P. 449, 453, 207 P. 689, said regarding the statute:

"There is no vested right, either in a corporation or natural person, to have property assessed in any particular way. Such matters rest entirely within the control and discretion of the Legislature. Heilig v. [City Council of] Puyallup, 7 Wash. 29, 34 P. 164. It is a question of uniformity and equality in the classes. 'The classification of property for assessment, where uniformity and equality exist in the classes, is a matter of legislative policy.' Ridpath v. Spokane County, 23 Wash. 436, 63 P. 261. That there is ample reason for the classification made by the statute in this case is easily perceived. Street railways have no fee in the streets, their properties are largely personalty, while the commercial steam railways own their rights of way, and own extensive freight yards, termini and station grounds."

And when the matter came before the United States Supreme Court, that court said regarding the contention of plaintiff that the statute violated the 14th Amendment: "We do not think, considering the very wide discretion a Legislature has in such a case, that it was arbitrary to tax the whole street railway unit as personalty"; and it held that there was no violation of the 14th Amendment.

[17, 18] But appellant argues that the power of the legislature to classify property for taxation is exceeded by the Act under review; that it is "invidious and without rational foundation." But in People v. Western Fruit Growers, 22 Cal.2d 494, at pages 506, 507, 140 P.2d 13, at page 20, the court said:

"Problems of classification under the California constitution are thus similar to those presented by the federal equal protection of the laws clause of the 14th Amendment. Under either provision, the mere production of inequality which necessarily results to some degree in every selection of persons for regulation does not place the classification within the constitutional prohibition. The discrimination or inequality produced, in order to conflict with the constitutional provisions, must be 'actually and palpably unreasonable and arbitrary,' or the legislative determination as to what is a sufficient distinction to warrant the classification will not be overthrown. Radice v. New York, 264 U.S. 292, 296, 44 S.Ct. 325, 327, 68 L.Ed. 690; Arkansas Natural Gas Co. v. Arkansas Railroad Comm., 261 U.S. 379, 384, 43 S.Ct. 387, 67 L.Ed. 705; In re Livingston, 10 Cal.2d 730, 740, 76 P.2d 1192; Rainey v. Michel, 6 Cal.2d 259, 57 P.2d 932, 105 A.L.R. 148; Los Angeles City School Dist. v. Griffin, 3 Cal. 2d 651, 46 P.2d 141; In re Weisberg, supra [215 Cal. 624, 12 P.2d 446]; Martin v. Superior Court, supra [194 Cal. 93, 227 P. 762]; Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 151 P. 398; In re Cardinal, 170 Cal. 519, 526, 150 P. 348, L.R.A. 1915F, 850. When a legislative classification is questioned, in any state of facts reasonably can be conceived that would sustain it, there is a presumption of existence of that state of facts, and the burden of showing arbitrary action rests upon the one who assails the classification. In re Fuller, 15 Cal.2d 425, 437, 102 P.2d 321; McCreery v. McColgan, 17 Cal.2d 555, 562, 110 P.2d 1051,

133 A.L.R. 800; In re Livingston, supra; Sequoia Nat. Park Stages Co. v. Sequoia & General Grant Nat. Parks Co., 210 Cal. 156, 291 P. 208; Martin v. Superior Court, supra; In re Cardinal, supra [170 Cal. 519, 150 P. 348, L.R.A. 1915F, 850]; County of Los Angeles v. Hurlbut, 44 Cal.App.2d 88, 111 P.2d 963; Pacific Gas & Elec. Co. v. Moore, 37 Cal.App.2d 91, 98 P.2d 819."

[19, 20] And in Livingston v. Robinson, 10 Cal.2d 730, 740, 76 P.2d 1192, it is stated that the question of classification is generally one for the legislative power, to be determined by it in the light of its knowledge of all the circumstances and requirements; that its discretion will not be overthrown unless it is palpably arbitrary, but it will be presumed that the legislature made inquiry to determine whether or not there were evils to be remedied and that the classification made was based upon the result of the inquiry.

[21] Also in Delaney v. Lowery, supra, 25 Cal.2d at page 573, 154 P.2d at page 680, the court said: "Clearly, property may be classified for the purpose of taxation as long as the classification is reasonable, and that is especially true where, as seen, the effect through the years will probably be insignificant."

We are not prepared to say that the classification of private cars, set forth in Section 2(a) of the Act, is "actually and palpably unreasonable and arbitrary"; and we conclude that the determination of the legislature that there is a sufficient distinction between private cars as defined in section 2 (a) and those excepted in said section, to justify the classification. Especially is this true in light of the provisions of Article XIII, Section 14, supra, authorizing the legislature "to classify any and all kinds of personal property for the purposes of assessment and taxation in a manner and at a rate or rates * * * different from any other property in this State subject to taxation."

[22-24] The Private Car Tax Act is presumed to be constitutional. In Jersey Maid Milk Products Co. v. Brock, 13 Cal.2d 620, 636, 91 P.2d 577, it was said that it is a well-established and universally recognized principle of law that all presumptions and intendments are in favor of the constitutionality of a statute enacted by a legislature; that all doubts are to be resolved in favor of and not against the validity of a statute; and that before an act may be declared invalid by the judiciary for the reason that it is in conflict with the Constitution, such conflict must be clear, positive and unquestionable. Also see Delaney v. Lowery, supra; Ray v. Parker, 15 Cal.2d 275, 101 P.2d 665; Hart v. City of Beverly Hills, 11 Cal.2d 343, 348, 79 P.2d 1080; People v. Western Fruit Growers, supra, 22 Cal.2d at page 499, 140 P.2d 13; 5 Cal.Jur. 626–630; Cooley's Constitutional Limitations, 8th Ed., p. 372. In Carmichael v. Southern Coal & Coke Co., supra, 301 U.S. at page 510, 57 S.Ct. at page 872, 81 L. Ed. at page 1253, 109 A.L.R. 1327, the court said:

"A state legislature, in the enactment of laws, has the widest possible latitude within the limits of the Constitution. In the nature of the case it cannot record a complete catalogue of the considerations which move its members to enact laws. In the absence of such a record courts cannot assume that its action is capricious, or that, with its informed acquaintance with local conditions to which the legislation is to be applied, it was not aware of facts which afford reasonable basis for its action. Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function."

[25-27] Regarding appellant's contention that the trial court erred in failing to compel compliance by respondent with a subpoena duces tecum issued at appellant's request and served upon respondent, as the subpoena does not appear in the record we are unable to determine its scope. No attempt to compel compliance with it was made prior to the trial, but during the course of the trial appellant's counsel stated that it had requested (and did then request) that respondent produce records of the State Board of Equalization and of the State of California showing any and all tax rates of county, city, and school districts and all general and special taxes used in computing the private car tax rate for the years 1937–1938 and subsequent years; books and records of the Board and of the State showing: The tax rate fixed and paid by common carrier railroad companies operating freight cars of the same kind and nature as the freight cars of the defendant herein; the tax rate fixed and paid by equipment companies operating freight cars of the same kind and nature as the freight cars of the defendant herein; in

what counties and taxing districts there was assessed and apportioned during the years 1937–38, and the amount thereof, of cars owned by common carrier railroad companies operated in the State of California, and cars owned by common carrier railroad companies not operated or doing business within the State but rented to railroad companies operating and doing business within the State, cars owned by equipment companies and rented to common carrier railroad companies doing business in the State, together with the nature, kind and physical classification of said cars; in what counties there are railroad lines and in what counties there are no railroad lines; the rate of tax and valuation, if any, placed upon railroad cars other than private cars in the State for the years 1937–38 and subsequent years; the railroad track mileage in the year 1937–38, and subsequent years, in incorporated cities and towns of the State and territory located outside of incorporated cities and towns; and the mileage traveled by each and every car of the defendant herein in California, and in each county or incorporated city or taxing district traveled and traversed by said cars in the years of 1937—38, and subsequent years. Objection to the request was interposed on the grounds that it was too broad and not sufficiently specific, that some of the information was contained in the property statements made to the State by the railroad companies for the purpose of assessing their property under entirely different acts, which statements were not public documents; that no request had been made for the compilation of figures from the records requested; that appellant had not shown that the records requested were material, and that information which defendant desired from the railroad companies' records should be secured by defendant from the railroad companies themselves. Later in the case the subject of these records was again brought up by defendant, when, it now says, it made an offer of proof but the court "persisted in adhering to its former ruling." But defendant's so-called offer of proof was not, in fact, such an offer. What its counsel said was: "I want to make an offer of proof here that if the records of the State Board of Equalization demanded had been produced we would have been able to show by those records that the tax rate demanded and fixed by the Board of Equalization resulted from the imposition upon the property of the defendant of a tax rate higher than that imposed upon property of identical nature, kind, basic classification, and use owned by others but deemed private cars under the definition of Section 2(a) of the Act as construed and interpreted by the board." There was more to the same effect, which it is unnecessary to recite since it is obvious that this did not constitute an offer of proof, but a conclusion of counsel as to what he thought he could have shown had the records been produced. Furthermore there was no ruling on this so-called offer, and obviously none was called for. A little later on in the case the court did say: "I might say that by way of further discussion in connection with the matter of producing records that the other side has made an offer of proof which I know nothing about, but from what I have heard here there are many things in your offer of proof that you would not be able to prove; it is one of those omnibus affairs where you offer to prove almost everything. I take it that you are required to be more specific and not merely say that with the records of the State Board of Equalization you could prove all you have indicated because I am quite sure there are things there that you never could prove by the records of the Board of Equalization, so we will leave that up in the air. If you gentlemen have some things you can prove, some specific facts by resort to specific portions of records or specific documents, that is one thing, but to say that you offer to prove all these things you have mentioned in this very general way is to my mind insufficient." Thereupon defendant modified its request stating that if it could get from the statements of the railroad companies the track mileage, it thought that, with what was already shown, it could establish what it had offered to prove. But the testimony of the witness for the state was that it would take a week or ten days to compile these figures. There was no request by defendant for a continuance for that purpose. We find no error in the court's rulings in this connection. It is well established that demands for the production of records, and subpoenas duces tecum must be reasonable and must be direct and specific in their terms and not couched in general terms, and that the relevancy and materiality of the documents requested must be made to appear. McClatchy Newspapers v. Superior Court, 26 Cal.2d 386, 159 P.2d 944. Furthermore information regarding the track mileage could have been secured by defendant directly from the railroad companies had defendant seen fit to take the proper steps to secure it; but its position as stated by its counsel was "Why should the defendant be burdened with the necessity of subpoenaing each and every railroad in the State when the Board has the information."

We find no error in the rulings of the trial court and the judgment is therefore affirmed.

THOMPSON and PEEK, JJ., concur.

Hearing denied; TRAYNOR, J., not participating.

70 Cal.App.2d 432

REMMERS v. CICILIOT et al.

Civ. 14641.

District Court of Appeal, Second District, Division 1, California.

Aug. 1, 1945.

1. Evidence ⚷113(19)

Tax assessor's valuation is not evidence of market value, sought to be established in action for specific performance of agreement to exchange realty.

2. Evidence ⚷543(3)

An adjoining landowner and real estate brokers familiar with realty involved in action for specific performance of exchange agreement were properly allowed to express opinions as to value thereof, as against objections to several of brokers that they had no knowledge of sales in vicinity. Code Civ.Proc. § 1872.

3. Specific performance ⚷121(8)

Evidence establishing that agreement for exchange of real property was just and reasonable as to both parties, that the consideration therefor was adequate, and consent to exchange was given freely and without fraudulent representations, sufficiently supported judgment decreeing specific performance.

4. Appeal and error ⚷1176(1)

Where judgment decreeing specific performance of an agreement for exchange of real property did not require conveyance of personal property and bakery equipment described in exchange agreement, the trial court will be directed to require that a bill of sale for personal property described in the exchange agreement be executed and delivered.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

On rehearing.

Judgment of the superior court modified and, as modified, affirmed.

Prior opinion 159 P.2d 77.

Julius V. Patrosso, of Los Angeles, for appellants.

Clark & Morgan, of Alhambra, for respondent.

PER CURIAM.

This is an appeal by defendants from a judgment rendered in favor of plaintiff in an action for specific performance of an agreement for the exchange of real property. The following grounds are urged in support of a reversal of the judgment:

"1. The evidence does not support the trial court's finding that the properties of the respondent and of the appellants were of equal value or its conclusion that the consideration was adequate to the appellants and the contract just and reasonable as to them;

"2. The findings do not support the judgment in that the trial court failed to make findings upon the issues raised by the pleadings (a) as to the respective values of the properties of the respondent and the appellants, and (b) as to the representations made by respondent to appellants as to the cost or value of her property;

"3. The judgment, while compelling a full performance by the appellants, does not require like performance by the respondent."

This is the second trial of the instant cause, a judgment in favor of appellants as a result of the first trial having been reversed on the ground of insufficiency of the findings to support the judgment. Remmers v. Ciciliot, 59 Cal.App.2d 113, 138 P.2d 306.

On July 29, 1941, the parties to the instant action met at respondent's property located at Monrovia, and entered into a contract whereby it was agreed that appellants would exchange their parcel of improved real property situate at Pomona, free of incumbrance, and $100 in cash, for respondent's parcel of real property at Monrovia, improved with a building then used as a bakery and the fixtures and equipment therein contained, said property being subject to a trust deed for $2,500. A memorandum in the form of a receipt was executed and an escrow opened at a bank to effect the proposed exchange, the parties signing the escrow instructions substantially in accordance with the terms of the memorandum, except that in addition to the $100 cash payment therein provided to be paid by appellants, they also agreed to pay an additional $150 which was deposited with the escrow agent at the time the instructions were executed.

Thereafter, to-wit, on September 25, 1941, and before the escrow was closed, appellants served notice of cancellation and rescission of the exchange agreement upon respondent and demanded the return of the sum of $250 theretofore paid by them, upon the ground that respondent had made material misrepresentations to them concerning her property.

On September 30, 1941, respondent filed her complaint for specific performance of the agreement of exchange. Appellants answered, admitting the execution of the agreement and alleging that they had been induced to enter therein by fraudulent representations to the effect that the respondent's property had cost her $6,000, and had a cash market value of that amount; that it was under lease to one Voltura for a five-year term at a rental of $40 per month for the first year, $45 per month for the second year and $50 per month for the remainder of the term, and that said Voltura was financially responsible; whereas, in fact, Voltura had no financial responsibility; was merely acting as agent and dummy for respondent, and was posing as her lessee to enable her to dispose of the property. It was also alleged that the exchange was unjust, unfair, unreasonable and inadequate; that said properties were not of equal value and that the consideration for such exchange was inadequate as to appellants.

When the cause came on for trial, respondent was permitted to file an amended complaint adding: (1) An allegation to the effect that she was still ready and willing to exchange her Monrovia property in accordance with the exchange agreement, and (2) a new paragraph, to-wit: "That the property owned by defendants at Pomona was and is the fair and reasonable value of the equity of the property owned by plaintiff at Monrovia. That the Pomona property was and is of the value of approximately $2800.00, and the value of the Monrovia property owned by plaintiff was and is of the value of approximately $5500.00 and that the consideration for the said exchange was thereby just, reasonable and adequate to the defendants."

The trial court found in favor of respondent in that the agreement for the exchange of the properties of the respective parties was executed as alleged; that appellant on September 25, 1941, served upon respondent a notice of rescission; that respondent had performed all of the conditions of the agreement upon her part to be performed and that appellants had refused to complete the transaction; that the agreement for the exchange and the escrow instructions were signed by the parties after each had inspected the property of the other; that appellants up to the time that they discovered that Voltura (lessee of respondent's property) had assigned his lease "were satisfied with the exchange and agreeable thereto and had no complaint as to the exchange"; that "it is not true that the agreement of exchange between plaintiff and defendants was fraudulently had or induced or obtained by deceitful or false or fraudulent representations made by plaintiff to the defendants; that it is not true that the plaintiff represented to the defendants that her property had cost $6,000.00 or was of the cash market value of $6,000.00 or that plaintiff represented to defendants that the tenant S. J. Voltura was financially responsible; that it is not true that S. J. Voltura was a dummy or agent of Rosa T. Remmers or that she executed the lease to him merely posing as her lessee for a sufficient length of time to exchange her property with the defendants, and it is not true that said property was bringing in no income or that it had not brought in any income during the term of said lease.

"It is not true that defendants were misled or deceived by plaintiff through any representations by plaintiff to enter into said agreement, and it is not true that plaintiff signed the escrow instructions under any misrepresentations at all. * * *

"The court finds that it is not true that said exchange of properties was unjust or unfair or unreasonable or inadequate, and it is not true that said properties were not of equal value as far as the equities of the exchange, but it is true that they were of equal value and it is true that on or about September 25, 1941, the defendants served a notice of cancellation and rescission on the plaintiff that they had cancelled said agreement and demanded the return of their property that they had placed in said escrow and demanded the return of their deed, but the court finds that said notice was without justification and has no legal effect."

Appellants urge that "before a decree of specific performance may be entered it must affirmatively be made to appear that the consideration for the contract is adequate. Moreover, not only must this fact be established by competent evidence, but in order to sustain a judgment decreeing specific performance, there must be a finding of *facts* from which it appears that the consideration was adequate *as to the defendant.* In the absence of such evidence or finding, a decree of specific performance cannot be sustained." (Emphasis included.)

[1] Over the objection of appellants, respondent in an effort to establish the market value of the properties covered by the exchange agreement introduced in evidence certified copies of the assessment roll of the county of Los Angeles for the year 1941 showing the assessed value of the properties in question. In overruling appellant's objection to the admission of this evidence, the trial court stated: "The court will take judicial notice of the fact that the valuations fixed by the assessor are a certain percentage of the actual value." The valuation placed upon the property by the assessor is not evidence of market value. Yolo Water & Power Co. v. Edmands, 50 Cal.App. 444, 450, 195 P. 463.

[2] Eliminating the assessor's record above referred to, the evidence respecting the value of appellants' property consists of the testimony of M. C. Trautwein and H. N. Wood. Mr. Trautwein testified that he had lived in Pomona for 22 years and had been engaged in the real estate business for a period of eight years; that he was familiar with appellants' property and had appraised it in 1941; that he dealt in Pomona property and had sold property in that vicinity; that he was familiar with values in that locality, and in his opinion $2,500 was the fair and reasonable market value of appellants' property as of July, 1941.

Mr. Wood, real estate broker and auctioneer, over the objection of appellants that "there is nothing shown that this man made any inquiry as to sales in that vicinity" was permitted to testify that in his opinion the value of the Pomona property was between $2,000 and $2,500.

With respect to the value of respondent's property, Mr. Wood testified upon cross-examination that he sold the Monrovia property to respondent at an auction sale some four to six weeks before the exchange went into escrow for $300 subject to a mortgage of $2,500.

Mr. Roy A. Watts, a resident of El Monte, a real estate broker and builder, testified that he had been employed as an appraiser by the real estate department of Southern California Builders, a loan association, from May 1933, to October, 1937; that for ten months prior to October, 1943, he had been leasing conversion units in California, Arizona and Wyoming for the Home Owners' Loan Corporation, and was familiar with the respondent's property in Monrovia, which he had inspected in June of 1941. This witness was permitted to give his opinion as to the value of this property over the objection of appellants that he had "not shown himself familiar with the value of property in that particular vicinity at the time of the transaction in 1941," because he testified that his estimate of value was "based purely on the fact of the physical conditions of that particular piece of property, the size of the lot, and the character of construction"; the "locality and surrounding territory" and "not on any personal knowledge of sales in that immediate vicinity in Monrovia." His estimate of the value of said property was given as $5,504.80.

Mr. C. H. Clark, who had been engaged in the real estate business, loans and insurance, for a period of thirty-five years at Monrovia, maintaining offices a block from respondent's property, testified that the value thereof was $2,800 as of July, 1941.

Mr. Bell, the owner of property adjoining that of respondent, testified he had been familiar with respondent's property over a period of ten years, and that "$1500.00 would be a big price for it."

The foregoing testimony was supplemented by photographs of the respective properties introduced in evidence, and by descriptions thereof given by the witnesses.

In De Freitas v. Town of Suisun City, 170 Cal. 263, 266, 149 P. 553, 555, is stated the procedure by which the value of property may be proved: "By preliminary questions the examiner should elicit the facts relating to the qualifications of the witnesses; for example, that he has seen and examined the land, or that he knows something of its character and condition, or the market values of land in that vicinity, if such values have been established, or the values of land similarly situated, and the like. He may, thereupon, be asked to give his opinion of its respective values * * *."

Again in Re Estate of Ross, 171 Cal. 64, 66, 151 P. 1138, 1139, it was stated with respect to this subject: "The party calling a witness to give his opinion on value may qualify him by showing his familiarity with the property and with other property in the neighborhood, his experience in the business, his familiarity with the state of the market and with sales of similar property in the vicinity, and any other facts tending to show his knowledge of the subject and capacity to give an opinion thereon."

Tested by the principles of law just enunciated, the evidence respecting market value of the two properties was competent, hence the trial court was justified in finding that the two pieces of property were of equal value. Moreover, on the question of inadequacy of consideration, it appears from the record that appellants in exchange for their property which had a maximum value of $3,000, plus $250 in cash, were to receive, subject to a mortgage for $2,500, a piece of property improved with a building containing bakery equipment which had a value of at least $750.

[3] An examination of the entire record discloses evidence establishing that the exchange agreement here in question is just and reasonable as to both parties thereto; and that the consideration therefore is adequate to appellants and that their consent thereto was given freely and was not induced by fraudulent representations of the respondent. In this state of the record, the judgment decreeing specific performance is amply supported.

This rehearing of the instant cause was granted by the court of its own motion, because, in order to avoid misunderstanding, it is deemed advisable to eliminate from the decision heretofore filed (— Cal.App.2d —, 159 P.2d 77) certain dictum which expressed rules of law as they existed prior to the enactment of section 1872 of the Code of Civil Procedure, added by Stats. 1937, p. 1606, and which rules were unfortunately quoted with approval in the cases of Thompson v. Stoakes, 1941, 46 Cal.App.2d 285, 293, 115 P.2d 830, and United States v. Certain Tracts of Land in Los Angeles County, D.C., 1944, 57 F.Supp. 739, 740.

Appellants also urge that the judgment is erroneous because while it requires full performance by appellants, it does not require respondent to convey to appellants the personal property and bakery equipment described in the exchange agreement. Respondent argues that the judgment is sufficient in form, but if insufficient, may be modified.

[4] Accordingly, the trial court is directed to require respondent to execute and deliver to appellants a bill of sale for the personal property described in the exchange agreement, and as so modified, the judgment is affirmed.

RATTRAY v. SCUDDER. *

Civ. 3172.

District Court of Appeal, Fourth District, California.

July 31, 1945.

Rehearing Denied Aug. 27, 1945.

Hearing Granted Sept. 27, 1945.

1. Brokers 🔑**3**

In order to justify real estate commissioner in revoking real estate broker's license for misconduct, broker must have been acting in capacity of broker as agent for injured party. St.1943, p. 841, § 10176 (f).

2. Brokers 🔑**3**

Real estate commissioner improperly revoked real estate broker's license on charge that broker had been guilty of dishonest dealings with owner of building in beating down the asking price for the property, where it did not appear that broker had acted in his capacity as broker in his dealings with owner. St.1943, p. 841, § 10176(f).

3. Mandamus 🔑**174**

In action for writ of mandate to compel real estate commissioner to cancel order revoking plaintiff's license as real estate broker, a finding that plaintiff's conduct in attempting to beat down owner's asking price for building would not warrant denial of plaintiff's application for a license or application for its renewal was improper as going beyond issues. St.1943, pp. 838, 841, §§ 10150, 10176.

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* Subsequent opinion 169 P.2d 371.

4. Brokers ⚿3

Real estate commissioner improperly revoked real estate broker's license, where it appeared that complaint filed with commissioner against broker was not verified as required by statute. St. 1943, p. 841, § 10176.

5. Mandamus ⚿190

Where copies of transcript of proceedings before real estate commissioner were produced and paid for by plaintiff in action for a writ of mandamus compelling commissioner to annul his order revoking plaintiff's license as real estate broker, and plaintiff prevailed in the action, plaintiff was entitled to recover cost of preparing transcripts.

◆

Appeal from Superior Court, Kern County; Warren Stockton, Judge.

Action by W. S. Rattray against Hubert E. Scudder, as real estate commissioner of the State of California, for a writ of mandate to annul defendant's order revoking plaintiff's license as a real estate broker. From a judgment granting peremptory writ of mandate and from an order taxing costs, the defendant appeals.

Affirmed.

See, also, 153 P.2d 433.

Robert W. Kenny, Atty. Gen., and Carl S. Kegley, Deputy Atty. Gen., for appellant.

Mack, Werdel & Bianco, of Bakersfield, for respondent.

MARKS, Justice.

This is an appeal from a judgment granting a peremptory writ of mandate annulling an order of defendant, Real Estate Commissioner of the State of California, which revoked the real estate broker's license of plaintiff, and from an order taxing costs.

Plaintiff had been a real estate broker for many years and at all times material here had held a State license as such. For about a year prior to October, 1943, he had been officing with and working out of the office of Edward A. Kelly, another licensed broker of Bakersfield.

John Leonard Humston, a 2nd Lieut. in the United States Army, was the owner of a court in the city of Bakersfield. He was stationed at Middletown, Ohio.

On January 19, 1943, on the letter head of Kelly & Son, petitioner Rattray wrote Humston a letter stating that "We have a client who is interested in purchasing property in this district, and thought you might wish to sell your property," and asking price and terms. Under date of February 4th, Humston replied stating the property was for sale for $13,000 and that a small second mortgage might be acceptable.

On February 11, 1943, Rattray wrote Humston that the property had been appraised by a competent appraiser; that there had been a heavy depreciation of the building and furniture; that a fair price would be $12,000; that "to this we would have to add the selling commission." A 60-day option dated February 15, 1943, was enclosed in favor of Kelly & Son giving them the right to purchase the property for $12,000. Humston inserted after the purchase price, "$10,000 cash, $2,000 at 8%", signed the option and returned it.

Rattray inserted an advertisement in a Bakersfield paper offering the property for sale at $15,000. This was reduced to $13,500 in later issues. Edward L. Espey contacted Rattray and wanted to buy the property. He said he thought it was worth $12,500 but that he might pay $13,500 for it if he could be financed. He had very little money but had other property in Bakersfield. At least the first conversation between Rattray and Espey occurred some time in March, 1943, probably before March 20th.

On March 20, 1943, Rattray wrote Humston, who was then stationed at Fort Rosecrans in San Diego, in part as follows:

"As the property was purchased through this office, we are able to arrive at a more definite valuation than some other office who might not be as well posted as we are.

"Our purpose for writing you this morning is to inquire whether you would consider $10,000.00 cash, as we have a prospect now who will likely purchase this property providing we can do some financing for him.

"Since buying the property through this office some years ago, there has been a depreciation of 3% a year, which would total at least $2,000.00. We, therefore, believe that under present conditions you would be wise in accepting this cash offer, providing we are able to arrange the financing as hereinabove referred to."

Under date of April 2, 1943, Rattray wrote Humston informing him that the customer had telephoned twice about the sale and urging Humston to accept $10,000 cash for the property. On April 6th, Humston telegraphed Rattray: "WILL TAKE TEN THOUSAND SEVEN FIFTY NET."

Rattray telephoned Humston, probably three times about the sale. Descriptions of the two earlier calls are indefinite both as to time and subject matter. The third call was placed by Rattray at about 4:15 o'clock on the afternoon of April 15, 1943. This conversation is described by Humston as follows: "Well, the—he said he had a prospect to buy the property, and he had to know right away, and he could not get the money I asked for the property, and that $10,000 was the most he could get. And I said I would not accept that, and he said—I told him—he said he had the deal made, and suggested I go ahead and make—they act for me—to go ahead and make the deal, and I told him I would take $10,500, and he said he could not make a deal like that, and I finally said I would take $10,250, and he said if I accepted $10,250 I would have certain expenses to pay out of that. I said I would accept $10,250 but I would not pay any expenses out of it—in other words that is the least I would take, and he said that I would have to pay title transfer—something—$14. I told him I would not pay it. He said, 'You wire me to the effect you will take $10,250 net', and I did that that night, April 15th."

Rattray detailed the conversation as follows: "I told Lt. Humston that I was unable to sell his property for the price he had placed upon it, and the only way we could get him $10,000 cash would be to buy it ourselves. He said 'I won't accept it; I will accept $10,500, if that is all you will give.' I said 'We will not pay $10,500; we will pay $10,000.' He said, 'Will you pay $10,250?' I said 'Will you accept $10,250?' 'Yes', he said, 'I think I will.' I said 'Will you confirm that by wire?' That was the entire conversation as I recall."

Humston telegraphed Rattray; "WILL TAKE TEN THOUSAND TWO HUNDRED AND FIFTY NET CASH WITHIN THIRTY DAYS." The following appears on the face of the telegram: "1943 Apr 15 PM 11 47."

Rattray testified that he telephoned Espey early on the morning of April 16th and informed him that Kelly was buying the property and would sell it to him; that about 9:30 or 10 o'clock that morning he instructed the Title Insurance and Trust Company to prepare escrow instructions; that between 12 o'clock noon and 1 o'clock p.m. he took Espey to the office of the title company where he signed the instructions agreeing to buy the property for $13,500 and deposited a check for $400 on account.

In a letter dated April 15, 1943, the title company sent Humston escrow instructions and a deed, also dated April 15, 1943, conveying the property to Edward A. Kelly. This deed was acknowledged by Humston and his wife in San Diego April 23, 1943. The escrow instruction signed by Humston and his wife were dated April 23, 1943, and were received by the title company April 27, 1943.

Espey signed a promissory note dated April 16, 1943, for $12,500 payable in instalments to Steve Ceccarelli and Margherita Ceccarelli. This note was secured by a deed of trust, bearing the same date, on the property involved here and other property belonging to Espey. The acknowledgement on the deed of trust was dated April *14,* 1943, and was executed by Emmett E. Wilson who was manager of the title company. Mr. Wilson had no material record of this acknowledgement. He testified that the deed of trust was actually signed and acknowledged by Espey on April 19, 1943; that the date, April 14, in the certificate was due to a mistake of the stenographer who filled in the blanks. Another employee of the title company corroborated this testimony.

The escrow instructions executed by Espey were dated and signed by him on April 16, 1943. They referred to the purchase of the property, the Ceccarelli note and deed of trust, and a chattel mortgage on the furniture in the court. The escrow instructions of Edw. A. Kelly were dated May 7, 1943. They referred, among other things, to a note of Espey to Kelly for $700 secured by a second deed of trust on the property in question here.

Mrs. Ceccarelli paid $7100 of the $12,500 loan on April 16, 1943, and the balance of $5400 on April 30, 1943.

The letters giving statements of disbursements of the funds in the escrow were dated May 17, 1943. They show that the total cash paid into escrow was $13,496.65; that Humston received $10,250 for his property; that Kelly received $2326.25 in cash besides the $700 promissory note. The evidence shows that Kelly paid Rattray over $900, being half of the net cash profit on the transaction.

Steve Ceccarelli, a resident of Mojave, California, was called as a witness. He testified that Kelly and Frank Simon (a broker who officed with Kelly) had handled loans for him for many years; that his wife was in Bakersfield and was contacted by either Kelly or Simon about the loan subsequently made to Espey; that she favored the loan but would not finally approve it until Ceccarelli had seen the property; that one morning Simon drove from Bakersfield to Mojave and took Ceccarelli back to Bakersfield where he looked at the property and approved the loan. The date of this trip is not fixed in the record but we know that it involved two tedious journeys through the Tehachapi Mountains. If all these things happened on the morning of April 16, in time to permit Espey to make his deposit and sign his escrow instructions during the noon hour on that day there was dispatch and speed involved that was unusual.

The foregoing facts are all gleaned from the transcript of the evidence taken before the deputy commissioner who tried the charges filed by Humston against Rattray. Upon this evidence the commissioner concluded that Rattray had been guilty of dishonest dealings with Humston in violation of subdivision "f" of section 10176 of the Business and Professions Code, St.1943, p. 841, and revoked his license.

Rattray then filed this action in the superior court seeking a writ of mandate to compel the commissioner to revoke the order cancelling his license and to restore the same. The only evidence introduced in the superior court action was the transcript of the proceedings before the commissioner.

On this evidence the trial court found as follows: "It is true that at neither of said hearings was there any evidence that the plaintiff herein was acting as the agent for the complainant John L. Humston; it is true that said John L. Humston never agreed to pay any commission to the plaintiff herein for any of the services of the plaintiff; it is true that the complainant John L. Humston on February 15, 1943, executed to the plaintiff herein and his associates an option to purchase the real property of the complainant; it is true that at no time pertinent herein did the relationship of principal and agent ever exist between the plaintiff herein and the said complainant John L. Humston; it is true that at no time herein did any relationship of trust and confidence ever exist between the plaintiff herein and the complainant John L. Humston; it is true that the plaintiff herein in handling the transaction referred to in the complaint of said John L. Humston filed with the defendant herein was not guilty of any conduct which constituted fraud or dishonest dealing and had not acted or conducted himself in any manner which would have warranted the denial of his application for a license or for the renewal of his then existing license."

Section 10176 of the Business and Professions Code provides in part as follows:

"The commissioner may, upon his own motion, and shall upon the verified complaint in writing of any person, investigate the actions of any person engaged in the business or acting in the capacity of a real estate licensee within this State, and he may temporarily suspend or permanently revoke a real estate license at any time where the licensee within the immediate preceding three years, while a real estate licensee, in performing or attempting to perform any of the acts within the scope of this chapter has been guilty of any of the following: * * *

"(f) Any other conduct, whether of the same or a different character than specified in this section, which constitutes fraud or dishonest dealing."

Were it not for the case of Schomig v. Keiser, 189 Cal. 596, 209 P. 550, we would have no hesitancy in holding that on the evidence before it, the trial court should have found that Rattray had been guilty of dishonest dealings with Humston in beating down the asking price for the property by concealing the true facts and by misrepresentations, and should have sustained the commissioner in revoking his broker's license. There seems to be little reason to doubt that the Ceccarelli loan had been approved and the sale to Espey for $13,500 thereby assured before Rattray telephoned Humston at about 4:15 o'clock on the afternoon of April 15th. At least these things must have happened before Rattray received Humston's telegram of acceptance. The letter of the title company and the deed conveying the property to Kelly, both dated April 15, sent to Humston with the escrow instructions, as well as the evidence in the case, make this conclusion reasonably certain.

[1, 2] However, this conclusion does not enable us to reverse the judgment. The trial court found in effect that the relation of principal and agent never existed between Humston and Rattray and that Rattray did not act in his capacity as broker in his dealings with Humston. This finding has evidentiary support and may not be questioned on appeal. In Schomig v. Keiser, supra, the Supreme Court held that in order to justify the commissioner in revoking a license, the broker must have been acting in that capacity as agent for the injured party. The trial court's finding on the question of agency and the decision of the Supreme Court seem decisive of this appeal.

[3] The balance of the finding to the effect that the conduct of Rattray would not warrant the denial of his application for a license or an application for its renewal, has no place in the findings. It goes far beyond the issues of the case. The law governing the issuance of a license differs materially from that controlling the revocation of a license. The applicant for a license must produce evidence that he "is honest, truthful and of good reputation", Sec. 10150, Business and Professions Code, so those characteristics become material when a license is to be issued. Certainly, in his dealings with Humston, Rattray used the truth with frugality. That fact might assume importance in the mind of the commissioner should Rattray again apply for a broker's license as his old license has long since expired. Glick v. Scudder, Cal. App., 160 P.2d 90.

[4] Another reason for affirming the judgment, although no point is made of it by counsel, may be found in the fact that the complaint filed by Humston with the commissioner does not seem to be verified as required by section 10176 of the Business and Professions Code.

[5] The memorandum of costs filed by Rattray included an item of $139.45 for copies of the transcript of the proceedings before the commissioner. As these transcripts were apparently produced and paid for by Rattray the cost of preparing them was recoverable by him as he prevailed in the action. Dare v. Board of Medical Examiners, 21 Cal.2d 790, 136 P.2d 304.

The judgment and order are affirmed.

BARNARD, P. J., concurs.

70 Cal.App.2d 542

PEOPLE v. ONE 1940 BUICK 8 SEDAN, LICENSE NO. 1F500, ENGINE NO. 74019475, et al.

Civ. 12877.

District Court of Appeal, First District, Division 1, California.

Aug. 18, 1945.

1. Forfeitures 🔑5

Finding that automobile was used to transport a narcotic unlawfully was supported by evidence of inspectors that they saw registered owner drive up and park automobile outside his residence and then remove from automobile and throw into gutter a cigarette butt containing three grains of marihuana. St.1939, p. 767, § 11610 et seq.; St.1940, 1st Ex.Sess., p. 23, § 11610.

2. Forfeitures 🔑5

Forfeiture of automobile under statute because of use in unlawfully transporting narcotic does not depend upon proof of transportation of any definite quantity of narcotics, or use of automobile to traffic in narcotics. St.1940, 1st Ex.Sess., p. 23, § 11610.

3. Forfeitures 🔑5

Evidence that conditional vendor of automobile was an aider and abettor of occupant of automobile used to unlawfully transport marihuana was not a prerequisite to forfeiture of conditional vendor's interest in automobile. St.1940, 1st Ex.Sess., p. 23, § 11610.

4. Forfeitures ⚷5

Claimant, in order to prevent forfeiture of his interest in automobile used to transport narcotics unlawfully, has burden of proving that such interest was created only after investigation required by statute which is an affirmative defense. St. 1939, p. 768, § 11620; St.1940, 1st Ex.Sess., p. 23, § 11610.

5. Forfeitures ⚷5

Whether a proper investigation was made before claimant's interest in automobile was created so as to protect such interest against forfeiture because of use of automobile to unlawfully transport narcotics is a question of fact to be tested by the legal standards ordinarily applied to such fact questions. St.1939, p. 768, § 11620; St.1940, 1st Ex.Sess., p. 23, § 11610.

6. Forfeitures ⚷3

What is a reasonable investigation of moral responsibility, character, and reputation of purchaser within statute permitting proof of such investigation before creation of claimant's interest in automobile as a defense against forfeiture of such interest because of use of automobile to unlawfully transport narcotics must be governed by the facts of each case. St.1939, p. 768, § 11620; St.1940, 1st Ex.Sess., p. 23, § 11610.

7. Forfeitures ⚷3

Investigation into financial standing or credit rating of automobile purchaser is not such a "reasonable investigation" of moral responsibility, character, and reputation as will protect conditional vendor's interest in automobile against forfeiture because of use of automobile in unlawfully transporting narcotics. St.1939, p. 768, § 11620; St.1940, 1st Ex.Sess., p. 23, § 11610.

See Words and Phrases, Permanent Edition, for all other definitions of "Reasonable Investigation".

8. Forfeitures ⚷3

A "reasonable investigation" of automobile purchaser sufficient to protect conditional vendor's interest against forfeiture because of use in transporting narcotics should reveal home address, past or present employer, source of income, family or social connections, and, in case of a stranger, some inquiry as to prior location and his standing in that community. St.1939, p. 768, § 11620; St.1940, 1st Ex. Sess., p. 23, § 11610.

9. Forfeitures ⚷5

Evidence sustained finding that interest in automobile of purchaser of conditional sales contract was not created after such a reasonable investigation of moral responsibility, character, and reputation of conditional buyer as was necessary to protect interest of purchaser of contract against forfeiture because of use of automobile to unlawfully transport narcotics. St.1939, p. 768, § 11620; St.1940, 1st Ex. Sess., p. 23, § 11610.

◆

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Proceeding by the People of the State of California to forfeit the interests of George Morris, registered owner, Kelley Kar Company, and F. C. Macy and others, doing business under the fictitious name and style of Automobile Investment Company, legal owner, in a certain 1940 Buick 8 Sedan, License No. 1F500, Engine No. 74019475, on the ground that such vehicle was used to unlawfully conceal or transport marihuana. From a judgment forfeiting to the State the interests of all concerned, F. C. Macy and others, doing business under the fictitious name and style of Automobile Investment Company, appeal.

Judgment affirmed.

Combs & Murphine, of Los Angeles, for appellants.

Robert W. Kenny, Atty. Gen., and Ralph W. Scott, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

This proceeding was instituted by the state under § 11610 et seq. of the Health and Safety Code, St.1939, p. 767, to forfeit the interests of George Morris, the registered owner, the Kelley Kar Company, and the Automobile Investment Company, a partnership, the legal owner, of a certain 1940 Buick Sedan, on the ground that such vehicle was used to unlawfully conceal, convey, carry, or transport marihuana in violation of the provisions of the Health and Safety Code, supra. Morris filed an answer denying the charge, but did not defend the action. He subsequently pleaded guilty to unlawful possession of narcotics based on the transaction here involved. The Kelly Kar Company had sold its interest in the automobile to the Automobile Investment Company prior to the date of the seizure and has no interest in this proceeding. The Automobile Investment Company alleged in its answer that the Kelley Kar Company sold the automobile to Morris by a conditional contract of sale which was subsequently purchased by it; that when the Kelley Kar Company executed the original contract of sale it made a proper investigation of the moral responsibility, character, reputation and credit of Morris, the nature of which investigation is set forth in detail and will be later discussed; that Kelley Kar Company when it sold the contract to defendant informed defendant of the nature, extent and results of its investigation. This defendant also denied that marihuana was ever unlawfully possessed by an occupant or that the vehicle was used to unlawfully conceal, convey or transport marihuana. It denied any knowledge that the vehicle was to be so used.

The trial court found that the Buick in question on October 16, 1943, was used by Morris "to unlawfully conceal, convey, carry and transport a certain narcotic, i. e., marihuana" contrary to the provisions of the Health and Safety Code, and that the interest of defendant "was not created therein after a reasonable investigation of the moral responsibility, character and reputation of the said George Morris." Based on these findings the interests of all concerned were forfeited to the state. From this judgment the Automobile Investment Company appeals, contending (1) that there is no evidence to support the finding that the automobile was used to transport narcotics; (2) that before the interest of a lien holder may be forfeited on the ground that a narcotic is unlawfully kept, deposited or concealed therein the lien owner must be particeps criminis with the occupant; and (3) that, in any event, the evidence shows, as a matter of law, that the investigation required by the statute to protect the lien holder was here made. All of these contentions are without merit.

[1] The finding that the automobile was used to transport a narcotic unlawfully is amply supported by the evidence of the two arresting inspectors. They testified that they seized the vehicle and arrested Morris on October 16, 1943; that on that evening they were waiting for Morris to return to his home at 2753 Golden Gate Avenue, San Francisco; that they were parked in their car across the street from that address; that late in the evening Morris drove up in the Buick and parked in front of that address; that with Morris was his wife; that Morris got out of the car and started to lock the door; that they got out of their car and started towards the Morris car; that the Morris car was parked near a street light; that as they approached within a few feet of the Morris car, Morris appeared to observe them, opened the front door of the Buick, reached into the car near the steering wheel and removed something therefrom, and then dropped a paper into the gutter by the curb. Inspector Carpenter testified that he picked up that paper and that there was no other paper near it in the gutter. Upon being analyzed the paper was found to be a cigarette butt containing three grains of cannabis sativa—marihuana. Morris denied that the cigarette was his and "he stated that he had not sold any marihuana for a long time." The two inspectors then accompanied Morris and his wife into the Morris house. Inspector Armstrong accused Morris of having gone to Tia Juana and returned with a large shipment of marihuana. Morris admitted just having returned from Tia Juana, but denied bringing in narcotics and stated that he had not had anything to do with peddling marihuana for a long time. Morris pleaded guilty to possession of narcotics based on this transaction.

[2] This evidence supports the finding that Morris was unlawfully transporting three grains of marihuana at the time and place in question. The officers saw the car moving on the public street, and saw Morris remove the narcotic from the car and drop it in the gutter. Defendant contends not only that three grains of marihuana is an insufficient quantity to constitute a violation of the act, but also that the act is violated only upon a showing that the occupant used the car to traffic in narcotics. The difficulty with these contentions is that they disregard the language of the statute. Although the prevention of the traffic in drugs is the basic aim of the statute, in order to effectually accomplish this purpose the legislature has seen fit to provide that "A vehicle used to unlawfully transport any narcotic, or in which any narcotic is unlawfully kept, de-

posited or concealed, or in which any narcotic is unlawfully possessed by an occupant thereof, shall be forfeited to the State." § 11610, Health and Safety Code, St.1940, 1st Ex.Sess., p. 23. Traffic in drugs is not made an indispensable element of any portion of this statute. Nor is any definite quantity of narcotics specified. As was said in People v. One Ford Coupe, etc., 10 Cal.App.2d 321, 323, 51 P.2d 882, 883, in answering a similar contention: "If a forfeiture for the transportation of such a small quantity of narcotics seemed a drastic penalty, it nevertheless was a matter within the domain of the Legislature, and was not a matter to guide the judgment of the court."

That no specific quantity of narcotics need be involved to result in a forfeiture seems so obvious from a reading of the statute that the point would not require further discussion were it not for some unfortunate dicta appearing in People v. One 1941 Cadillac Club Coupe, 63 Cal.App.2d 418, 147 P.2d 49, decided by a divided court and in which three justices of the Supreme Court voted for a hearing. The only real question involved in that case was the sufficiency of the examination by the conditional vendor and its assignee. In the course of its discussion of this problem the court quoted § 11610 of the Health and Safety Code and then stated (63 Cal.App.2d at page 421, 147 P.2d at page 51): "To transport means to carry or convey from one place to another. And it must clearly appear that the vehicle was being used for such a purpose. The incidental discovery of a single marihuana cigarette in a vehicle is not sufficient to establish the fact that the vehicle was being used to transport narcotics. The forfeiture provisions of the Health & Safety Code are designed to aid in the suppression of the traffic in narcotics. There is no evidence in the record tending to prove, or that even suggests, that the automobile in question was being used for such a purpose."

It is somewhat difficult to ascertain what the court meant by the quoted language. So far as the opinion discloses, the arresting officers did not observe the automobile in motion. The opinion simply states that (63 Cal.App.2d at page 419, 147 P.2d at page 50) "while the automobile was, with the consent the registered owner, under the sole control and in the temporary possession of one Andrew Pekara, certain narcotic enforcement officers made a search of the vehicle and in a depression in the seat thereof * * * found a single marihuana cigarette." If the first quoted portion of the opinion merely holds that to prove an offense under the transportation portions of § 11610 there must be some evidence that the car was moved while the narcotics were therein, the opinion is undoubtedly correct. This element of proof was supplied in the instant case. The arresting officers saw Morris drive up and remove the narcotic from the car. If the portion of the opinion first above quoted should be interpreted to mean that the finding of one marihuana cigarette in an automobile that was observed to be moving in traffic does not constitute a violation of the transportation provisions of § 11610, supra, or that the state must prove that the occupant of the car was actually engaged in the drug traffic, then the opinion must be disregarded as being directly contrary to the provisions of the pertinent statute. At any rate the language quoted was not necessary to the opinion and was clearly dicta.

[3] So far as the contention that to forfeit a conditional vendor's interest there must be evidence that he was an aider and abettor of the occupant is concerned, it is obvious that the section provides for no such requirement. This point has recently been determined by the Supreme Court in a decision rendered after the trial of this case and after the briefs were prepared. In People v. One 1941 Ford 8 Stake Truck, 26 Cal.2d 503, 159 P.2d 641, it was held that the legal and registered owner's interest would be forfeited even where the occupant, there an employee, was using the car on a personal errand and in direct violation of instructions. It was also held that the only defense permitted was that the legal or registered owner had made a proper investigation, and that no other defense, except that the car is used without the owner's consent—i.e., is stolen—is permitted by law.

The next contention is that the finding that the defendant did not make a reasonable investigation before purchasing the contract is unsupported by the evidence. Section 11620 of the Health and Safety Code, St.1939, p. 768, provides: "The claimant of any right, title, or interest in the vehicle may prove his lien, mortgage or conditional sales contract to be bona fide and that his right, title, or interest was created after a reasonable investigation of the moral responsibility, character, and reputation of the purchaser, and without any knowledge that the vehicle was being, or was to be, used for the purpose charged." There is no doubt that the conditional sales contract here involved was bona fide and that neither the Kelley Kar Company nor the defendant had any knowledge that the car was to be used to transport narcotics.

In interpreting the above-quoted section certain principles have been definitely settled:

[4] 1. The defense that the investigation required by the statute has been made is an affirmative defense, and the burden of proof on the issue rests with the claimant.

[5] 2. The question as to whether a proper investigation has been made is one of fact and is to be tested by the legal standards ordinarily applied to such fact questions.

[6] 3. The statute does not prescribe the maximum or minimum of the investigation that must be made. It requires a "reasonable" investigation of the factors involved. What is reasonable must be governed by the facts of each case.

[7] 4. An investigation into the financial standing or the credit rating of the car purchaser is not sufficient—the law requires an investigation of the "moral responsibility, character, and reputation of the purchaser." See cases cited later in this opinion.

There have been many cases decided by the appellate courts discussing what constitutes a sufficient investigation. Some have held that the investigation made in the particular case complied with the statutory requirements. People v. One 1933 Buick Sedan, 43 Cal.App.2d 482, 111 P.2d 378; People v. One Ford V8 Coach, 21 Cal.App.2d 445, 69 P.2d 473; People v. One Plymouth Sedan, 21 Cal.App.2d 715, 69 P.2d 1011; People v. One 1939 Plymouth 6 Coupe, 41 Cal.App.2d 559, 107 P.2d 266; People v. One 1940 Chrysler Coupe, 48 Cal.App.2d 546, 120 P.2d 117; People v. One 1939 Buick Coupe, 56 Cal. App.2d 163, 132 P.2d 308. All of these cases involved situations where the trial court found the investigations were sufficient, and it was held that the finding was supported.

There are other cases affirming the finding that the investigation was insufficient. People v. One 1938 Buick Sedan, 39 Cal. App.2d 42, 102 P.2d 447; People v. One Packard 6 Touring Sedan, 26 Cal.2d 150, 79 P.2d 130.

There are also a series of cases where the trial court found the investigation was sufficient to comply with the statute, but the appellate courts held that the finding was unsupported, and the judgments for the lien claimants were reversed. People v. One Harley-Davidson Motorcycle, 5 Cal.2d 188, 53 P.2d 155; People v. One 1939 Buick 8 Coupe, 43 Cal.App.2d 411, 110 P.2d 1013; People v. One 1937 Packard, 50 Cal.App.2d 761, 123 P.2d 900; People v. One Lincoln Eight, etc., 12 Cal.App.2d 622, 55 P.2d 925. This last cited series of cases are of particular importance because they involved situations where it was held that the investigations there made, as a matter of law, were insufficient. In the 5 Cal.2d 188, 53 P.2d 155, case the conditional vendor secured the names of three references from the purchaser, one of whom was the employer of the purchaser. The employer was interviewed. It was held that the investigation as a matter of law did not comply with the statute.

In the 50 Cal.App.2d 761, 123 P.2d 900, case the purchaser made certain statements as to his background to the manager of the bank, among which was the statement that he lived with his parents. The manager knew the parents of the purchaser and had had business dealings with them for over ten years. He knew the parents had a fine reputation and was satisfied, when the father of the purchaser agreed to endorse the purchaser's note. A finding that the investigation complied with the statutory requirements was reversed.

In the 12 Cal.App.2d 622, 55 P.2d 925, case the testimony showed an investigation was made of the financial responsibility of the purchaser, and that an inquiry was made of two references and one stated the purchaser was a "good old soak" and the other that the purchaser was a "very fine gentleman." The finding that a proper investigation had been made was reversed.

[8] One of the best reasoned cases dealing with this problem is the one appearing in 43 Cal.App.2d 411, 110 P.2d 1013. In that case the salesman that sold the car had known the prospective purchaser for a period of over six months. He called at the purchaser's home at least once and knew the purchaser frequented

a certain eating place. He inquired of the proprietor about the reputation of the purchaser and was told that the prospective purchaser was of "good character," was of good morals and of "good reputation." No inquiry was made at the prospective purchaser's home or business address. A financial report was secured from a credit association. In holding that the finding that a proper investigation had been made was unsupported the court stated (43 Cal. App.2d at page 416, 110 P.2d at page 1016): "It is clear, however, that the burden of proving an investigation of the kind and to the extent required by the statute rests upon the claimant, and although the question of the scope and reasonableness of such an investigation is primarily one of fact, it must meet cartain legal requirements. It would seem that a bona fide investigation should, among other essentials, reveal the home address of the prospect, his employer, either past or present, the source of his income, his family or social connections, and as in the case here of a stranger, some inquiry as to his prior location and his standing in that community."

[9] Tested by these standards we cannot hold that the challenged finding is unsupported as a matter of law. The record shows that when Morris purchased the automobile on August 30, 1943, he was a stranger to the seller and that he gave the seller, Kelley Kar Company a "purchaser's statement." In this statement he stated that his residence was 439 Lisbon Street, San Francisco; that for the past three years he had been employed as a watch salesman and by the Merchant Marine; that his salary was $300 per month payable on the first of each month; that the name of his previous employer was the Yellow Cab Company in San Francisco; that he was married and had one child. He gave the names of three persons in San Francisco as personal references, and stated that he had purchased a car through a designated seller in San Francisco.

The record shows that the C. I. T. Corporation refused to purchase this contract; that nevertheless the Kelley Kar Company, pursuant to prior arrangements, asked the Los Angeles office of the Universal C. I. T. Corporation for a report on Morris. This request was forwarded to the San Francisco office of the C. I. T. Corporation. That company referred the request to the Retail Credit Association in San Francisco. That company reported that they had a card in their files dated December 12, 1926, which showed the occupation of the proposed purchaser was that of fruit peddler and that he owed a jewelry company $30 and had not paid it. The report also stated that the Yellow Cab Company reported that he had been employed by that company but had left their employ in July of 1943. The report also stated that Ed's Vehicle Company had sold him a car but that a finance company had purchased the contract and that Ed's Vehicle Company had no record of the transaction. The report concluded: "Sorry we could not get more for you."

This information was forwarded to the Kelley Kar Company in Los Angeles. The defendant company purchased the contract from the Kelley Kar Company on September 20, 1943, in the regular course of business. They had purchased several hundred thousand dollars worth of contracts from the Kelley Kar Company. The Automobile Investment Company made no independent investigation but relied on that made by Kelley Kar Company, the results of which they knew.

There is another report of the Retail Credit Association that appears in the record. This report is dated November 29, 1943. This report also states that Morris had been employed by the Yellow Cab Company; that in 1936 he was reported to be a fruit peddler but "we were unable to learn details"; that a sister of Morris informed the question that Morris was in the Merchant Marine and that his wife was believed to be with the Yellow Cab Company; that the Morrises no longer live at 439 Lisbon Street; that their present address is unknown; that the Yellow Cab Company has no record of the employment of the wife; that "without a residence address we are unable to learn details of his activities. Due to emergency restrictions the U. S. Merchant Marine refuses information"; that "their financial status is unknown." There is considerable doubt as to whether defendant had the information in this report prior to September 20, 1943, when it purchased the contract. The defendant contends that the information in the November report was telephoned to Kelley Kar Company September 8, 1943. This is not entirely clear from the testimony of the representatives of the Retail Credit Association. The trial court would have been justified in finding that the defendant did not have the information contained in the November report at the time it purchased the contract. However, we are of the opinion that even if both reports of the Retail Credit Association were before the defendant before it purchased the contract the investigation did not, as a matter of law, comply with the statutory requirements.

Morris was a stranger to the Kelley Kar Company and to defendant. The automobile was purchased in a locality where the purchaser was unknown. The investigation made was primarily a credit investigation. No real investigation was made at the place of employment given on the questionnaire except to discover that he was no longer there employed. The investigation did disclose that neither Morris nor his wife lived at the address given by Morris. No check at all was made of the personal references given. The investigation disclosed that Morris had been a peddler and not a watch salesman as he had stated, and that he had failed to pay a $30 bill. Certainly the investigation here made cannot be held, as a matter of law, to constitute a "reasonable investigation of the moral responsibility, character, and reputation of the purchaser" as required by § 11620 of the Health and Safety Code. The finding that no real investigation of the purchaser's moral responsibility was made is amply supported.

Defendant makes the usual arguments made in these forfeiture cases, namely, that the statute is a harsh one, that it must be strictly construed, that their investigation was as thorough as is practical in modern business dealings, and that their reliance on established credit agencies was reasonable. The law has seen fit to provide a forfeiture of the innocent vendee's interest except where a proper investigation is made. The legislature has determined that such forfeitures are reasonably necessary to carry out the beneficent purposes of the statute. It is not for the courts to try to relax the clear terms of the statute. The answer to defendant's contentions is to be found in the case of People v. One 1941 Ford 8 Stake Truck, 26 Cal.2d 503, 507, 159 P.2d 641, 643, where it was stated: "Clearly shown by the terms of section 11610 et seq. is a legislative policy that the vicious traffic in narcotics, with its disastrous effect upon the unfortunate members of society, is so great an evil as to justify the drastic penalty of confiscation of vehicles used to transport the contraband. The public interest to be protected against the drug and its victims outweighs the loss suffered by those whose confidence in others proves to be misplaced, and although, in some cases, hardship may result from the enforcement of the statute, no constitutional guarantees are invaded."

The judgment appealed from is affirmed.

KNIGHT and WARD, JJ., concur.

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70 Cal.App.2d 454

KAPITAN v. SMITH.

Civ. 12847.

District Court of Appeal, First District,
Division 2, California.

Aug. 7, 1945.

Rehearing Denied Sept. 6, 1945.
Hearing Denied Oct. 1, 1945.

1. Automobiles 🔑244(35)

Evidence, including defendant's testimony that he did not see plaintiff until she was lying in highway and testimony of witnesses who heard skidding of defendant's vehicle and the impact when it struck plaintiff, supported finding of negligence on ground that defendant was traveling at an excessive speed.

2. Automobiles 🔑217(3), 245(72)

A pedestrian is not prohibited from crossing a public highway where pedestrian crossings are not marked, and if pedestrian is negligent in so doing it is a question of fact to be decided under all circumstances.

3. Automobiles 🔑244(50)

Evidence supported finding that plaintiff, who was struck by automobile when attempting to cross highway, was not guilty of contributory negligence in attempting to cross at a place where pedestrian crossing was not marked.

4. Appeal and error 🔑891

Denying defendant's motion for leave to take additional evidence, based upon his affidavit that witness who was unavailable at time of trial would testify that lights were burning on defendant's automobile after the accident and that skid marks appearing on the highway were beyond and ahead of point where defendant's automobile was stopped, was not error, where proposed testimony as to lights after automobile was stopped would not aid defendant, and testimony regarding location of skid marks would merely create an immaterial conflict.

◆

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action by Merle Kapitan against Robert Hayes Smith for injuries suffered by plaintiff when struck by defendant's motor vehicle. From a judgment for plaintiff, the defendant appeals.

Affirmed.

Robert Hayes Smith, of Hillsborough, in pro. per.

Lewis E. Lercara, of Oakland, and Shirley, Robb & Saroyan, of San Francisco, for respondent.

NOURSE, Presiding Justice.

In a trial to the court sitting without a jury the plaintiff had a judgment for damages for injuries suffered when struck by defendant's motor vehicle. When the cause was called for oral argument the defendant moved to take the testimony of a witness who was not present at the trial. Three questions are presented for decision—the sufficiency of the evidence to support the finding of defendant's negligence, the question whether plaintiff was guilty of contributory negligence as matter of law, and the demand to take additional evidence.

At about 8:30 p. m. on August 20, 1943, plaintiff was a pedestrian walking in a westerly direction across El Camino Real in the town of Milbrae at a point in a twenty-five mile zone where there were no pedestrian cross-walks. The highway at that point had four lanes. When plaintiff reached the curb she paused to let a north bound vehicle pass, stopped in the middle of the highway at the double line and looked for traffic coming from the north. She saw nothing and proceeded in her course to the westerly outer lane where she was struck by defendant's vehicle and thrown to the ground. She testified that the vehicle was traveling without head lights and two witnesses corroborated her. These two witnesses were seated in an apartment about two hundred feet from the point of collision. They testified that they were aroused by the noise of the skidding tires and by the sound of the impact. Defendant testified that he did not strike plaintiff, that he first saw her when she was lying in the highway, and that, though his lights were on, the accident occurred during the "dim out" period. It was shown, however, that the dim out regulations were not applicable to this territory.

[1] As to appellant's negligence, respondent relies on her proof that he was traveling without lights and that the skidding of the vehicle showed that he was traveling at an excessive speed. Either factor was sufficient to support the finding of negligence. The appellant testified that he did not see respondent until she was lying in the highway. This testimony taken with that of the witnesses who heard the skidding of the vehicle and the impact merely supports the inference that appellant was driving negligently at an excessive speed. There is no conflict on this issue except in appellant's statement on one occasion that he was traveling at a speed of five miles an hour, on another occasion that his speed was fifteen.

[2, 3] The issue of contributory negligence is not debatable. There is no rule of law that prohibits a pedestrian from crossing a public highway where pedestrian crossings are not marked. If one is negligent in so doing it is a question of fact to be decided under all the circumstances of the particular case. Here the trial court found that respondent was not negligent and that finding cannot be disturbed. Casalegno v. Leonard, 40 Cal.App.2d 575, 578, 105 P.2d 125; Bushey v. Rigby, 34 Cal.App.2d 41, 45, 92 P.2d 1032.

[4] Appellant's motion for leave to take additional evidence is based upon his affidavit that a witness who was unavailable at the time of the trial would testify that the lights were burning on appellant's car after the accident and that the skid marks appearing on the highway were beyond and ahead of the point where the car was stopped. It does not appear that the proposed witness saw the collision or that he saw the lights on the car before it was stopped. His testimony as to the lights after the car was stopped would not aid appellant. The testimony regarding the location of the skid marks would merely create a conflict which is not material. If the question of excessive speed presented the only issue of negligence, the testimony

of those witnesses who heard the tires skidding before the impact was sufficient evidence of excessive speed—and that testimony was not controverted.

The motion is denied and the judgment affirmed.

GOODELL, J., and DOOLING, Justice pro tem., concur.

70 Cal.App.2d 472

GOLDBERG v. PACIFIC EMPLOYERS INS. CO. et al.

Civ. 12846.

District Court of Appeal, First District, Division 2, California.

Aug. 9, 1945.

Hearing Denied Oct. 4, 1945.

1. Workmen's compensation 🔑709

Under the "bunk house rule" where employee by contract with, or requirement of, employer resides on employer's premises, an injury incurred by employee while on employer's premises, though incurred while not actually engaged in doing any work for employer, is compensable.

See Words and Phrases, Permanent Edition, for all other definitions of "Bunk House Rule".

2. Workmen's compensation 🔑164

Household domestic servant who was actually employed less than 52 hours per week in rendering services for employer in whose home she lived was not employed by one employer for over 52 hours per week so as to be an employee within coverage of Workmen's Compensation Act, though, including sleep and free time, she spent considerably more than 52 hours per week on employer's premises. St.1937, p. 265, § 3202; St. 1939, pp. 2873, 2874, §§ 3352(g), 3358.5, 5704.5.

3. Workmen's compensation 🔑53

The Workmen's Compensation Act is to be liberally construed to extend its benefits for the protection of persons injured in the course of their employment, but must nevertheless be construed to carry out legislative intent as expressed in language used in legislative enactments. St.1937, p. 265, § 3202.

4. Workmen's compensation 🔑164

Time actually spent in rendering services is the proper measure to be applied in determining whether household domestic servant is employed by one employer for over 52 hours per week so as to be an employee within the coverage of Workmen's Compensation Act. St.1937, p. 265, § 3202; St.1939, pp. 2873, 2874, §§ 3352(g), 3358.5, 5704.5.

5. Workmen's compensation 🔑1345, 1427

The burden of proving that injured household domestic servant was excluded from coverage under Workmen's Compensation Act was fully met by servant's own testimony showing that she was engaged less than 52 hours per week in actually performing services for employer, and any presumption in servant's favor was thereby effectively destroyed. St.1937, pp. 265, 299, §§ 3202, 5705(a); St.1939, pp. 2873, 2874, §§ 3352(g), 3358.5, 5704.5.

Proceeding under the Workmen's Compensation Act by Katherine Devens, claimant, opposed by Joseph Goldberg, employer, and Pacific Employers Insurance Company. To review an award of the Industrial Accident Commission of the State of California in favor of claimant, the employer brings certiorari.

Award annulled.

George C. Faulkner, of San Francisco, for petitioner.

Everett A. Corten and R. C. McKellips, both of San Francisco, for respondent Commission.

S. Norman Hays, of San Francisco, for respondent Pacific Employers Ins. Co.

Henry G. Sanford, of San Francisco, for respondent Devens.

DOOLING, Justice pro tem.

This is a proceeding in certiorari to review an award of the Industrial Accident Commission in favor of the respondent, Katherine Devens. Taking the evidence of Mrs. Devens, which is the most favorable to her case, the following facts appear:

Mrs. Devens was for many years engaged in household domestic service. It was her practice to work by the day or half day in the homes of several employers each week. Among these part time employers were the petitioner Joseph Goldberg and his wife. In the fall of 1943 the Goldbergs suggested to her that she come to their home to live. Mrs. Goldberg at first proposed that Mrs. Devens should pay for a room in their home and that the Goldbergs would continue to pay her for whatever household work she might do for them. This proposal was not carried out but instead, about two weeks before Christmas, 1943, Mrs. Devens moved into the Goldberg home under an oral agreement whereby she was to perform certain services for the Goldbergs in exchange for her room. It was further understood that Mrs. Devens would continue to work in the homes of other employers, as before, and that if she rendered any services for the Goldbergs in addition to those agreed to be performed in payment for her room the Goldbergs would pay her for such services. The hours of service which Mrs. Devens testified that she performed weekly in exchange for her room were as follows: One hour each week-day morning, from 7 to 8 o'clock, preparing breakfast; four hours each Sunday morning; two days per week from 1 p.m. to 8 p.m.; one day per week from 4 p.m. to 8 p.m.; and on three nights per week two hours per night washing dishes. The total hours per week so testified to comes to thirty-four. The Sunday after Christmas Mrs. Devens worked fifteen hours for the Goldbergs, for which she was paid in cash. Since this fifteen hours was inclusive of the four hours which she normally worked on Sunday morning it would appear that during that week she had worked a total of forty-five hours. On no other occasion between the time that she went to live in the Goldberg home and the date of her injury was she called upon to do any additional work in the Goldberg household. It should be added that Mrs. Devens did at one time testify that she worked for the Goldbergs "about 51 hours altogether here", but her detailed testimony above outlined failed to support this general statement.

Mrs. Devens was injured on January 15, 1944, when a porch of the Goldberg home collapsed while she was standing on it cleaning a rug.

Section 3358.5 of the Labor Code, St. 1939, p. 2874, provides that: "Any person engaged in household domestic service who is employed by one employer for over fifty-two hours per week is an employee under this division."

The respondent Commission found that "the applicant was engaged in household domestic service by said employer for over fifty-two hours per week."

This finding is attacked as totally unsupported by any evidence.

[1] It is not claimed by the respondents that there was any evidence produced before the Industrial Accident Commission that the time that Mrs. Devens was actually engaged in doing household work in the Goldberg home amounted to fifty-two hours per week. The respondent Commission relies on the "bunk house" rule to support the finding attacked, citing Associated Oil Co. v. Industrial Acc. Comm., 191 Cal. 557, 217 P. 744; Larson v. Industrial Acc. Comm., 193 Cal. 406, 224 P. 744; State Comp. Ins. Fund v. Indus. Acc. Comm., 194 Cal. 28, 227 P. 168; and Employers', etc., Corp. v. Indus. Acc. Comm., 37 Cal.App.2d 567, 99 P.2d 1089. Those cases were not concerned with the question here presented. They dealt with the question whether or not an injury incurred by an employee while not actually engaged in doing any work for his employer was none the less compensable where the employee by contract with, or requirement of, the employer resided on the employer's premises and incurred an injury while on the premises. The cases cited hold that such an injury is compensable. They do not discuss or consider the question here involved, whether an employee employed by one employer to perform actual services covering less than fifty-two hours per week shall be considered in law to be "employed by one employer for over fifty-two hours per week" because under the terms of his employment he resides on the premises of the employer.

[2] The "bunk house" rule in this respect is no different from certain other well recognized exceptions to the general rule that an injury to an employee to be compensable must occur during the time that he is actually engaged in performing services for his employer. Among these well recognized exceptions may be cited the rules that an employee is entitled to compensation when he is injured while being transported to or from his work in his employer's conveyance (27 Cal.Jur. 383); while he is eating lunch on his employer's premises (27 Cal.Jur. 387); and while he is entering his employer's premises to commence his work or leaving his employer's premises after his work is finished for the day (27 Cal.Jur. 387 et seq.). We cannot

believe that in computing the number of hours per week for which an employee was employed by his employer the time consumed in going to and from the job in his employer's conveyance, the time consumed in eating lunch on his employer's premises, or the time consumed in entering the premises before commencing work or in leaving the premises after the work is finished should be included. No more do we believe that the Legislature intended that a domestic servant actually employed to do less than fifty-two hours per week should be considered "employed * * * for over fifty-two hours per week" because during the time when she was not hired to work, and actually was not working for her employer, she lived upon the employer's premises.

If respondents' contention in this regard is correct some surprising results would follow. A servant residing upon an employer's premises might be reasonably assumed to spend at least eight hours per night in her room or fifty-six hours per week. If she agreed to perform services for only eight hours per week, or four or even one, in exchange for her room, she would be employed over fifty-two hours per week by that employer under respondents' theory. Indeed, under that theory, it would be practically impossible to employ any domestic servant residing on the premises without employing her for fifty-two hours per week, however little work per week she was actually engaged to do.

Section 1350 of the Labor Code provides that: "No female shall be employed in any * * * hotel, public lodging house, apartment house, hospital * * * more than eight hours during any one day of twenty-four hours or more than forty-eight hours in one week." In State Comp. Ins. Fund v. Indus. Acc. Comm., supra, 194 Cal. 28, 227 P. 168, one of the cases cited and relied upon by respondents, the Supreme Court applied the "bunk house" rule to a hotel maid whose contract of employment required her to live in the hotel, holding an injury received by the maid while leaving the hotel on her day off to be compensable. Applying the reasoning contended for by respondents, this maid and every other female employee of a hotel, lodging house, apartment house or hospital who resided on the employer's premises under her contract of employment would do so in violation of section 1350, Labor Code.

[3] Our Workmen's Compensation Act, now embodied in the Labor Code, is to be liberally construed to extend its benefits for the protection of persons injured in the course of their employment. Labor Code, § 3202, St. 1937, p. 265. With this beneficent purpose in mind it must still be construed to carry out the legislative intent as expressed in the language used in the legislative enactments. Labor Code, § 3358.5, was enacted in 1939. Stats. 1939, pp. 2873, 2874. The entire statute contained three sections. Section 1 of that statute amended section 3352 of the Labor Code by rearranging its subdivisions and adding to the former subdivision (b) (rearranged as (g) in the amendment) the words which we italicize in the following quotation:

> "'Employee' excludes:
>
> *　*　*　*　*　*
>
> "(g) Any person engaged in household domestic service *except as provided in section 3358.5.*"

The effect of this amendment together with the adoption of section 3358.5 hereinabove quoted (by section 2 of the statute) was to bring within the coverage of the Compensation Act for the first time a limited class of household domestic servants, i. e., those "employed by one employer for over fifty-two hours per week."

Section 3 of the same statute added section 5704.5 to the Labor Code. Section 5704.5, so added, reads: "A written contract entered into between a person engaged in household domestic service and his employer shall raise a rebuttable presumption that the hours of employment specified therein are the hours actually worked per week by such household domestic for that employer."

We quote section 5704.5 not because there was a written contract of employment in this case. There was none. But because it sheds light on the legislative intent in adopting section 3358.5, as a part of the same statute. There would be no purpose in creating a rebuttable presumption that the hours of employment specified in a written contract "are the hours actually worked per week" unless the hours *actually worked* per week was the measure to be applied in determining whether the household domestic servant is "employed by one employer for over fifty-two hours per week" within the meaning of section 3358.5.

[4] It seems clear that the time actually spent in rendering service is the proper measure to be applied and that respondent commission erroneously took into consideration free time spent on the premises solely because the injured servant resided thereon.

[5] It is further argued that the burden of proof was on the employer to prove that Mrs. Devens was an excluded employee. Labor Code, § 5705 (a). The burden was fully met by Mrs. Devens' own testimony and any presumption in her favor was thereby effectively destroyed. Mar Shee v. Maryland Assurance Corp., 190 Cal. 1, 210 P. 269.

Our conclusion on this phase of the case makes it unnecessary to consider the questions of insurance coverage also argued.

The award is annulled.

NOURSE, P. J., and GOODELL, J., concur.

Hearing denied; GIBSON, C. J., and CARTER, J., dissenting.

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70 Cal.App.2d 492

FERRARI v. MAMBRETTI et al.

Civ. 12888.

District Court of Appeal, First District, Division 2, California.

Aug. 10, 1945.

Rehearing Denied Sept. 8, 1945.

Hearing Denied Oct. 4, 1945.

1. Continuance 🔑25

In action for value of plaintiff's services, it was not error to deny plaintiff's motion for continuance on ground that two nonresidents could not attend for two months, where their testimony would deal with only a small part of plaintiff's services, and there was no showing that they were the only witnesses who could testify to the facts.

2. Continuance 🔑19

The right of parties to be present at trial is not unqualified, as regards right to continuance.

3. Continuance 🔑7

The granting or denial of continuance rests in sound discretion of trial court.

4. Appeal and error 🔑966(1)

The granting or denial of continuance will be reversed only on satisfactory showing of abuse of discretion.

5. Continuance 🔑19

In action for value of plaintiff's services to decedent, though there was no counter showing against plaintiff's motion for continuance due to inability to leave nursery business to attend trial, judge could consider that action had been pending for 3½ years, that plaintiff could not be a witness, that case had been tried once before, that plaintiff would be in city of forum, etc.

6. Continuance 🔑19

In action for value of plaintiff's services to decedent, denial of plaintiff's motion for continuance due to inability to leave nursery business to attend trial was not abuse of discretion under facts, in view of plaintiff's incompetence as witness and counsel's familiarity with case because of prior trial, etc. Code Civ.Proc. § 1880, subd. 3.

Appeal from Superior Court, City and County of San Francisco; Thomas M. Foley, Judge.

Action by Louis Ferrari against Palmira Mambretti, as administratrix of the estate of David Ferrari, alias, deceased, for the value of services allegedly performed by plaintiff for the deceased. From a judgment dismissing the action, plaintiff appeals.

Affirmed.

Frank J. Perry and George Olshausen, both of San Francisco, for appellant.

Anthony S. Devoto, of San Francisco, for respondent.

DOOLING, Justice pro tem.

This appeal is prosecuted by the plaintiff from a judgment dismissing the action. The case was regularly set for trial on November 6, 1944, and the judgment of dismissal was ordered on that date following the statement of plaintiff's counsel that "I am standing on the grounds that I am not ready to go to trial at this time." It was and is appellant's position that the trial court abused its discretion in denying appellant's motion for a continuance of the trial date to January, 1945.

A previous judgment for appellant in the same case was reversed in this court. Ferrari v. Mambretti, 58 Cal.App.2d 318, 136 P.2d 326. The nature of the action sufficiently appears from that opinion. After the remittitur was filed in the trial court appellant made a motion to file an amended complaint, which was denied. The motion was twice renewed and the last order of denial was made on June 21, 1944. On July 14, 1944, appellant filed a memorandum of motion to set the cause for trial and on August 29, 1944, a motion of respondent to advance the cause for trial was granted and the cause set for trial on October 16, 1944. Thereafter the court continued the case for trial to November 6, 1944.

On October 30, 1944, appellant moved the court for a continuance of the trial to some time in the month of January, 1945. This motion was supported by an affidavit of the plaintiff, one of plaintiff's counsel, the affidavits of two men who were familiar with plaintiff's business, and the affidavits of two witnesses for plaintiff, Voight and Wilson.

The motion for continuance was based upon two grounds: (1) That the requirements of plaintiff's business are such that he could not attend the trial of his action during November or December without suffering irreparable financial loss, and (2) that the witnesses Voight and Wilson, who resided in Lake County beyond the reach of subpoena, could not attend the trial during those months.

[1] The second ground may be summarily dealt with. The testimony of these witnesses would deal with only a small part of plaintiff's services, a few trips to Lake County with his uncle to buy turkeys. There was no showing in any of the affidavits that these two witnesses were the only ones who could testify to these facts. "In order to obtain a continuance it should further appear that the facts expected to be proved by the absent material witness cannot be otherwise proved." 5 Cal.Jur. 992, 993.

The sufficiency of the showing of plaintiff's inability to be in continuous attendance on a trial of the length of this one (the first trial consumed nine days) may be conceded. The affidavits showed quite fully that he is a partner in a wholesale nursery business, that the business is largely seasonal and during November and December of each year requires all of his time, and that this was particularly true in 1944 because of war-time shortage of help and the illness of a partner. There was, however, no showing by affidavit that the plaintiff's continuous attendance on the trial was necessary or essential to its prosecution, and it was conceded on the argument of the motion that he could not be a witness by reason of the prohibition of Code Civ.Proc. § 1880, subd. 3.

The following quotations from the transcript of the argument on the motion for continuance may serve to evoke some of the atmosphere of, and the interplay of ideas that occurred in, the trial courtroom:

"The Court: Well, that is right, the plaintiff is foreclosed under 1880 from testifying.

"Mr. Perry: That is correct. But we put the plaintiff on the stand and objection was made that he could not testify; but in a trial for any substantial amount of money, if the plaintiff does not appear, it is tantamount to losing the case.

"The Court: Oh well, no; he does not have to be in court. * * *

"Mr. Perry: * * * As I stated before, to force my client to trial—and your honor takes a different view than I do, that there is no necessity in him coming in; and I feel that plaintiff needs every possible advantage in the case, to present a case and let the jury look at the plaintiff and see what his conduct and demeanor is during the course of the trial, and put the plaintiff on the stand and make counsel go through the formality of objecting to his testimony under 1880 of the Code of Civil Procedure.

"The Court: But that should not take more than one day.

"Mr. Perry: I understand that. But it is my idea as attorney for the plaintiff that I feel the plaintiff should be present during the entire trial. That is the position we are in. It is not a point where we just want to get a continuance for the sake of getting it. It has turned out to be an economic point on the part of my client as to whether or not he is going to lose more money in his business if the case goes to trial in this court now, as against an amount he may get from a verdict.

"The Court: If there is any question, he can let the case go ahead and come in now and then. As long as he is not testifying, I don't think it is necessary for him to be there all along. Anyway, that is the order. * * *"

We quote this portion of the argument because, as noted above, the affidavits in support of the motion for continuance did not state, or set out any facts tending to prove, that the plaintiff's continuous presence in the courtroom was necessary or essential.

Appellant leans heavily on Jaffe v. Lilienthal, 101 Cal. 175, 35 P. 636, 637, and argues in effect that a plaintiff is always entitled to be present at the trial of his cause and must be granted a continuance where it is shown that his absence on the date set for trial through no fault of his own will be unavoidable. The facts in the cited case were not at all similar to those here presented. In Jaffe v. Lilienthal, supra, the plaintiff was unavoidably detained out of the state of California and the affidavits expressly showed "that his presence at the trial was indispensably necessary; that he was the only person who knew the whereabouts of the witnesses necessary to be called on his behalf; that their names had not been communicated to his attorney, nor the matters to which they would testify." In the case before us the plaintiff resided and had his business in San Francisco, the place of trial. The case had once been tried and presumably all of the witnesses' names were known to plaintiff's counsel. If not, it is not shown that the exigencies of plaintiff's business were such that he could not meet and counsel with his attorney.

It is true that in Jaffe v. Lilienthal the court used the following language, 101 Cal. 177, 35 P. 637:

"It seldom happens that a trial can be properly had in the absence of the plaintiff, even where he is disqualified as a witness, especially where it is to be tried upon oral testimony. With all the care that can reasonably be taken by both attorney and client, some matter of vital importance is liable to be overlooked by them until the trial calls it to the recollection of the plaintiff, and this is especially true in relation to matters purely in rebuttal. It is the right of parties to be present at the trial of their cases."

[2] Subsequent decisions of the Supreme Court make clear that the right of parties to be present at the trial of their cases is not absolute and unqualified. Lynch v. Superior Court, 150 Cal. 123, 88 P. 708; Sheldon v. Landwehr, 159 Cal. 778, 116 P. 44; Mission Film Corporation v. Chadwick Pictures Corporation, 207 Cal. 386, 278 P. 855. The court said in Sheldon v. Landwehr, supra, 159 Cal. at page 781, 116 P. at page 45:

"The circumstance that the witness who is unable to attend is at the same time one of the parties should no doubt be regarded as strengthening the showing in favor of a continuance (citing Jaffe v. Lilienthal, supra), but it has never been held in this court that the unavoidable absence of a party necessarily compels the court to grant a continuance."

See also Sonstelie v. Bush, 102 Cal.App. 396, 283 P. 336; Ross v. Thirlwall, 101 Cal.App. 411, 281 P. 714; Johnson v. Johnson, 59 Cal.App.2d 375, 139 P.2d 33; Queirolo v. Queirolo, 129 Cal. 686, 62 P. 315; 17 C.J.S., Continuances, § 27, pp. 211–212.

[3-6] The granting or denial of motions for continuance rests in the sound discretion of the trial court and the trial court's action thereon will only be reversed on a satisfactory showing that this discretion has been abused. 5 Cal.Jur. 968–970. While there was no counter showing by affidavit or testimony on defendant's part, the trial judge was entitled to take into consideration the facts shown by the record that the action had been pending since April 26, 1941; that it was against the administratrix of an estate; and that the estate could not be closed while the action was pending; together with the further facts that appellant could not be a witness on his own behalf; that the case had already once been tried and counsel was therefore familiar with the witnesses on both sides and their previous testimony; that appellant would be present in San Francisco to counsel and advise with his attorney during the course of the trial; and, as the trial judge put it, "If there is any question he can let the case go ahead and come in now and then." Upon the whole record we can find no abuse of discretion in the trial court's order denying the continuance.

This conclusion makes it unnecessary to consider the question, also presented, of the propriety of the orders denying leave to further amend the complaint.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.

Hearing denied; CARTER, J., dissenting.

70 Cal.App.2d 470

PEOPLE v. LONG.

Cr. 636.

District Court of Appeal, Fourth District, California.

Aug. 8, 1945.

1. Criminal law ⇨1159(3)

Mere conflict in the evidence furnishes no ground for reversal if there is substantial evidence supporting the verdict and judgment.

2. Criminal law ⇨338(2)

The fact that a weapon was used in committing a crime may be proved by circumstantial, as well as by direct, evidence, like any other fact in the case.

3. Mayhem ⇨5

In prosecution for mayhem, evidence was sufficient to support conclusion drawn by jury that defendant had some sharp instrument in his hand when he struck prosecuting witness over the eye and that such instrument pierced the eyeball. Pen.Code, § 203.

4. Mayhem ⇨1

Where defendant's injury of another with a weapon caused the loss of an eye, defendant was properly convicted of mayhem. Pen.Code, § 203.

◆

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Willard Long was convicted of mayhem, and, from the judgment pronounced and an order denying his motion for new trial, he appeals.

Judgment and order affirmed.

Duckworth, Mussell & King, of San Bernardino, for appellant.

Robert W. Kenny, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Jerome B. Kavanaugh, Dist. Atty., of San Bernardino, for respondent.

MARKS, Justice.

This is an appeal from a judgment pronounced on defendant after his conviction of the crime of mayhem, and from an order denying his motion for new trial.

[1] The only ground urged for a reversal of the judgment is that the evidence is insufficient to support the verdict. There is a sharp conflict in the evidence on several material points between that offered by the People and that of the witnesses for the defendant. As the jury evidently believed the witnesses for the prosecution and rejected some of the other testimony, we need only outline the portions of the evidence tending to support the verdict and judgment as mere conflicts in the evidence furnish no ground for reversal if there is substantial evidence supporting the verdict and judgment.

Calvin Enfield was the owner of concessions in a carnival that was operating in the city of Colton, among which was a dart game. The dart has a sharp steel point and is thrown at a card. The successful player receives a prize.

Defendant, members of his family and some friends visited the carnival on the evening of November 8, 1944. He played the dart game and won a chalk dog. He played other games and after a short time missed the dog. He returned to the dart game and engaged in an argument with a Mrs. Lewis, the operator. Enfield saw that an argument was in progress and came to the concession. The two men entered into an argument and blows were exchanged. Defendant struck Enfield over the eye with his fist which cut his face both above and below the eye socket. His eyeball was pierced by a sharp instrument and so badly injured that it had to be removed. No one saw anything in the hand of defendant with which he struck Enfield. The fight occurred within between two and seven feet in front of the dart concession where there were darts stuck into a board. There is evidence supporting the conclusion that no one other than defendant struck Enfield in the face though this was contradicted by witnesses for defendant.

It is admitted that a blow from a clenched fist alone could not have caused a rupture of the eyeball unless it was of sufficient force to crush the bony structure protecting the eye.

A physician who treated Enfield's eye, and finally had to remove the eyeball, testified that the puncture of the eyeball was caused by a sharp instrument and could have been caused by a dart held in the fist of defendant when he struck Enfield. He was of the opinion that it could not have been caused by the blow from defendant's fist alone.

[2] The fact that a weapon was used in committing a crime may be proved by circumstantial as well as by direct evidence, like any other fact in a case.

[3, 4] The evidence offered by the prosecution was sufficient to support the conclusion drawn by the jury that defendant had some sharp instrument in his hand when he struck Enfield over the eye, and that such instrument pierced the eyeball. As this injury caused the loss of the eye the evidence was sufficient to support the conviction of mayhem. Sec. 203, Penal Code.

The judgment and order are affirmed.

BARBARD, P. J., concurs.

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70 Cal.App.2d 407

FRANK v. REPP & MOTT et al.

Civ. 14782.

District Court of Appeal, Second District, Division 3, California.

July 31, 1945.

1. Auctions and auctioneers 🔑11

Where it was undisputed that former employee had stolen furniture from employer and had delivered it to auctioneer who had sold it, instruction that defendant auctioneer was liable was proper.

2. Payment 🔑16(1)

When a note is taken for a pre-existing debt, it is not payment of the debt unless there is an express agreement to that effect, and the presumption is that note was not taken in payment, and the burden of showing that it was is upon the maker.

3. Trial 🔑208

In action against auctioneer for conversion of furniture which plaintiff's employee had stolen and auctioneer had sold, where evidence was insufficient to support a finding that employee's note was given in payment or part payment of the indebtedness or to support a finding that plaintiff released employee or the defendant from the obligation, it was not error to instruct jury not to credit the amount of the note on the amount found to be the value of the goods.

4. Appeal and error 🔑1048(2)
Evidence 🔑543(4)

Plaintiff who testified that he had been in the furniture business since 1921 and that he had familiarized himself with the value of furniture was qualified to testify as an expert on values, and instruction that jury should consider such expert opinion and should weigh the reasons, if any, given for it was not prejudicial.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Nat Frank against Repp & Mott, a corporation, Hiram E. Repp, Kenneth L. Mott and Paul S. Muir, for conversion of furniture. From a judgment for plaintiff for $1,500 damages and $300.12 interest, the defendant Repp & Mott, a corporation, appeals.

Judgment affirmed.

F. A. Knight, of Long Beach, for appellant.

Fred M. Riedman and Clock, Waestman & Clock, all of Long Beach, for respondent.

PARKER WOOD, Justice.

Plaintiff owned and operated a retail furniture store. Defendant Muir had been employed by him as a truck driver to deliver furniture. Repp & Mott, a corporation, hereinafter called the defendant, operated an auction business in which furniture and other articles, received from stores and individuals, were sold at public auction on a commission basis. At various times Muir had stolen furniture from plaintiff's store and delivered it to defendant which sold it at auction to various persons. In a jury trial of this action for damages for conversion of the furniture, the plaintiff obtained judgment for $1,500 damages and $300.12 interest. Defendant appeals from the judgment.

[1] Defendant asserts that the court erred in instructing the jury to return a verdict against defendant. After the evidence had been presented and before the arguments were made, the trial judge stated to the jury: "I think I might as well state to the jury what I have stated there so they

can follow the argument. I stated to counsel here that I was prepared to instruct the jury that there is no conflict of evidence as to the matters on which liability is founded, and therefore, I will instruct the jury at the proper time, that there is liability on the part of Repp & Mott, a corporation, as a matter of law, and the only thing the jury needs to determine is the reasonable value of the furniture and furnishings. I think that will simplify your work and will simplify the argument, so we will proceed to the argument if you wish, but it will be confined to the question of the value of the furniture." After the argument the court instructed the jury: "You are also instructed to return a verdict in favor of the plaintiff and against the defendant Repp & Mott, a corporation. The amount of the award is for you to determine. The amount of the award will be the fair wholesale market value F. O. B. Long Beach, Calif. of the goods belonging to the plaintiff which you find that the defendant Paul S. Muir took without the consent of the plaintiff and delivered to the defendant Repp & Mott, a Corporation, and which were sold by said corporation. * * * The amount of the note which the defendant Muir gave to the plaintiff is not to be credited by you on the amount you find to be the value of said goods." The jury was also instructed that: "The plaintiff has the burden of proving by a preponderance of the evidence what goods belonging to him were taken by the defendant Muir without plaintiff's consent and sold by the defendant Repp & Mott, a corporation. The plaintiff also has the burden of proving by a preponderance of the evidence what was the value of the goods so sold."

Defendant had furnished to plaintiff a list of property which it had sold for Muir during the time from April 2, 1941, to August 13, 1941 (the time involved herein). Muir testified, by deposition, that the property described on that list had been stolen by him from plaintiff and had been sold by defendant. Mr. Mott testified that he went over the list with Muir and Muir said there were several articles thereon which did not come from plaintiff's store and pointed out those articles on the list; that he (Mott) could not designate the articles which were so referred to, but he knew that Muir said that two of those articles, a radiant heater and a range, did not come from plaintiff's store. It was established by uncontradicted evidence that defendant was liable to plaintiff for the goods which were stolen by Muir and sold by defendant. The court left it to the jury to determine what goods were so stolen and sold. It was not error to instruct the jury that there was liability on the part of defendant.

Defendant asserts further that the court erred in instructing the jury that "The amount of the note which the defendant Muir gave to the plaintiff is not to be credited by you on the amount you find to be the value of said goods." His argument is that it was a question of fact for the consideration of the jury as to whether the $750 note was given and received in payment or part payment of plaintiff's claim. Plaintiff asserts that the note was not taken in payment or partial payment, but was only to be used as part payment in a contemplated compromise which was not consummated.

Plaintiff prepared in his handwriting a promissory note for $750, dated December 11, 1941, payable to himself in annual payments of $375 each, the first payment being due December 11, 1942, and Muir took the note and signed it as the maker. Plaintiff testified that "he didn't believe that Muir signed it in his presence." Muir testified that he signed the note in the presence of plaintiff. Muir gave the note to a person who was a truck driver for defendant, and that driver gave it to defendant.

Mr. Aspinwall, who had been the attorney for defendant, testified that while he was such attorney he received a telephone call from Mr. Riedman, who was attorney for plaintiff at that time, in which Riedman asked him to bring Muir's promissory note to his office; that he asked Riedman what note he was referring to and Riedman replied, "The note of Paul Muir for Nat Frank"; that he asked Riedman if there was such a note and Riedman said that defendant had it; that he went to the office of defendant and obtained the $750 note which had been signed by Muir; that he took the note to Riedman's office and placed it on his desk or handed it to him, and Riedman held the note and looked at it; and that he left the note with Riedman.

Mr. Riedman, who was one of the attorneys for the plaintiff at the time of the trial, testified that in a telephone conversation with Aspinwall they discussed the $750 note and that he told Aspinwall that plaintiff would settle the claim on the basis of defendant paying $1,050 and Muir giving a note for $750, and that his client had told him that Muir had made such a note; that he (Riedman) told his client (plaintiff) to give the note to defendant and that when the entire matter was straightened out they would take the note and a check and give the releases; that it was stated between them (Riedman and Aspinwall) in one of their conversations that Aspinwall was to get the note and defendant's check for $1,050, that he (Riedman) was to prepare the releases, and that the note and check would be exchanged for the releases; that Aspinwall came to his office with the note and handed it to him or laid it on his desk; that he asked Aspinwall where the check was; that he did not remember his answer; that he told Aspinwall that he had no authority to accept the note until the entire matter was settled, and that he had no use for the note; and that when he offered to return the note to Aspinwall he did not take it, but "he ran like a scared jackrabbit."

Mr. Aspinwall testified on redirect examination that there was "No conversation in which there was any agreement relating to the giving up the note and the check for $1,050.00"; that he told Riedman, "you have gone behind our backs to settle with this man and taken a note without our knowledge in this matter of settlement and there will be no check—we will not have anything further to do along that line"; that he saw a release when he was in Riedman's office; and that he did not run out of the office.

On May 12, 1942, Muir signed a written statement regarding the note. That statement, offered in evidence by defendant and received, was as follows: "Paul S. Muir voluntarily makes the following statement regarding the promissory note dated December 11, 1941, in the sum of $750.00, payable to Nat Frank, a photostatic copy of which is attached hereto. That on or about the date of said note, Nat Frank requested me to come to his place of business in the City of Long Beach, California, which I did. At that time we discussed certain furniture, household furnishings and personal property which he accused me of having sold, through the auction house of Repp & Mott, and said Frank demanded that I give him a promissory note in payment of the value of the same. We discussed at some length the value of the furniture and finally he presented me with the said note and I then and there signed the same and delivered it to Nat Frank upon his stating to me that he would not prosecute me nor hold me liable in any manner for taking the goods except by the payment of the note. At that time I stated to Nat Frank the full value of said goods, and thereupon Nat Frank asked that I deliver said promissory note to Repp & Mott, but did not state to me why I was to take the note to Repp & Mott. No one was present at this conversation except ourselves. A few days after receiving this note from Nat Frank I delivered the note to a man whose name I do not know but who was a driver of one of the Repp & Mott trucks, and I requested him to hand the note to Repp & Mott."

On January 12, 1943, Muir wrote a letter to Mr. Aspinwall regarding the note. That letter, offered in evidence by defendant and received, was as follows: "Dear Sir, Received your letter. Very sorry that you were unable to see me. Sorry I haven't sent you my new address. Well, there isnt much I can write about, as I told you on phone Mr. Frank wrote me several time more or less I think just to see if I were still here. he had very little to say about case, but he though that it would come up soon, he never has mention fact that he has sue me for any amount, other than the note, which I sgin, Seem to be kind worried about that note, some what, of course, I never ask him why, as far as every collect, more than $750.00 I think he kind crazy. I cann seem find letter from Mr. Reedman but here one of Mr. Frank letter, they are about all same. As far as he, can expect to, sue me he crazy after sgin Note for every cent I owe him then turn around, and file for three time the amount will kill that, very quick, Well if there any news. Please let me know, Your Truly,"

Muir was not present at the trial but he testified by deposition that he gave the note for every cent that he owed the plaintiff.

The note was produced at the trial by the plaintiff. It was offered in evidence by defendant and was received in evidence over the objection of plaintiff. Muir's deposition, which was read in evidence, was offered by plaintiff.

[2, 3] At the time the note was made it was not delivered by Muir to plaintiff, but was delivered on a later day to defendant. The circumstances under which the note was left with plaintiff's attorney did

not show that it was retained as payment or part payment of the amount due plaintiff. There was no express agreement or any agreement that the note was taken or was to be taken in payment or part payment. No part of the note was paid. When a note is taken for a pre-existing debt, it is not payment of the debt unless there is an express agreement to that effect; the presumption is that such a note was not taken in payment, and the burden of showing that it was in payment is upon the maker. See Selig Cahn, Inc., v. California W. Co., 9 Cal.2d 617, 619, 71 P.2d 1113. The evidence showed that plaintiff would have been willing to accept Muir's note for $750 and defendant's check for $1,050 in settlement of his claim, but the check was not offered to plaintiff and the contemplated compromise was never consummated. Although Muir testified at length by deposition and was cross-examined by defendant's counsel, he did not testify that the matters contained in his written statement, above quoted, and his letter, above quoted, were true, except he did testify that he had given the note for every cent he owed the plaintiff. He did not testify as to any conversation with plaintiff concerning the purpose in giving the note. The testimony of plaintiff was that the note was never handed to him and that he did not accept it or intend to accept it as payment or part payment of the obligation of Muir and defendant to reimburse him for the goods. The evidence was not sufficient to support a finding that the note was given in payment or part payment of the indebtedness, or to support a finding that plaintiff released Muir or the defendant from the obligation. It was not error to instruct the jury not to credit the amount of the note on the amount found to be the value of the goods.

[4] Defendant contends further that the court erred in instructing the jury that it should consider, as expert testimony, the testimony of plaintiff as to the value of the furniture. During the trial when plaintiff was a witness the following proceedings were had:

"Q. [by counsel for plaintiff] In Plaintiff's Exhibit 2, it shows the first sale made was 4-2-41 and the last one made was 8-13-41. Will you give us the reasonable market value for those goods in this locality, laid down at your store on those dates?

"Mr. Knight [counsel for defendant]: We object to the question as no foundation being laid. That calls for a conclusion of the witness and no qualification of the witness shown.

"The Court: Objection overruled.

"Q. Answer the question.

"The Court: The owner can testify to the value of the goods—

"The witness: Yes, sir.

"Q. What is the value? A. $1,800.00." The court gave the following instruction: "The rules of evidence ordinarily do not permit the opinion of a witness to be received as evidence. An exception to this rule exists in the case of expert witnesses. A person who by education, study and experience has become an expert in any art, science or profession, and who is called as a witness, may give his opinion as to any such matter in which he is versed and which is material to the case. In this case, the plaintiff gave his opinion as to the value of the property in question. You should consider such expert opinion and should weigh the reasons, if any, given for it. * * *"

It appears that the court, in receiving plaintiff's testimony as to value of the furniture, limited his testimony to his opinion as the owner of the furniture. The plaintiff had testified that he had been in the furniture business since 1921 and that he had familiarized himself with the values of furniture. He testified that he arrived at the amount, $1,800, by going over the list of stolen articles with Mr. Mott and Mr. Repp and that he checked the list from his inventory. It appears that plaintiff was qualified to testify as an expert. No evidence as to value of the furniture was introduced by defendant. The instruction wherein plaintiff's testimony was referred to as that of an expert was not prejudicial.

The judgment is affirmed.

DESMOND, P. J., and SHINN, J., concur.

WOLSKI v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 7160.

District Court of Appeal, Third District, California.

July 31, 1945.

Rehearing Denied Aug. 28, 1945.

Hearing Denied Sept. 27, 1945.

1. Workmen's compensation 🔑900

Under Labor Code, employer of one-eyed man, losing sight of good eye as result of industrial accident, is not liable for compensation based on rating of total permanent disability, but only for portion of disability due to injury to good eye. St. 1937, pp. 284, 285, §§ 4662, 4750.

2. Workmen's compensation 🔑900

An employee, having impaired and defective left eye, insufficient without his good right eye to enable him to pursue his occupation of logger, at time of industrial accident resulting in destruction of sight of right eye, was "suffering from previous disability or physical impairment" within statutory provision that employee so suffering shall not receive compensation for later permanent injury in excess of that allowed for such injury alone. St.1937, pp. 284, 285, §§ 4662, 4750.

See Words and Phrases, Permanent Edition, for all other definitions of "Suffering from Previous Disability or Physical Impairment".

3. Workmen's compensation 🔑845

The general rule that workmen's compensation statutes must be liberally construed in employees' favor does not mean that statutory mandate that permanently injured employee, suffering from previous permanent disability or physical impairment, shall not receive compensation for later injury in excess of that allowed for such injury alone, is to be ignored. St. 1937, p. 285, § 4750.

* * *

Proceeding under the Workmen's Compensation Act by Joe Wolski, also known as Joseph Wolski, claimant, opposed by Sterling C. Linebaugh and another, employers, and the State Compensation Insurance Fund, insurance carrier. From an award of compensation for permanent partial disability by the Industrial Accident Commission, claimant appeals.

Affirmed.

Virgil M. Airola, of San Andreas, for petitioner.

Everett A. Corten and R. C. McKellips, both of San Francisco, for respondents.

ADAMS, Presiding Justice.

Petitioner Wolski, aged 55 years, on December 2, 1943, while employed as a logger by respondents Sterling C. Linebaugh and Tena I. Linebaugh, sustained injury arising out of and occurring in the course of said employment, when a chip of wood struck his right eye and completely destroyed the sight thereof. The employers' insurance carrier was State Compensation Insurance Fund, and both employer and employee were subject to the Workmen's Compensation Laws of California. After a hearing the Industrial Accident Commission found the facts as above stated and further found that petitioner's injury caused permanent disability, the percentage of said disability for petitioner's age and occupation being 28¼% of total disability, entitling him to 113 weeks of disability payments of $25 each in the total sum of $2,825.

Petitioner in this proceeding contends that in making its award as aforesaid the Commission acted without and in excess of its jurisdiction and that the award is unreasonable and not justified by the evidence, because petitioner since childhood has possessed an impaired and defective left eye (squint eye) which eye alone and without his good right eye was not sufficient to enable him to pursue the occupation of a logger; and that since the injury to his right eye destroyed its vision, petitioner is now practically blind and unable to carry on his occupation as a logger, or in fact any occupation of any importance and that he is entitled to a total permanent disability rating.

The question before us thus is, whether, under Section 4750 of the Labor Code St.1937, p. 285, petitioner is entitled to compensation as for total permanent disability or for only that portion of his disability which is due to loss of vision in the right eye as though no prior disability or impairment of the left eye had existed.

Section 4750 of the Labor Code provides:

"An employee who is suffering from a previous permanent disability or physical impairment and sustains permanent injury thereafter shall not receive compensation for the later injury in excess of the compensation allowed for such injury when considered by itself and not in conjunction with or in relation to the previous disability or impairment.

"The employer shall not be liable for compensation to such an employee for the combined disability, but only for that portion due to the later injury as though no prior disability or impairment had existed."

Petitioner cites and relies upon Liptak v. Industrial Accident Comm., 200 Cal. 39, 251 P. 635; Ford Motor Co. v. Industrial Accident Comm., 202 Cal. 459, 464, 261 P. 466; Bartlett Hayward Co. v. Industrial Accident Comm., 203 Cal. 522, 524, 265 P. 195; United States Fidelity, etc., Co. v. Industrial Accident Comm., 204 Cal. 88, 93, 266 P. 805; Edson v. Industrial Accident Comm., 206 Cal. 134, 136, 140, 273 P. 572; and Harris v. Industrial Accident Comm., 204 Cal. 432, 268 P. 902. Respondents argue that the foregoing cases were decided upon the law as it existed prior to its amendment in 1929, and that they are no longer applicable to a case such as is presented by petitioner.

We think respondents' contention must be sustained. Prior to 1929, Sec. 9(b) 2 (10) a of the Workmen's Compensation Act provided (see Stats.1925, Ch. 354, p. 643, and Stats.1919, Ch. 471, p. 916): "The percentage of permanent disability caused by any injury shall be so computed as to cover the permanent disability caused by that particular injury without reference to any injury previously suffered or any permanent disability caused thereby." Also Sec. 9(b) 2 (9) provided, as does Sec. 4662 of the Labor Code today: "Any of the following permanent disabilities shall be conclusively presumed to be total in character: (a) Loss of both eyes or the sight thereof."

[1] In the Liptak case, above cited, petitioner, who had previously lost the sight of one eye in a non-industrial accident, lost the sight of the other eye in an industrial accident. The Industrial Accident Commission, following rules which it had applied in previous proceedings, awarded him disability payments based upon a finding of about 26¼% permanent disability. Petitioner contended that he should have been given a total permanent disability rating. Respondent invoked the provisions of Sec. 9(b) 2 (10), but the court held that the language of said section as it then read was ambiguous and uncertain, that it was susceptible of a construction favorable to petitioner's contention, and that, in view of the provisions of Sec. 9(b) 2 (9), supra, and of Sec. 69, par. (a) of the act, St.1917, p. 877, which called for a liberal construction of its terms in favor of an injured person, the uncertainty and ambiguity must be resolved in petitioner's favor. Other cases cited by petitioner, decided prior to 1929, follow the ruling in the Liptak case, though in Edson v. Industrial Accident Comm., supra, the court to some extent departed from the rule thereof. However in 1929 Sec. 9(b) 2 (10) was amended to read as Sec. 4750, supra, does today; and we think that said section clearly and unambiguously provides that where, as here, an industrial accident destroys the sight of a one-eyed man's sole good eye, his employer may not be held liable for compensation based on a rating of total permanent disability, but only for the portion of the disability due to the injury to the one eye, as if petitioner had had two good eyes and the sight of the one only had been destroyed. It is said in 1 Campbell's Workmen's Compensation, p. 737, Sec. 826:

"The Legislature in 1929 amended the Act to insure that each injury should be considered by itself and, so far as the liability of the employer is concerned, be rated as if prior injuries had not been suffered. This restores the former rule."

This is also the holding in Gardner v. Industrial Accident Comm., 28 Cal.App.2d 682, 83 P.2d 295, 296, decided in October, 1938. There the applicant, in June, 1937, sustained an injury to his left leg necessitating its amputation above the knee. He had, in a previous accident in another state, sustained an injury to his right leg that impaired its efficiency. His total permanent disability was rated at 58¾%, but 12% was deducted therefrom for the prior disability. The court cited Section 4750 of the Labor Code, and said: "The general rule is that industry is to be charged only for those injuries arising out of and in the course of employment and only for the result of that particular injury when considered by itself and not in conjunction with or in relation to a previous injury." Hearing in the Supreme Court was there denied. Also see State Compensation Fund v. Industrial Accident Comm., 43 Cal.App.2d 233, 235, 110 P.2d 510.

[2] Petitioner, seeking to avoid the effects of Sec. 4750, supra, alleges that prior to his injury his ability to compete with other laborers in the open market, and to perform the duties of a logger, for which occupation he had qualified himself, and to earn the same wages as others similarly engaged, was not lessened or diminished in any manner by reason of the defective left eye; and that he was not, therefore, prior to the injury to his right eye, suffering from any disability in his chosen occupation by reason of the defect in the left eye. We do not construe the words "suffering from a previous permanent disability or physical impairment," as used in Sec. 4750, to be so limited. The word "suffer" is defined in 60 Corpus Juris 990 as follows: "To be affected by; to bear; to undergo; to endure; to support." Webster's New International Dictionary, Second Edition, also contains the following as definitions of the word "suffer": "To submit to or be forced to endure the infliction, imposition, or penalty of; to bear as a victim or the like; as, to suffer martyrdom, severe losses, or a year's imprisonment; * * *. To undergo; to experience; to go or pass through; as to suffer alteration or deterioration; * * *. To be injured; to sustain loss or damage; as business suffers greatly from a long-continued depression." It cannot be denied that petitioner prior to the accident to his right eye "was affected by" the condition of his left eye and that he did "bear as a victim" the condition of same; and he alleges that he had since childhood been possessed of an impaired and defective left eye which alone and without his good right eye was not sufficient to enable him to pursue the occupation of a logger. We therefore hold that petitioner was, prior to the injury to his right eye, "suffering from a previous permanent disability or physical impairment" within the meaning of Sec. 4750 of the Labor Code, and that his employers were liable to him for compensation only for that portion of his disability due to the injury to his right eye as though no prior impairment of the left eye had existed.

[3] While it is provided by the Workmen's Act itself, and generally held by the courts, that such statutes are to be liberally construed in favor of the employee, this does not mean that the legislative mandate of Sec. 4750 is to be ignored. As stated by Campbell in Vol. 1 Workmen's Compensation, p. 737, sec. 827, the purpose of such legislation is to remove any reasonable ground for an employer to refuse to hire one-armed, one-legged, or one-eyed men. In short, it is intended for the long-range benefit of handicapped workmen, and it is not for the court to say that it is not calculated to effect that result.

The award is affirmed.

THOMPSON and PEEK, JJ., concur.

70 Cal.App.2d 457

PEOPLE v. HUGHES.

Cr. 2346.

District Court of Appeal, First District,
Division 2, California.
Aug. 7, 1945.

1. Criminal law ⇨1159(5)

In prosecution for robbery and mayhem, where record disclosed no possible ground for ascribing any improper motive to complaining witness, a consideration of the motive and propensities of witnesses did not require the acceptance of defendant's testimony in support of defense of alibi as conclusive proof of that defense.

2. Criminal law ⇨572

Evidence sustained conviction of robbery and mayhem as against defense of alibi.

3. Criminal law ⇨1134(2)

Defendant's willingness to take witness stand in his own defense, to talk freely with arresting officers and to district attorney as indicative of his innocence are appropriate in an argument to court or jury as triers of fact but present no issue on appeal.

4. Criminal law ⇨1159(5)

Where complaining witness in prosecution for robbery and mayhem who was permanently blinded in the commission of offense upon him, on issue of identity, identified one of his assailants as a man with whom witness had worked, testified as to the name which such person had then used, described his physical features and his voice, and jury was in position to determine whether description fitted defendant, jury's finding on issue of identity could not be disturbed on appeal.

5. Criminal law ⚷792(3)

Proposed instruction in prosecution for mayhem and robbery that if jury were satisfied that defendant was present at time offenses were alleged to have been committed but did not act to aid and abet such offenses jury should find defendant not guilty was properly refused as an incomplete statement of the law.

6. Criminal law ⚷59(3)

Presence of a defendant at the commission of a felony by another is evidence to be considered together with all the circumstances immediately preceding, attending and following the perpetration of the felony as tending to show defendant's complicity in the offense. Pen.Code, § 31.

7. Criminal law ⚷726

Under the circumstances, district attorney's interruption of argument of defendant's counsel to the jury was not misconduct.

◆

Appeal from Superior Court, San Francisco County; Frank T. Deasy, Judge.

Joe C. Hughes was convicted of robbery and mayhem and from the judgments of conviction and order denying his motion for new trial, he appeals.

Affirmed.

Joseph A. Garry, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., and David K. Lener and Miriam E. Wolff, Deputy Attys. Gen., for respondent.

NOURSE, Presiding Justice.

Informations charging defendant with robbery and mayhem were consolidated and tried to a jury which returned verdicts of guilty on both charges. Defendant's motion for a new trial was ordered denied. He appeals from the judgments and the order.

Nelson, the complaining witness, testified that he had known and lived with defendant for about two months at a farm where they had both been sent after conviction of drunkenness. On June 8, 1944, Nelson went to Oakland after work to see a doctor, returned to San Francisco and entered a tavern at First and Mission streets at "approximately close to nine o'clock" to have a sandwich and beer. While drinking the beer he noticed defendant and another man and started conversing with them. One of the men told Nelson that "they had a bottle" and invited him outside for a drink. He thereupon opened his wallet; paid his check and left with the two men. Upon reaching a gasoline station at Main and Howard streets the unidentified man demanded Nelson's pocketbook. The victim handed the man a wallet containing identification cards but upon further demand gave him the wallet in which he kept his money. Throughout the altercation between Nelson and the other party the defendant stood a few feet away and did nothing other than to serve as a lookout for his associate. Nelson told defendant that it was a serious offense in which the men were engaged and that he would do time at the penitentiary, whereupon the other man raised his arms and Nelson recalled nothing more. He was found the next morning by the gas station attendant and was sent to the hospital. A streetcleaner found Nelson's wallets nearby and turned them over to the police. Nelson was taken to a hospital where his eyes were found to be so badly ruptured and so swollen that no examination was possible for eleven days; his face was badly bruised and his mental condition was such that no case history could be provided until two months after the beating. The injury to the eyes was such that he became permanently blind.

The defendant denied that he had any participation in the altercation, denied that he had ever been in the tavern, and testified that he was in another part of the city at the time of the attack. He was substanially contradicted in all his testimony and left the jurors no course other than to decide whether they would believe the straightforward testimony of the victim or the denials of the defendant.

On this appeal his first ground urged for a reversal is that this court should overturn the verdict of the jury and determine that his testimony in support of his defense of "alibi" should be accepted as conclusive proof of that defense. He rests his argument on the statement in Herbert v. Lankershim, 9 Cal.2d 409, 471, 71 P.2d 220, 251, relative to the function of the reviewing court where the issue of the sufficiency of the evidence is raised and reading: "This rule, however, does not relieve an appellate court of its duty of analyzing the evidence in the light of reason and human experience and giving consideration to the motives and propensities which tend to influence or prompt human action, in an effort to solve the question as to whether the judgment is reasonably and substantially sustained by the evidence."

[1, 2] A consideration of the "motives and propensities" of the witnesses would not aid appellant. There is no possible ground for ascribing any improper motive to the complaining witness. His testimony was straightforward and no reason is suggested why it should be rejected. On the other hand it is elementary that a defendant in a criminal case will tell his story in the light most favorable to his defense. Here the complaining witness testified that he entered that tavern at "approximately" 9 o'clock in the evening and noticed appellant and his companion about fifteen minutes later. The appellant testified that he worked until 9:15, took a bus downtown, and ate supper at a cafeteria a few blocks from the tavern. Neither witness was shown to have looked at a clock or watch in fixing the time. As appellant states in his brief "we had a hopeless conflict between the evidence for the prosecution and the evidence for the defense." It was a conflict for the jury to decide. The defense of alibi is a good defense if the jurors believe it, but when the evidence is conflicting the jury's findings will not be disturbed on appeal. People v. Spillard, 15 Cal.App.2d 649, 652, 59 P.2d 887.

[3, 4] The repeated references in appellant's brief to his willingness to take the witness stand in his own defense, to talk freely with the arresting officers and to the district attorney as indicative of his innocence are all appropriate in an argument to the court or jury as triers of the fact; but they present no issue on the appeal. The same may be said as to the evidence identifying the appellant. The testimony of the complaining witness was clear and definite both as to description of the physical features of appellant, as to his voice, and as to the name by which he was known when they worked together. This was done by a blind man in the presence of the jury and the jurors were in a position to determine whether the description fitted the individual who stood before them. This finding of the jury on that issue cannot be disturbed. People v. Farrington, 213 Cal. 459, 463, 2 P.2d 814.

The appellant criticizes the action of the trial court in repeating "practically the same instructions" on aiding and abetting. Cases are cited in which the reviewing court admonishes the trial court that this is not good practice and should be avoided. No case is cited holding that it is reversible error.

[5] The appellant assigns error in the refusal to give his proposed instruction reading: "If, on the other hand, you should be satisfied to a moral certainty and beyond all reasonable doubt from the evidence that the defendant was present at the time the offenses are alleged to have been committed, but that he did no act to aid and abet the same, you should find the defendant not guilty."

[6] The proposed instruction is an incomplete statement of the law though it was approved in People v. Woodward, 45 Cal. 293, 13 Am.Rep. 176. A more correct statement is found in People v. Torrillo, 60 Cal.App.2d 755, 759, 141 P.2d 472, 474, where it is said: "Presence of a defendant at the commission of a felony by another is evidence to be considered, together with all of the circumstances immediately preceding, attending, and following the perpetration of the felony, as tending to show defendant's complicity in the crime. People v. Erno, 195 Cal. 272, 278, 232 P. 710; People v. Yeager, 194 Cal. 452, 460, 229 P. 40; People v. Woodward, 45 Cal. 293, 294, 13 Am.Rep. 176; People v. Ho Kim You, 24 Cal.App. 451, 462, 141 P. 950."

This is in accord with the express provisions of section 31 of the Penal Code reading, in part: "All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, * * * are principals in any crime so committed." Here the jury was properly instructed in accordance with these authorities whereas the instruction proposed by appellant might have confused the jury as to whether it was necessary to find that appellant took an active part in the physical assault or in the robbery.

[7] Finally it is argued that there was some sort of misconduct on the part of the district attorney when he interrupted

the argument to the jury of appellant's counsel. Both parties had got off the record in their controversy and the trial judge brought them back to a discussion of the evidence. He thereafter instructed the jury to disregard all statements of counsel not supported by the record. The charge of misconduct is too trivial for further treatment.

The judgments and the order are affirmed.

GOODELL, J. and DOOLING, J., pro tem. concur.

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70 Cal.App.2d 330

In re LAIR'S ESTATE.

SHNELL et al. v. BRUNTON.

Civ. 14368.

District Court of Appeal, Second District, Division 3, California.

July 27, 1945.

1. Trusts 🔑227

Where testamentary trustee died and his attorney was appointed administrator of his estate, the superior court had jurisdiction to award attorney's fees direct to the attorney for the trustee for legal services rendered during the life of the trustee. Probate Code, §§ 911, 1120, 1122.

2. Trusts 🔑227

Where testamentary trustee died and his attorney was appointed administrator of his estate, such administrator in presenting the account of the deceased trustee was acting in a representative capacity as administrator of the estate of the deceased trustee, and the fees for his services as such representative should be awarded to him in his representative capacity and not to him individually, and an award to him individually would be a direct judgment for money in favor of a person not a party to the proceeding and would be void. Probate Code, §§ 911, 1120, 1122.

3. Trusts 🔑227

A testamentary trustee who acts as attorney for himself cannot be given compensation for his services as such attorney. Probate Code, §§ 911, 1120, 1122.

4. Trusts 🔑227

Where testamentary trustee died and his attorney was appointed administrator of his estate and claimed fees for services rendered both before and after the death of such trustee and there was an award for his services as attorney and as administrator, it must be assumed that lump-sum judgment included an award for legal services after the death of the testamentary trustee, and so far as the judgment did so it was erroneous and would be reversed. Probate Code, §§ 911, 1120, 1122.

5. Trusts 🔑227

Where court had determined that beneficiaries' efforts to charge testamentary trustee personally for lien against estate and to remove him were unwarranted and it was necessary for court to determine ownership of corpus, it was proper for trustee and his attorney to call to court's attention the efforts of the remainder-beneficiaries to impair the provisions of the trust in violation of the contest provision in the will and the trustee and his attorney did not thereby attempt to destroy the trust so as to prevent the allowance of attorney's fees. Probate Code, §§ 911, 1120, 1122.

Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Proceeding in the matter of the estate of Nancy Ray Lair, deceased, on petition of A. W. Brunton, individually and as administrator with the will annexed of the estate of John W. Lair, deceased trustee, for settlement of an amended and supplemental first and final account which was contested by John W. Shnell and others. From judgment settling the account and awarding a lump-sum fee to A. W. Brunton for services as attorney and administrator of the estate of John W. Lair, deceased trustee, and distributing the trust estate to the remainder-beneficiaries, the contestants appeal.

Judgment in accordance with opinion.

Prior opinion 157 P.2d 16.

Charles W. Cradick, of Los Angeles, for appellants.

A. W. Brunton, of Los Angeles, in pro. per., for respondent.

PARKER WOOD, Justice.

This is an appeal from a judgment settling an amended and supplemental first and final account rendered by the legal representative of a deceased trustee of a testamentary trust; awarding a "lump sum" fee to A. W. Brunton "for services as attorney and administrator of the estate" of the deceased trustee; and distributing the trust estate to the remainder-beneficiaries. Although the notice of appeal states that the appeal is from the whole judgment, the brief of appellant states that the appeal is directed only to the following portion thereof: "It is further Ordered, Adjudged and Decreed, that the said A. W. Brunton be and he is hereby allowed the sum of $800.00 for his services as attorney and as Administrator of the Estate of John W. Lair, rendered in the above entitled matter, and that the said A. W. Brunton have a lien upon all of the assets of said trust estate to secure the payment of said sum of $800.00."

Appellants contend in part that the court was without jurisdiction to award attorney's fees direct to the attorney for the trustee; that an administrator or a testamentary trustee who acts as attorney for himself cannot have compensation for his services as attorney; and that when a part of a lump sum allowance for fees has been made upon an improper basis and there is no means of segregating the improper part from the total allowance, the whole order for fees should be reversed.

The appellants are the husband, son and daughter of a deceased sister of the trustor, Nancy Ray Lair, deceased, which sister was one of four remainder-beneficiaries of the corpus of the trust. The appellants were the objectors to the account herein. The other beneficiaries have not appealed.

In 1936 John W. Lair became the trustee of the testamentary trust of his deceased wife, Nancy Ray Lair. Under the provisions of the trust he was to receive the income from the trust during his life and upon his death the corpus of the trust was to be distributed to her brother and three sisters. In 1939 he filed his first account as such trustee. The remainder-beneficiaries objected to the account upon the ground, among others, that the trustees should be charged personally with $850 which had been made a lien upon the corpus of the estate during the administration and before distribution to the trustee. That objection was sustained, but the order was reversed on appeal. In re Estate of Lair, 38 Cal.App.2d 737, 102 P.2d 436. Upon a rehearing of the account after the reversal, the trial court found that an item of $55.11 (which the trustee had listed as income) was a part of the corpus, and ordered that said sum should be charged against the trustee personally; and further ordered that no expenses should be charged against the corpus of the estate. Those orders were reversed on appeal. In re Estate of Lair, 52 Cal. App.2d 222, 126 P.2d 133. Soon after the trial court in 1939 had ordered that the trustee be charged personally with the $850, the remainder-beneficiaries filed a complaint, designated a bill in equity, to remove the trustee. That action was tried and submitted on January 20, 1941. On February 6, 1941, before the decision therein was rendered, the trustee John W. Lair died. While the first appeal, above mentioned, was pending the trustee filed a second account, and after the reversal on that appeal he filed an amended and supplemental second account which was set for hearing on February 7, 1941. Mr. Lair having died prior to the date for that hearing, the matter of said second account was placed off calendar pending the appointment of a legal representative of the deceased trustee. A. W. Brunton, an attorney at law who had been the attorney for the trustee John W. Lair, was appointed administrator with the will annexed of the estate of John W. Lair, deceased, on March 11, 1941. As such administrator, Mr. Brunton was substituted in place of Mr. Lair in the action which had been submitted on January 20, 1941. That action was decided on June 5, 1941, and it was therein adjudged that plaintiff recover $55.11 from defendant for the benefit of the corpus of the trust estate. That judgment was reversed on apeal. Shnell v. Brunton, 52 Cal.App.2d 226, 126 P.2d 135.

On November 20, 1942, Mr. Brunton, as such administrator of the deceased trustee's estate, filed the amended and supplemental first and final account, petition for fees, and petition to determine ownership of corpus, which are involved herein.

In the petition for fees the administrator asked that fees in the sum of $50 be allowed A. W. Brunton as administrator for services rendered by the deceased trustee, and that fees in the sum of $3,000 "be allowed A. W. Brunton as attorney for said trustee and as Administrator" of his estate for services rendered as such administrator. The petition alleged that, in connection with the action to remove the trustee, Mr. Brunton rendered sixty-nine hours of services as attorney for the trustee prior to the death of the trustee, and that after the death of the trustee Mr. Brunton rendered fifty-five hours "appearing in pro. per." as administrator of the estate of the deceased trustee; that he spent five hours in preparing the first account and ten additional hours in preparing a first account rendered by himself as administrator (not the one now before the court); that he had spent ten hours in preparing the account now before the court and he would spend ten additional hours in the hearing of the account and preparing the findings and decree; and that he spent more than one hundred hours in connection with the first account filed by the trustee, including the appeals involved therein. Mr. Brunton submitted evidence in support of those allegations.

It therefore appears that the petitioner sought an allowance for the services of the deceased trustee, and sought an allowance for the services of himself as attorney rendered before and after the death of the trustee, and for services as administrator of the estate of the deceased trustee; that the court made no allowance for the services of the deceased trustee although it found (in its general findings) that he had rendered services of the value of $50; and that the court made a lump sum allowance of $800 to A. W. Brunton individually "for his services as attorney and as Administrator."

[1] Appellants assert, as above stated, that the court was without jurisdiction to award attorney's fees direct to the attorney for the trustee. Their argument is that there is no statutory provision authorizing the court to award attorney's fees in such manner; that Section 1122 of the Probate Code, which provides that "the court shall allow the trustee his proper expenses," is the only statute providing for the payment of fees for the services of the trustee's attorney and, by reason of that provision, such fees must be awarded to the trustee and not direct to the attorney; that the only exception to the requirement that such fees be awarded to the trustee is that when the trustee is without funds of the estate in his possession he may by agreement require the attorney to look solely to the trust estate for his fees, and under such circumstances the attorney could proceed in equity to satisfy his claim from the trust estate; that such an exception does not exist herein; that the provisions of Section 911 of the Probate Code, whereby the court is authorized to award attorney's fees direct to an attorney who has rendered services to an executor or administrator, do not apply in the matter of awarding fees for services of an attorney for a trustee; that amending Section 1616 of the Code of Civil Procedure (from which Section 911 of the Probate Code was taken) to allow the court to award payment direct to an attorney for an executor or administrator, and the failure to amend Section 1700 of the Code of Civil Procedure (from which Section 1122 of the Probate Code was taken) in such manner as to allow the court to award payment direct to an attorney for a trustee, and the failure to so amend Section 1122 of the Probate Code, show that it was not the intention of the Legislature that such an award be made direct to an attorney for a trustee. Section 1120 of the Probate Code provides that: "When a trust created by a will continues after distribution, the superior court shall not lose jurisdiction of the estate by final distribution, but shall retain jurisdiction for the purpose of * * * settling the accounts * * * of the trustee * * *." In the Estate of Smead, 16 Cal.2d 204, 105 P.2d 589, wherein fees for services of an attorney for a testamentary trustee had been awarded direct to the attorney, it was said that in a former appeal in the Estate of Smead, 12 Cal.2d 20, 82 P.2d 182, "it was determined that the court in settling the accounts of the testamentary trustee was acting in the exercise of its probate jurisdiction. That jurisdiction was continuing and attached to the corpus of the trust when it passed from the respondent as executor to himself as testamentary trustee. Thus it was proper for the court to make provision for attorney's fees in its decree settling the trustee's accounts in conformity with the law applicable to decedent's estates". [16 Cal.2d 204, 105 P.2d 590]. Under the authority of the Estate of Smead, 16 Cal.2d 204, 105 P.2d 589, the superior court in the present case, involving a testamentary trust, had jurisdiction to award attorney's fees direct to A. W. Brunton, the attorney for the trustee, for legal

services rendered by him while Mr. Lair was trustee. Whether the circumstances herein were such as would justify an award direct to the attorney for the trustee was for the court in probate to decide.

[2] The respondent, A. W. Brunton, as administrator with the will annexed of the Estate of John W. Lair, deceased, contends in his supplemental brief that since the Smead Estate decision determines that an award of attorney's fees may be direct to the attorney for the trustee, the court should also have power to award fees for services of the administrator of the estate of the deceased trustee direct to the administrator. His argument in that behalf is that the services he performed as administrator were for the testamentary trust created by Mrs. Lair and were not for the estate of Mr. Lair. Mr. Brunton, in presenting the account of the deceased trustee, was acting in a representative capacity as administrator of the estate of the deceased trustee, and the fees for his services as such representative should be awarded to him in his representative capacity and not to him individually. As an individual he was a stranger to the proceeding. An award to him individually would be a direct judgment for money in favor of a person not a party to the proceeding and would be void. In Garra v. Superior Court, 58 Cal.App.2d 588, 137 P.2d 31, which was a proceeding to prohibit the trial court from enforcing an order that attorney's fees be paid direct to the attorney for a guardian, it was said at pages 590, 591 of 58 Cal.App.2d, at page 32 of 137 P.2d: "* * * the decree * * * in so far as it purports to award attorney's fees directly [to the attorney] is void, as the court had no jurisdiction to award 'judgment' to a person not a party to the proceedings." There is no statutory provision authorizing an award of fees from a trust estate to an administrator of the estate of a deceased trustee, individually, for his services as such trustee. Mr. Brunton was entitled to compensation for his services as administrator of the estate of the deceased trustee, and it would have been proper to make an award for such services to him as such administrator.

[3, 4] Appellants' further contention, that a testamentary trustee who acts as attorney for himself cannot be given compensation for his services as such attorney, is sustained. In Re Estate of Parker, 1926, 200 Cal. 132, at page 135, 251 P. 907, at page 909, 49 A.L.R. 1025, it was said: "An executor, administrator, or testamentary trustee who is himself an attorney at law may properly employ another attorney to render the necessary legal services for the estate. * * * But if the executor, administrator, or testamentary trustee, being himself a practicing lawyer, elects to act as his own attorney * * * the general rule is that he will not be entitled to an allowance against the estate for his professional services, in the absence of some statutory provision entitling him thereto." That rule is one of public policy forbidding one who acts in a fiduciary capacity to become his own employer. Estate of Parker, supra, 200 Cal. at page 136, 251 P. 907, 49 A.L.R. 1025. Respondent asserts that the circumstances herein bring him within the exception to that rule, which exception is stated in the Estate of Lankershim, 6 Cal.2d 568, 572–574, 58 P.2d 1282. In that matter an attorney and a bank were appointed special administrators with the apparent consent of all parties in interest. The attorney, by reason of his previous relations with the decedent and the appellants therein, was completely familiar with the affairs of the estate. It was apparent to all parties therein and to the court at the time of the appointment that the bank should perform the principal part of the routine duties of administration and that it would be greatly to the interest of the estate to have the duties of legal counsel performed by that attorney. Although it was openly stated to all the parties that the attorney proposed to waive fees as special administrator and look only to such allowance as might be made for his legal services, the appellants therein made no objection to the arrangement until the services had been performed. The court therein held that the appellants were estopped by their conduct in permitting the attorney to perform such services without affording him an opportunity of self protection if there was to be any challenge of his claim for compensation. In the present case the attorney was familiar with the affairs of the trust estate, but it does not appear that the appellants consented to the appointment of the attorney as administrator or that they in any way indicated approval of his dual position, but on the contrary it appears that at the time of his appointment as administrator the attorney and the appellants were involved in litigation which had been extended over a long period of time and in which their interests

were adverse. In the present case estoppel is not involved and respondent is not within said exception. The petition for fees and the evidence in behalf of the petitioner are to the effect that some of the services for which fees were sought were legal services rendered by Mr. Brunton in propria persona as administrator of the deceased trustee's estate. The court found that "the services alleged in the petition for fees were rendered as alleged therein," and the court then enumerated in its findings various specific items of legal services rendered by Mr. Brunton after the death of Mr. Lair. It does not appear from the findings or the judgment that the amount awarded for fees did not include an award for such legal services rendered after the death of Mr. Lair, but it does appear from the judgment that the award was for Mr. Brunton's "services as attorney and as administrator," and under these circumstances it is to be assumed that the judgment included an award for legal services of Mr. Brunton after the death of Mr. Lair. Insofar as the judgment included an award for legal services of Mr. Brunton as attorney for himself as administrator of the deceased trustee's estate, it was erroneous.

Another contention of appellants is that since the allowance for fees is based partly upon services for which the court had no power to order payment, and since the fees were awarded in a lump sum and the condition of the record is such that the improperly allowed fees cannot be segregated from the total allowance, that the whole order for fees should be reversed. This contention is sustained. As above mentioned, it cannot be determined from the record what portion of the total award, if any, was awarded for legal services rendered during the life of Mr. Lair, and it cannot be determined therefrom what portion, if any, was awarded for legal services rendered after the death of Mr. Lair while Mr. Brunton was acting in propria persona. The fees awarded for legal services, and for services rendered as administrator, and for services of Mr. Lair as trustee, if any, should have been stated separately in the judgment in order that the interested parties might consider whether the amounts awarded for specific items were reasonable, whether the amounts were for services rendered by a person acting in a double capacity as attorney and administrator, and whether they were awarded upon any illegal basis.

Respondent asserts that the decision in the Estate of Scherer, 58 Cal.App.2d 133, 136 P.2d 103, is applicable here. In that matter, wherein an executor asked for $20,850 as executor's fees and attorney's fees for himself and was allowed $8,000, the items not being segregated, the court held that it was apparent that when all the services which might be characterized as "legal" were eliminated there would remain within the sphere of executor's services a sufficient amount of work for which an award of $8,000 could not be considered unreasonable. In the present case it appears that the legal services were much more extensive than the services as administrator, and it should not be concluded from the record on this appeal that if the legal services were eliminated the $800 allowed would be a reasonable sum for the services as administrator.

[5] Another contention of appellants is that the trustee and the administrator of the deceased trustee's estate sought to destroy the trust and therefore attorney's fees should not be allowed. The assertion that they sought to destroy the trust is based upon an allegation, in the petition herein to determine ownership of the corpus of the estate, to the effect that all of the remainder-beneficiaries had forfeited their interests in the trust because they had attacked the will of Nancy Ray Lair in violation of a contest provision in the will. The alleged violation was based upon their effort to charge the trustee personally with the $850 lien against the estate, and their efforts to remove him as trustee. The court had stated in the Estate of Lair, 1942, 52 Cal.App.2d 222, at page 225, 126 P.2d 133, at page 134, that the action, designated a bill in equity, to cancel the $850 lien and to remove the trustee was "an unfounded action" and "clearly there was no occasion for the filing of the suit," and that the $850 was charged properly against the corpus. It was necessary that the trial court herein determine the ownership of the corpus, and it was not improper to call the court's attention to the efforts of the remainder-beneficiaries to impair the provisions of the trust. Said contention of appellants is not sustained.

The portion of the judgment wherein A. W. Brunton was allowed "$800.00 for his services as attorney and as Administrator," which portion is the third paragraph of the judgment appealed from, is reversed; and the superior court is directed to fix and separately state and to secure by a lien on the assets of the trust estate, the fees, if any, properly payable: (1) For services rendered by John W. Lair as trustee; (2) for legal services rendered by A. W. Brunton as attorney for John W. Lair while Mr. Lair was trustee; and (3) for services rendered by A. W. Brunton as administrator with the will annexed of the estate of John W. Lair, deceased, in connection with said trust matters. The fees, if any, for items (1) and (3) just referred to should be awarded to A. W. Brunton, administrator with the will annexed of the estate of John W. Lair, deceased. The fees, if any, for item (2) for legal services rendered by A. W. Brunton as attorney for John W. Lair while Mr. Lair was trustee may be awarded direct to A. W. Brunton. The judgment as to all portions other than the third paragraph is affirmed.

DESMOND, P. J., and SHINN, J., concur.

70 Cal.App.2d 439

PEOPLE v. VAUGHN.

Cr. 3887.

District Court of Appeal, Second District, Division 1, California.

Aug. 2, 1945.

1. Indictment and Information 🔑3

The offenses of kidnapping, rape, assault by means of force likely to produce great bodily injury, and violation of the Deadly Weapon Act could be prosecuted by information, rather than by indictment. Gen.Laws 1937, Act 1970, § 2; Pen.Code, § 261, subd. 4; Const. art. 1, § 8.

2. Rape 🔑54(1)

The uncorroborated testimony of prosecutrix will sustain rape conviction. Pen. Code, § 261, subd. 4.

3. Rape 🔑51(2)

Testimony of prosecutrix, physician who examined her, and chemist who analyzed smears taken from her vaginal canal sufficiently established corpus delicti to sustain rape conviction. Pen.Code, § 261, subd. 4.

4. Criminal law 🔑1202(4)

Where accused prosecuted for violation of Deadly Weapon Act provision against possession of weapon by one convicted of a felony, and for other offenses, denied prior felony conviction charged in information, such prior conviction could be proved to jury. Gen.Laws 1937, Act 1970, § 2; Pen.Code, §§ 969, 969a, 1025, 1093.

5. Assault and battery 🔑92
Criminal law 🔑572
Kidnapping 🔑5
Rape 🔑51(4, 7)
Weapons 🔑17(4)

Evidence supported conviction of kidnapping, rape, assault by means of force likely to produce great bodily injury, and violation of the Deadly Weapon Act, as against contentions of improbability, lack of identification, lack of resistance, and alibi. Gen.Laws 1937, Act 1970, § 2; Pen. Code, § 261, subd. 4.

6. Criminal law 🔑1159(2, 4)

The determination of trier of facts on issue involving credibility of witnesses and weight of their testimony is conclusive on reviewing court.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Robert F. Vaughn was convicted of kidnapping, rape, assault by means of force likely to produce great bodily injury, and violation of the Deadly Weapon Act, and he appeals.

Affirmed.

Robert F. Vaughn, in pro. per.

Robert W. Kenny, Atty. Gen., and Everett W. Mattoon, Deputy Atty. Gen., for respondent.

YORK, Presiding Justice.

On September 28, 1944, the District Attorney of Los Angeles County filed a second amended information containing six counts, the first three counts of which charged defendant with the commission on April 11, 1944, of the offenses of kidnapping, rape, and assault by means of force likely to produce great bodily injury upon Mrs. Marion Davis. Counts 4 and 5 charged kidnapping and assault by means of force likely to produce great bodily injury committed by defendant on May 15, 1944, against Helen Rogers. Count 6 charged a violation on April 22, 1944, of the deadly weapon act, and in addition, defendant was charged with two prior convictions of felonies, i. e., burglary and perjury. He admitted the prior conviction of the crime of perjury, and the jury found him guilty on all six counts of the said information; that he was armed at the time he committed the offenses charged in counts 1, 2 and 3, and that he had suffered the prior conviction for the crime of burglary and had served a term of imprisonment therefor. This appeal is prosecuted from the judgment of conviction and also from the order denying the motion for a new trial.

Appellant appears in this court in propria persona, and makes many specifications of error which, he urges, entitle him to a reversal of the judgment and the order appealed from.

With respect to the offenses with which appellant was charged in the first three counts of the said information, Mrs. Davis testified that she was employed as a mail clerk at the Terminal Annex, United States Postoffice at Los Angeles, and left there at 2:30 a. m. on April 11, 1944; that she boarded a street car at Alameda and Macy Streets and went to Fifth and Spring Streets, where she transferred to a "U" car, from which she alighted at Washington Street and Central Avenue; that she proceeded to walk a block and a half to her home at 1232 East 20th Street; that when she reached the house next door to her home, she was accosted by appellant, who had stopped his automobile in the street; that he ran toward her, aiming his gun at her and forced her into his car, on the pretext that she was a woman named Rosa, who had some money belonging to him and that he was taking her to the police station; that after driving for twenty or thirty minutes, he stopped his car and accomplished an act of sexual intercourse with Mrs. Davis, against her will and without her consent, whereupon he drove her back to her home and left her there about 4:30 a. m. Later that morning Mrs. Davis, accompanied by a friend, reported the occurrence to the police, who took her to the police department hospital for an examination.

Willie Jones, who occupied an apartment in the same building in which Mrs. Davis lived, testified that around 3:20 in the morning of April 11, 1944, he was awakened by the voices of a man and a woman "talking awfully loud," and immediately thereafter he heard an automobile drive off; that he did not recognize the voices and did not hear what was said; that about an hour later, Mrs. Davis knocked on the door of his apartment; that she was crying and her knees were bruised, and at that time she related to him what had happened to her.

With respect to counts 4 and 5 of the said information, Mrs. Helen E. Rogers testified that in May of 1944, she was working at the Margold Cafe, 5259 South Central Avenue, and on May 14th she left there at 11:30 in the evening, walked to 51st and Central where she boarded a street car, later transferring to a bus in which she rode to Jefferson and San Pedro Streets. Within a block of this intersection, San Pedro curves into Avalon, and as the witness proceeded along Avalon toward 35th Street, a man "walked up toward me and stopped just before I reached the corner (of Avalon and 35th Street) * * * and asked me could I direct him to a person by the name of George Wright. * * * I told him no. * * * I continued to walk, and as I turned the corner, the gentleman stepped a little behind me and grabbed me." It was then about 12:05 a. m. of May 15th. Continuing, Mrs. Rogers testified that: "When he grabbed me I screamed, and as I started screaming he grabbed me around my neck and started choking me and dragging me at the same time toward the car which was parked on 35th Street facing Avalon. * * * he was pushing and pulling me toward this car. * * * He had both hands around my neck * * * choking me, and I was screaming all at the same time. * * * When he grabbed me he pinned my arms to my side. * * * I was on my feet until I reached the grass part of the pavement * * * about four feet (from the car) * * * As I reached the grass part I fell down on my knees by the force of his pushing me, dragging me over there to the car door * * * when he got me to the car door he turned my neck loose to open the door, holding me with one arm. Well, I was on my knees and I went, I fell onto the ground, with one of my knees, my right knee, to be exact, under me. I reached down and grabbed one of my shoes and pulled it off and struck him * * * somewhere around his temple, the side of his head * * * when I struck him he struck me

* * * on my forehead, just above my left eye." By this time appellant had the door of his car open and had pushed the witness partly inside the car, but she continued to struggle, whereupon appellant struck her again, stunning her and breaking her glasses. She then "started screaming and crying and begging him not to strike me again, and whimpering, telling him I would go with him if he would not hurt me any more * * * I grabbed his tie and in that way tried to choke him * * * he was bending over me, still trying to get me in the car * * * I asked him to please let me get my shoes. It was then I realized both of them were off. * * * He told me he would get my shoes, but for me to turn his God damn tie loose, which I did, and he raised up and over me as if to go and get my shoes, and I rolled out of the car, and when I rolled out of the car I was half way on the curbing off the street, and half way in the street—not underneath the car, but just enough off the street that I wasn't lying completely on the sidewalk. He jumped over me and into the car and drives off and leaves me lying there."

In the meantime, the witness Cleophos Mack was on his way home from his girl friend's house, and in company with another boy, was sitting in a car near Jefferson and San Pedro, a short block from 35th and Avalon, when he heard "a woman's screams." He jumped out of the car and ran from Jefferson to 35th Street where he observed a man dragging a woman toward a car; the woman "was rolling on the ground when I saw her." When the witness Mack and his friend were within 10 or 11 feet of the automobile, "the man turned around and ran and got in the car and drove off. * * * He drove right past me and I got the license number and I saw the man," whom he identified as being the appellant. "I went over and helped the lady up, and I picked her pocket book up, and her glasses, and her shoes, and I took her home (a distance of 30 or 40 yards). * * * Her stockings were torn, her heels of her shoes were sort of bruised, and her glasses broken, and her blouse was torn, and she had a hicky on her head. When Mrs. Rogers reached home, the police were called and the witness Mack gave them the license number of appellant's car.

The prosecutrix Davis testified upon cross-examination, that the next time she saw appellant after April 11, 1944, was around 5:15 p. m. of May 15th; that she was sitting at Central Avenue and Washington Street waiting for a street car when she saw him pass in an automobile; that she was between 15 and 18 feet from him, got a good look at him and immediately recognized him as the man who had forced her into his car on April 11th; that she took the license number of his car and called the police. She further testified that the car which appellant was driving on May 15th stopped for the signal and drove on after the light changed, and that appellant did not see her; that when she identified appellant at the police station, four or five prisoners, all colored men, were lined up and she was brought into the room in which they were standing and made her identification of appellant to the police officers, McGruder and Broady.

The violation of the Deadly Weapon Act, charged in Count 6, was established by admissions of appellant and the testimony of the witness Chester Spencer to the effect that appellant on April 22, 1944, pawned a Colt's 38 caliber revolver, number 44325, at the pawn shop where the witness worked at 4368 South Central Avenue, and the original pawn ticket and the revolver were admitted in evidence as People's Exhibits 1 and 2. Appellant admitted that the signature on the pawn ticket was in his own handwriting and that he wrote it on April 22, 1944, and that he personally took the gun to the pawn shop; that he brought the gun from Texas on March 20, 1944, and kept it in his trunk in Los Angeles from that date until April 22, 1944, when he carried it to the pawn shop. He also admitted having been convicted of the crime of perjury in the State of Texas in December of 1938.

[1] There is no merit in appellant's first specification of error, that the offenses charged against him should have been by indictment instead of information. Const. Art. I, sec. 8; People v. Flannelly, 128 Cal. 83, 86, 60 P. 670.

Appellant's complaints that he was denied a fair and impartial trial, that the rules of evidence were disregarded, that the witnesses called by the State were prompted and coached, that there was prejudice on the part of the trial court, and that he was not properly represented by defense counsel, are not supported by reference to any particular instance or instances. However, a careful examination of the entire record fails to substantiate such claims, but as a matter of fact discloses that appellant was ably represented and that he had a fair and impartial trial.

[2] It is claimed that the corpus delicti was not established as to the charge of rape, in that the prosecution "did not make a showing to prove the substance of the crimes." The corpus delicti of the crime of rape consists of "an act of sexual intercourse, accomplished with a female not the wife of the perpetrator," where the victim "is prevented from resisting by threats of great and immediate bodily harm, accompanied by apparent power of execution * * *." Sub. 4, Sec. 261, Pen.Code. These elements were established by the testimony of the prosecutrix Davis, it being settled law that the uncorroborated testimony of a prosecutrix is sufficient to sustain a conviction of rape. 22 Cal.Jur. 399 and cases there cited; People v. Gidney, 10 Cal.2d 138, 143, 73 P.2d 1186; People v. Akey, 163 Cal. 54, 56, 124 P. 718. In People v. Gallagher, 108 Cal.App. 128, 129, 291 P. 626, 627, the court stated as follows: "The first point made for reversal is that there was no testimony proving the corpus delicti of the offense alleged. A review of the testimony of the complaining witness reveals that she testified that she had sexual intercourse with the defendant at the time and place set forth in the information. This testimony completely answers the appellant's contention. The argument of appellant likewise, that he was convicted upon the uncorroborated testimony of the complaining witness furnishes no ground for a reversal of the judgment. A review of the cases cited in 22 California Jurisprudence, p. 399, shows clearly that, if the jury accepts the testimony of the complaining witness as true, nothing further is required to sustain a conviction. The cases cited are all one way, and it is unnecessary to refer to any authorities other than those cited in California Jurisprudence to which we have referred."

In the instant case, however, there was corroboration of the testimony of the complaining witness by the doctor who examined her immediately after the alleged attack, and also by the chemist who analyzed the smears taken by the doctor from the vaginal canal of the prosecutrix.

[3] The claim that penetration was not proved and that no male spermatozoa was produced ignores the testimony of the prosecutrix Davis and the corroborating testimony of the doctor and chemist hereinbefore mentioned.

[4] Appellant urges that the prosecution violated section 1025 of the Penal Code when they branded him an "ex-convict during the trial procedure of the gun act, before prosecuting the First, Second, Third, Fourth and Fifth Counts of said Information." Sections 969 and 969a of the Penal Code require that all known previous convictions of felonies must be charged in the indictment or information and the defendant required to plead thereto. In the instant cause, the information charged appellant with two prior convictions. He admitted one, that of perjury, but he denied that he had previously been convicted of the crime of burglary. It is only when an information charges a defendant with the commission of a felony and also charges a previous conviction which is confessed by the defendant, that the charge of such previous conviction cannot be read to the jury nor alluded to at the trial. Secs. 1025 and 1093, Penal Code. Hence, in the procedure followed at the trial in the instant case, there was no violation of section 1025, because appellant having denied the prior conviction of the crime of burglary, it became necessary to establish such prior conviction in connection with Count 6 of the information which charged a violation of section 2 of the so-called Deadly Weapon Act to-wit: "* * * no person * * * who has been convicted of a felony under the laws of the United States, of the state of California, or any other state * * * shall own or have in his possession or under his custody or control any pistol, revolver or other firearm capable of being concealed upon the person." Act 1970, Deering's General Laws.

[5] With respect to the claim that the evidence was highly improbable, it was held in People v. Asavis, 27 Cal.App.2d 685, 688, 81 P.2d 595, 596, that: "We are not directed to, nor do we find in this record, anything that would justify this court in stamping the story of the prosecutrix as inherently unbelievable or even improbable. As was said in People v. Haydon, 18 Cal.App. 543, 123 P. 1102, 1108, 1114, 'A statement, to bear upon its face the brand of improbability, or which may be said to be unbelievable per se, must involve, we think, a claim that something has been done that it would not seem

possible could be done under the circumstances described, or involve conduct that no one but a person of a seriously calentured mentality would be likely to do.'" The stories of the two complaining witnesses with respect to what occurred upon the two occasions hereinbefore set forth, which were corroborated by other witnesses, instead of being highly improbable, were entirely reasonable and probable.

The claim by appellant that he was not sufficiently identified does not find support in the record. As to the commission of the offenses against Mrs. Davis on April 11th, she had ample opportunity to scrutinize her assailant, both when he was standing over her threatening her with his gun, and later in the automobile, when, in addition to his other features, she noted his gold tooth. She had no difficulty in picking him out of a group of colored men in a line-up at the police station. As the perpetrator of the offenses committed against Mrs. Rogers on May 15th, he was positively identified not only by Mrs. Rogers, whom he approached under the street light on Avalon near 35th Street, but also by Mr. Mack, who rescued her.

Appellant also argues that there was lack of resistance on the part of prosecutrix Davis as to the offenses committed against her on April 11th. The testimony of Mrs. Davis is replete with evidence of her attempt to flee from appellant in order to reach her home, also of her pleas to be released when caught and her extreme fear of the revolver used by appellant in the accomplishment of his purpose.

[6] As a final point urged as a ground for reversal of the judgment herein, appellant asserts he established alibis in that he proved "by witnesses where he was at the time and during the alleged attacks." With respect to the offenses committed after three o'clock on the morning of April 11, which included the offense of rape, his testimony, which is uncorroborated by any of the three persons in whose company he claims to have been, was that he was at the Little Harlem Cafe until about 1:30 a. m., and that "at the early hours of the morning I was at home." No corroboration of this testimony was offered, and no further attempt was made to establish an alibi for the offenses committed between the hours of 3:20 and 4:30 of that morning. As for the offenses committed shortly after midnight on May 15th, he testified that he went to Miss Smith's house at about 11:15 p. m. on May 14th and "stayed there two or three hours," returning to his home from there. Miss Smith testified that appellant came to her house and remained two hours, but on cross-examination when asked whether anything unusual occurred to make her note the time he left, she replied, "No; I just estimated that he stayed there for about two hours." In this connection, appellant urges that he "proved he was employed and was engaged in working during those times whereupon the attacks took place," is not supported by the record. The timekeeper of the Southern Pacific Company testified that the records of the company showed that appellant appeared at work at 10:00 a. m., on May 15th, working on the train which went to San Francisco on that day, and returned to Los Angeles at 1:00 p. m. on May 16th. No offenses were charged as having been committed during any of this period. The crimes nearest in time to the period so testified to were perpetrated shortly after midnight on May 15th. Appellant was in Los Angeles at that time, and did not report for work until over nine hours thereafter. The question of the claimed alibis, which are weak at best, involves the credibility of the witnesses and the weight to be accorded their testimony, therefore the determination of the trier of the facts is conclusive upon this court.

One discrepancy in the testimony of Mrs. Davis is pointed out in respondent's brief, to-wit: This witness testified that she saw appellant at about 5:15 p. m., of May 15th at Central and Washington, where she was sitting on a seat waiting for the street car and saw him pass; that he was in the same car that she saw and rode in on April 11th and she took the license number of it; that she was 15 to 18 feet from him and recognized him, and also saw a bottle of lotion in the car which she had noticed when she was in the car on April 11th; that she was sure of the lotion and sure of the identity of the man and that she put the license number down and called the police. Thereafter, the timekeeper of the Southern Pacific Company testified from his records that appellant reported for work at 10:00 a. m. of May 15th and went to San Francisco on a train that day, returning to Los Angeles on May 16th at 1:00 p. m. From this it would appear that Mrs. Davis was either confused or mistaken as to the date upon which she saw appellant pass her in his car.

An examination of the record herein discloses that appellant was accorded a fair and impartial trial, remarkably free from error, and that the evidence presented was sufficient to support the verdicts of the jury finding appellant guilty, as charged.

For the reasons stated, the judgment and the order appealed from are, and each of them is, affirmed.

DORAN and WHITE, JJ., concur.

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70 Cal.App.2d 508

PEOPLE v. FINKEL.

Cr. 2304.

District Court of Appeal, First District, Division 2, California.

Aug. 14, 1945.

Hearing Denied Sept. 13, 1945.

1. Burglary 🔑41(1)

Evidence supported conviction on count of indictment charging defendant with burglary in entering an apartment with felonious intent to commit theft, though no theft was committed, where it was a fair inference that such was one of defendant's intentions. Pen.Code, § 459.

2. Assault and battery 🔑91

Evidence supported conviction of simple assult under a count in indictment charging assault with intent to commit rape.

3. Burglary 🔑41(1)
Rape 🔑51(1), 53(2)
Robbery 🔑24(1)

Evidence, including identification of defendant by victims, supported conviction of rape, robbery and burglary of premises of one of victims as charged in sixth, seventh and eight counts of indictment, and of assault with intent to commit rape and of burglary of premises of another victim as charged in counts nine and ten. Pen. Code, § 459.

4. Criminal law 🔑737(1)

The strength or weakness of identification of defendant is a matter for jury's determination.

5. Criminal law 🔑1134(3)

Question whether trial court erred in refusing to instruct jury to acquit on one of counts of indictment became moot, where sentence on that count had been served before appeal was perfected.

6. Criminal law 🔑768(1)

Where uncontradicted evidence other than that of prosecutrix showed that a criminal attack had been made in middle of night after an unlawful entry into woman's bedroom, and prosecutrix' testimony relating to the assault was corroborated by other circumstances, a cautionary instruction that such charges were easily made and difficult to disprove was unnecessary.

7. Criminal law 🔑1173(1)

In prosecutions such as for rape, circumstances would determine whether failure to give cautionary instruction that such charges were easily made and difficult to disprove constituted prejudicial error.

8. Rape 🔑59(12)

Where burden of defense was an attack upon testimony of witnesses identifying defendant as party committing crimes, an instruction that fact that complaining witnesses made prompt complaint to authorities could be considered in corroboration of other testimony given by them was not error.

9. Criminal law 🔑1169(11)

A reversal can be had on ground that testimony as to offenses other than those charged were admitted over defendant's objection only when claimed error appears to have been prejudicial.

10. Criminal law 🔑1169(5)

In prosecution under indictment charging rape, robbery, burglary, and attempt to commit rape in respect to five different women, admission of testimony of police officer detailing his conversation with defendant relating to similar offenses committed elsewhere or charged to him, which was thereafter stricken on defendant's motion and jury was instructed to disregard it, did not entitle defendant to a reversal, where defendant did not attempt to show

how testimony could be deemed prejudicial.

11. Grand jury ⚷36

Grand jury was not required to compel defendant to appear before it when he was under investigation for purpose of enabling witnesses to identify him. Pen. Code, § 920.

12. Indictment and information ⚷140(1)

If there is some evidence to support indictment, court will not inquire into its sufficiency on motion to quash.

Appeal from Superior Court, San Francisco County; Edward P. Murphy, Judge.

Joseph Finkel was convicted of rape, robbery, burglary, attempt to commit rape, and simple assault, and he appeals.

Affirmed.

Nathan C. Coghlan, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

Defendant was charged in thirteen counts of an indictment with rape, robbery, burglary, and attempt to commit rape in respect to five different women. On a trial to a jury he was acquitted on the charges alleged in counts 1 to 3, inclusive, and counts 11 to 13, inclusive. He was convicted on the charges found in counts 4, 6 to 10, inclusive, and guilty of the lesser offense of simple assault on the charge of assault with intent to commit rape found in count 5. The jury also found that the charge of a prior offense of attempt to commit rape in Honolulu was true. Consecutive sentences were imposed for the various offenses of which he was found guilty and his motion for a new trial was denied. His appeal is from the judgment and the order denying a new trial.

A brief statement of the facts will suffice, as it cannot be seriously argued that the evidence relating to the various assaults is insufficient to support the verdicts.

The transactions upon which the counts of the indictment were based differ in detail, but in substance they were all similar. Briefly, it appeared that each of the women involved resided in either a basement room or apartment in San Francisco. In each case, no other adult was present except the victim. In each instance, except in the case of Mrs. Wilhelmson, the woman awoke at night to find a man choking her. Mrs. Wilhelmson heard a noise, got out of bed, and found the man standing in the clothes closet. He attempted in each case to bind and blindfold the victim. He then, except in the case of Miss Brockman and Miss Farris, committed an act of rape, and upon its conclusion extracted money from the victim's purse. In all instances he informed the victim he would not hurt them if they were "nice to him," and he stifled their outcrys by choking them. The women all appeared to have a similar impression of his voice. Miss Brockman struggled successfully with him and he was unable either to rape or rob her, and finally fled after inflicting numerous scratches and bruises on her body. It was on this transaction that defendant was convicted only of simple assault and burglary and was sentenced to five months in the county jail on the former. Miss Farris' room-mate returned home while the man was binding her and he ran out without accomplishing his purpose.

The women all identified their attacker as a negro, or as a white man with negro blood or features, or as a Mexican or "foreigner". However, four of these women picked Finkel in the police line-up and identified his picture beforehand, picking it out of a group of five. The police originally traced him through a laundry mark bearing the initial "F" found torn off of a piece of linen used to bind and gag one of the victims.

It was also shown that a fellow prisoner—formerly a barber—had been giving Finkel skin bleaching treatments with a preparation containing Fuller's earth while the defendant was confined in the county jail awaiting trial. The barber had also cut Finkel's naturally kinky hair into waves and had shaved his eyebrows, which altered his appearance greatly. This testimony was denied by witnesses for the defense, whose testimony, however, was fully impeached.

[1] Appellant attacks the fourth count of the indictment on which he was found guilty as not supported by the evidence. It charged him with the crime of burglary in entering the apartment of Ann Brockman "with the felonious intent * * * to commit theft." Appellant argues that the only evidence of intent was that he intended to

commit the crime denounced by section 288a of the Penal Code; that the evidence shows that he was prevented from doing so by the resistance of his intended victim, that no theft was committed, and hence no proof of a burglary. The argument is facetious. In substance it is that if a man enters the bedroom of a strange woman in the middle of the night, finds her asleep in bed, blindfolds her and ties her hands, tries to attack her, but is kicked out of the bed by the intended victim who throws the bed over on him and sets up such an outcry that he has to flee, his statement that he just wanted a glass of water must be taken as conclusive proof that his entry was without criminal intent. Burglary is defined in section 459 of the Penal Code as an entry "with intent to commit grand or petit larceny or any felony." "* * * one can commit burglary by entering a building with intent to commit any felony, such as rape, robbery, arson, or murder." People v. Devlin, 143 Cal. 128, 129, 76 P. 900. Though the indictment charge "intent to commit theft" and no theft was committed, it was a fair inference from all the evidence that such was one of his intentions.

The evidence amply supports the verdict on this count and the identification of the appellant was complete. He was recognised by the complainant and two other occupants of the apartment house who saw him escaping from the premises.

[2] No good purpose can be served in an extended treatment of appellant's attack upon the verdict in respect to count five. He was charged with an assault with intent to commit rape and was convicted of a simple assault. He argues that from the evidence that he stated he intended to commit sodomy and not rape the "simple assault" was an offense included in the major offense of sodomy which was not charged. As we said in reference to the fourth count the intent of the assailant in a case of this character may be determined from his actions and the surrounding circumstances. Though appellant has now served the sentence on this count and the questions raised are moot (except his argument that this count and the evidence supporting it were improperly added by the prosecution for the sole purpose of creating prejudice against him) we are satisfied that the charge was properly pleaded, that the evidence was sufficient to prove the charge as made, and hence it was necessarily sufficient to support the verdict of guilty of the minor offense.

[3] On the sixth, seventh and eighth counts appellant was convicted of rape, robbery and burglary of the premises of Mrs. Wilhelmson. She was awakened about 4:30 a. m. She got up and walked into the hall way. An electric light was burning in the bath room. The appellant came from a closet through the path of this light and the complainant had a full view of his face and features. Appellant seized her by the throat and threatened to kill her. He then walked her out of the house to a patio where an act of rape was committed. He walked her back into the house where he forced her to give him her purse and took all the money she had. The complainant's testimony was complete and sufficient to sustain the conviction on all three counts. Her identification of appellant was unmistakable and was not shaken by any competent evidence.

On counts nine and ten appellant was convicted of assault with intent to commit rape and of burglary of Mary Farris. She was awakened about 11 p. m., after she had gone to bed, by a man choking her. He followed the same tactics as in the other instances—threatening severe punishment while choking her, tying her hands behind her back, and blindfolding her. He used the same kind of bandanas for this purpose, wore soft shoes and gloves, and demanded money. The evidence of the two offenses is clear and sufficient. The identification is also complete and unmistaken. In addition the roommate of the complaining witness returned as appellant was running from the room. This room was well lighted and both women had a good look at the intruder.

Evidence covering counts 1 to 3, inclusive, and 11 to 13, inclusive, on all of which appellant was acquitted showed similar tactics on the part of the intruder, but the complaining witnesses had been blindfolded before they were able to see the party attacking them and the jury no doubt believed that the evidence of identification was not satisfactory.

As we understand the argument of appellant it is that the testimony of all these witnesses was the result of hallucinations, and that it was discredited on cross-examination. He labors the point that some of them at first thought he was a negro or a Mexican, or a white man with some negro blood, and that some said he had a little mustache. Their testimony was corroborated by that of a barber in the county jail detailing treatments he had given appellant before the trial to bleach his face and to alter the cut of his hair and eyebrows. Though appellant testified that he had never worn a mustache the State produced his identification badge and card from the Bethlehem Shipbuilding Company where he was employed during the time when these attacks were made. This picture showed him with a mustache and another employee of the company testified that he wore a mustache while at work during the period in question.

[4] All these circumstances bring the issue of identification squarely within the rule that the strength or weakness of the identification is a matter for the determination of the jury. People v. Farrington, 213 Cal. 459–463, 2 P.2d 814; People v. Knight, 44 Cal.App.2d 887, 891, 113 P.2d 226; People v. Harsch, 44 Cal.App.2d 572, 575, 112 P.2d 654.

[5] As to the claimed error in the refusal to instruct the jury to acquit on count 5 it is unnecessary to say more than that the question has become moot because the sentence on that count had been served before the appeal was perfected.

[6, 7] Appellant complains of the refusal of the trial court to give his proposed cautionary instruction citing People v. Putnam, 20 Cal.2d 885, 129 P.2d 367, and People v. Trumbo, 60 Cal.App.2d 681, 141 P.2d 225. The court instructed the jury as follows: "And while it is true that the law does not require in this character of case that the prosecuting witnesses be necessarily supported by another witness or witnesses, or by corroborating circumstances, still I charge you that the law does require in this class of cases that you examine their testimony with caution." The assignment of error should be confined to the conviction under count 6. It can have no application to the convictions for burglary, robbery, or assault with intent to commit rape. The latter must be eliminated because in each instance the witness was fully corroborated, either by the physical evidence showing that an assault had been made or by other witnesses identifying the appellant immediately following the inflicting of physical injuries upon the victim of the assault. In all those instances the physical assault having been proved and corroborated, the intent to commit rape stood proved by the circumstantial evidence of the attack in addition to the direct evidence of the complaining witness. Those cases holding that it was error to refuse to give the cautionary instruction were based upon the reviewing court's analysis of the testimony of the prosecuting witness and the court's conclusion that it was inherently improbable, or that it might have been motivated by spite or vindictiveness. Where, however, the uncontradicted evidence other than that of the prosecutrix shows that a criminal attack was made in the middle of the night after an unlawful entry into a woman's bedroom and the victim's testimony relating to the assault is corroborated by other circumstances, as in this case, the rule applicable is that stated in People v. Fleming, 58 Cal.App.2d 37, 47, 136 P.2d 88, 94, reading: "It further follows that in a case where the reason for the rule, viz., a conviction on the uncorroborated testimony of the prosecutrix is not present, the rule does not apply. As was said in People v. Putnam, 20 Cal.2d 885, 892, 129 P.2d 367, 370, relied upon by appellant, 'The circumstances of the case must determine whether the failure to instruct the jury constitutes prejudicial error.'" Cases in harmony with this statement are cited in People v. Roberts, 50 Cal.App.2d 558, 568, 123 P.2d 628.

[8] It is significant that the appellant does not attack the sufficiency of the evidence to prove the crimes charged. He states that the "claim that rape had been committed was not disputed because the defense knew nothing to the contrary." No one of the prosecuting witnesses was cross-examined on this issue, nor on the issues of burglary or robbery. The burden of the defense in the trial court was an attack upon the testimony of those witnesses identifying the appellant as the party committing the crimes. Hence, there was no error in the instruction that the fact that the complaining witnesses made prompt complaint to the authorities could be considered in corroboration of other testimony given by them. This evidence showing that in every instance the witness made immediate complaint and disclosure of the fact that an assault was committed by someone negatives any claim that the charges were motivated by spite or vindictiveness against this appellant, because when the complaints were made no one of the witnesses knew whom to charge.

Hence, the "reason for the rule" calling for a cautionary instruction is not present.

[9, 10] Appellant complains of the admission over his objection of the testimony of a police officer detailing his conversation with appellant relating to similar offenses committed elsewhere, or charged to him. The testimony was stricken on motion of appellant and the jury was instructed to disregard it. Appellant does not attempt to show how the testimony could be deemed prejudicial. The Honolulu affair was a conviction of attempt to commit rape which appellant admitted but sought to excuse because the attack was made upon a "Japanese girl." (The conviction was had on May 21, 1934. The trial in the instant case commenced on October 8, 1943.) The testimony relating to affairs in Long Beach and Omaha, Nebraska, discloses minor offenses. We are unable to discover in what respect the testimony was prejudicial. We may assume from the manner of presentation of the point that the appellant has not been able to show wherein the rulings might be prejudicial. Certainly the incidental references to minor troubles resulting from drunkenness were far less damaging to the defense than appellant's admission that he had theretofore been convicted of assault with intent to commit rape. It is only when the claimed error appears to have been prejudicial that a reversal can be had on that ground. People v. Jordan, 24 Cal.App.2d 39, 52, 74 P.2d 519; People v. Pianezzi, 42 Cal.App.2d 270, 280, 108 P.2d 685.

[11, 12] Appellant assigns error in the denial of his motion to quash the indictment and in the order overruling his demurrer. No argument is made as to the latter. His motion to quash was based upon the theory that no legal evidence was taken by the grand jury identifying him with the offenses charged. In this connection he refers to the testimony of the several witnesses who had picked him out at the police line up as conclusions when they referred to the one who had committed the offenses as "Joseph Finkel." The appellant was not called as an exhibit before the grand jury and he now states that he was within the same building and could have been called so that the witnesses could have pointed to him and so identified him as the offender. What possible advantage this would have served appellant does not appear. There was no question about his name at any stage of the proceedings. If any of the witnesses made a mistake in his identification that is a question going to the weight of the evidence and counsel concedes that the question now raised is in substance the same as his attack upon the credibility of these witnesses. We know of no rule which requires the grand jury to compel one under investigation to appear before it either as a witness or as an "exhibit." In fact section 920 of the Penal Code provides that: "The grand jury is not bound to hear evidence for the defendant; * * *." Appellant relies upon Greenberg v. Superior Court, 19 Cal.2d 319, 121 P.2d 713, 715, but it does not help him. There an indictment was returned against five persons charging conspiracy to commit grand theft. The supreme court said there was "no evidence even remotely supporting the charges made against petitioner." However, in the same opinion it was said (page 322 of 19 Cal.2d, page 715 of 121 P.2d): "If there is some evidence to support the indictment the courts will not inquire into its sufficiency (see cases collected in 59 A.L.R. 573), but the lack of any evidence conclusively establishes that the grand jury has exceeded its authority in returning an indictment." Here there was evidence supporting the indictment in all particulars. If appellant would claim that the "Joseph Finkel" referred to by the witnesses is some one other than himself, that claim should have been made in the trial court where it could have been met properly by the evidence.

We find no prejudicial error in the record.

The judgment and order are affirmed.

GOODELL, J., and DOOLING, J., pro tem., concur.

70 Cal.App.2d 530

PEOPLE v. BURKE.

Cr. 1906.

District Court of Appeal, Third District,
California.

Aug. 17, 1945.

1. Criminal law 🔑554

In murder prosecution in which defendant was impeached by proof that he had previously been convicted of a felony, jury was entitled to disbelieve his testimony in which he denied that he stabbed deceased and that he had a knife during the affray.

2. Homicide 🔑236(1)

In murder prosecution, evidence was sufficient to identify knife found behind fence as weapon with which defendant stabbed deceased.

3. Homicide 🔑250

Evidence supported conviction for manslaughter.

◆

Appeal from Superior Court, Sacramento County; Raymond T. Coughlin, Judge.

Joe Burke was convicted of manslaughter, and he appeals.

Affirmed.

George E. Foote, of Sacramento, for appellant.

Robt. W. Kenny, Atty. Gen., and Ward Sullivan, Deputy Atty. Gen., for respondent.

THOMPSON, Justice.

[1] The defendant was charged with murdering Harold Rannells. A jury convicted him of manslaughter. In an affray which occurred in Sacramento, September 9, 1944, between the defendant and Harold Rannells the latter was stabbed in the abdomen, as a result of which he died nine days later. From the judgment of conviction of manslaughter the defendant has appealed. The only contention of the defendant on appeal is that the verdict and judgment are not supported by the evidence for the chief reason that there is a total lack of evidence indicating that the defendant stabbed the deceased or that the knife with which he was stabbed belonged to the defendant. The defendant denied that he stabbed the deceased, that he had a knife during the affray or that the knife which was found and received in evidence belonged to him. But the defendant was impeached by proof that he had been previously convicted of a felony, and the jury was entitled to disbelieve his testimony.

The judgment is adequately supported by the evidence.

About 10 o'clock at night on September 9, 1944, the defendant who had been in the merchant marine, and his wife, together with their friends Louis Hill and his wife, were walking westerly on the northern sidewalk of K Street in Sacramento between 6th and 5th Streets. The defendant had been drinking intoxicating liquor to some extent, but he was not noticeably drunk. Two unidentified men, who were not witnesses at the trial, accosted the group and made disparaging remarks about the women. A fight between the defendant and those two men ensued on the sidewalk near the middle of the block. The deceased, Harold Rannells, took no part in that affray. There is no evidence that he even knew the defendant or his assailants. Rannells was then leaning against an automobile parked some distance away near the corner of Sixth and K Streets, from which point he watched the fight. The defendant was knocked down and badly bruised above his eyes and about his face. The defendant bled considerably as a result of the beating. Witnesses testified that they saw a knife or knives in the hands of the strangers during that brawl, but they said the knives were soon put in their pockets and that the defendant was not cut. The inference is that one of the strangers might have subsequently stabbed Rannells. There is no evidence to reasonably support that theory. That contingency is improbable. Evidently the deceased was not acquainted with any of the parties to that affray. He did not participate in that conflict. He stood 20 feet or more away from the location of the fight. No occasion was shown for the strangers to stab the deceased. At least it was the sole province of the jury to determine from the evidence whether it was the defendant who stabbed the deceased in the subsequent affray which occurred between them. The jury concluded that the defendant stabbed the deceased. The evidence supports that conclusion.

After the defendant had been knocked down once or twice by the strangers during that first affray, he and his associates left the scene of that conflict and walked easterly along the sidewalk toward 6th Street. As they passed Rannells, who was leaning against the automobile parked near the corner, something was evidently said by him. The defendant stopped, turned about and returning to where Rannells stood, he struck him in the face. A violent struggle promptly ensued between the defendant and Rannells. They were striking and clinching each other and scuffling about in a lively manner. Suddenly, in the midst of that affray, the deceased disengaged himself and "hollered out he was stabbed". No one pretends the two strangers who instigated the first conflict with the defendant were then present. The deceased at once pulled up his shirt and at least one witness observed the wound in the abdomen where he had been stabbed. The defendant and his associates promptly left, turning southerly onto 6th Street. Three disinterested witnesses testified substantially to the foregoing facts. There is no evidence to the contrary, except that the defendant and his wife deny that he had a knife or that he stabbed Rannells. Manuel Mauricio, who watched the encounter from a position near by, said: "Burke was walking—he walked a few feet [after he passed Rannells], then he came back and he struck Rannells; they got in quite a clinch, then pretty soon Rannells comes out hollering that he was stabbed, and Burke had disappeared. * * * He [the deceased] had his shirt up; he said his stomach was stabbed. * * * I seen the stab."

Mr. Yannoyan, a private first class in the United States Army, who was then stationed on duty as a military policeman in that vicinity, in company with Sergeant Fambro, watched the fight from across the street. When the defendant and his wife and friends left the scene of the affray, the soldiers followed them down 6th street to N Street where they overtook them near an alley. Sergeant Fambro testified that as a military officer he ordered the defendant to stop for the purpose of placing him under arrest; that Burke started toward him in a threatening manner and the witness then drew his revolver and ordered him to "stay back"; that the defendant then had his right hand behind his back and he backed up against the fence at the alley and dropped an object which he held in his right hand over the fence. The defendant was then taken in custody. Ambrose Reyes, who lived close to that alley, heard the commotion and looking from his window he saw the group standing near the fence. Evidently he saw the defendant drop the weapon over the fence. After the defendant and the officers had gone, Reyes immediately went down and found the knife in the grass just over the fence, where the defendant had evidently thrown it. It was subsequently delivered to the officers and received in evidence.

After the affray, the victim, Harold Rannells, was taken to the Emergency Hospital on a stretcher. While he was being questioned there by James Lyons, a police officer, the defendant was brought into their presence. Referring to the defendant Lyons asked Rannells if that was the man who cut him. He replied "That is the man." He declared that he was positive the defendant was the man who cut him. Mr. Burke, who then stood beside the stretcher, failed to deny that charge. He made no reply whatever. Nine days later Rannells died from peritonitis as a result of the wound in his abdomen.

[2, 3] While it is true that no witness testified he actually saw the defendant cut the deceased, or that a knife was seen in the defendant's hands during the melee, it is evident that the deceased was stabbed in the struggle between him and the defendant, for he suddenly abandoned the conflict and declared he had been cut. He immediately pulled up his shirt and exhibited the wound. There was then no other person who could have cut the deceased. The knife was sufficiently identified as the weapon which was used to stab the deceased. The defendant was followed by the Military Police and when he was placed under arrest he backed up to the fence and threw the knife away. It was found immediately afterward over that fence in the grass. Moreover, the deceased charged the defendant in his presence with cutting him, and defendant failed to deny that charge. The evidence is therefore sufficient to identify the knife as the weapon with which the defendant stabbed the deceased. The verdict and judgment of manslaughter are adequately supported by the evidence.

The judgment and the order are affirmed.

ADAMS, P. J., and PEEK, J., concur.

26 Cal.2d 795

PEOPLE v. SIMEONE.

Cr. 4628.

Supreme Court of California.

Aug. 3, 1945.

1. Criminal law ⚷1160

In prosecution for four robberies and two murders, verdict of guilty on all counts resolved the matter of the defendant's identification against him, and verdicts were approved by trial court's denial of defendant's motion for a new trial, and could not be disturbed on appeal where supported by competent evidence.

2. Homicide ⚷253(1)
Robbery ⚷24(1)

Evidence sustained conviction of four robberies of the first degree and of two murders of the first degree.

3. Criminal law ⚷1036(1), 1044

Where evidence of collateral offense was received without objection and defendant did not move to strike out the evidence, there was no proper foundation to complain of its admission on appeal.

4. Criminal law ⚷369(2)

In prosecution for four robberies and two murders, admission of evidence of robbery and the shooting of a person with a .38-caliber revolver, 13 days before the first of the series of robberies and murders for which the defendant was tried, was proper to show that defendant possessed a .38-caliber revolver prior to the time when the offenses for which he was on trial were committed.

5. Witnesses ⚷277(2)

Where defendant charged with four robberies and two murders testified on direct examination that he had bought revolver for himself as a birthday present, and prior declarations of defendant received without objection included admission that he bought the revolver with the intention of perpetrating robberies and a denial that he was carrying a revolver at the time he was arrested, cross-examination, whether the defendant did not know that as an ex-convict he had no right to even have possession of a revolver for any purpose, was proper.

6. Witnesses ⚷277(3)

Where defendant on direct examination testified that in a wallet which he allegedly bought from another were the driver's license which was taken at one of the robberies allegedly committed by defendant, and some other credentials, and on cross-examination had testified that one of the union cards may have been and the other was in the wallet when it was allegedly purchased, cross-examination to show that defendant had obtained certain union cards in a robbery which had no connection with the offenses for which the defendant was on trial was proper, not only to contradict defendant's testimony as to how he came into possession of the union cards, but also to discredit his entire story as to the manner in which he obtained the wallet.

7. Criminal law ⚷1036(1)

Defendant could not for first time on appeal object to admission of evidence showing collateral offense, proof of which had gone in without objection.

8. Witnesses ⚷277(3)

Where defendant charged with robberies and murders testified in his own behalf, he was properly asked on cross-examination whether he had not told a doctor that soon after his parole he bought a gun and started out to hold up cafes.

9. Criminal law ⚷784(1), 1186(4)

Where prosecution's case was based primarily on direct testimony of eyewitnesses, and circumstantial evidence was merely incidental and corroborative of the direct evidence, refusal to charge that if jury could draw two equally reasonable conclusions, one of guilt and the other of innocence, it was jury's duty to adopt the latter, was error but not prejudicial. Const. art. 6, § 4½.

10. Criminal law ⚷829(13)

Refusal to give charge concerning evidence of collateral offenses was not error, where the matter was covered in subsequent instruction unduly favorable to defendant.

11. Criminal law ⚷824(8)

Where defendant had failed to request an instruction limiting evidence of collateral offense, he could not complain that none was given by the trial court.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Albert Simeone was convicted on four counts of robbery of the first degree and on two counts of murder of the first degree with no recommendation as to penalty, and, from an order denying his motion for new trial and from the whole of the judgment, he appeals.

Affirmed.

Martin S. Ryan, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Fred N. Howser, Dist. Atty., and Jere J. Sullivan and Thomas W. Cochran, Deputy Dist. Attys., all of Los Angeles, for respondent.

SCHAUER, Justice.

A jury found defendant guilty of four counts of robbery of the first degree and two counts of murder of the first degree and, as to the two counts of murder, made no recommendation as to penalty. Defendant's motion for a new trial was denied and he was sentenced to the state prison for the term prescribed by law on each robbery count and to suffer the death penalty on each murder count. He appeals from the order denying his motion for new trial and from the whole of the judgment.

Defendant urges as grounds for reversal that (1) the evidence, particularly as to counts I through IV (which counts include two robberies and the two murders), is insufficient to sustain his conviction, (2) the admission (without objection) of evidence of asserted prior offenses was prejudicial error, (3) the court erred in permitting cross-examination of defendant (in some instances without objection) as to offenses unconnected with the crimes for which he was on trial, and (4) the court erred in failing to give certain instructions. We have concluded that the evidence is legally sufficient to support the verdict as to each count and that the record is free from prejudicial error. The judgment therefore must be affirmed.

The four robberies were of cocktail lounges and bars in the city of Los Angeles and were committed during the period from February 8 through March 8, 1944. The two murders were committed in the perpetration of two of such robberies. The defendant testified that he did not commit any of the six crimes charged and introduced evidence of an alibi covering the time of the commission of one robbery and murder (counts III and IV).

Counts I and II

The Robbery and Murder of Joseph Martinez

On the night of March 8, 1944, Joseph Martinez, owner of a cafe located at 2230 Whittier Boulevard, Los Angeles, was robbed and fatally shot. From the testimony of five witnesses it appears that on the evening of March 8 defendant was at the bar of the cafe from some time before 9:10 until after 11:45, when the bar closed. During this time defendant drank several Scotch and sodas. Mrs. Martinez testified that when the bar had closed and only she, Mr. Martinez, and defendant remained in the cafe, defendant produced a revolver, announced, "This is a hold-up," and forced Mr. and Mrs. Martinez to accompany him to their safe. Martinez opened the safe and handed defendant a bag of money. Defendant shot Martinez twice and ran out. As a result of the bullet wounds Martinez died on about March 11, 1944. The five witnesses (Mrs. Martinez, a waitress, and three customers) identified defendant with degrees of certainty ranging from "I am positive" to "I believe it is." They further testified that defendant wore a dark suit which resembled People's Exhibit 14 (a suit of defendant) and a gray hat which resembled People's Exhibit 15 (a hat which was found in defendant's car when he was arrested and which belonged to one Breckenridge, who was arrested at the same time). These witnesses had previously testified at the preliminary hearing of one Jetton that Jetton was the man whom they had seen at the Martinez cafe on March 8, but when they thereafter saw defendant they concluded that they had been mistaken in their identification of Jetton.

One Stoner, a police officer, testified that at a police show-up Mrs. Martinez said to defendant, "You are the man that killed my husband," and defendant replied, "If you say I am, lady, I guess I am." Defendant testified, "I might have said that. * * * Mrs. Martinez had told me that I was the man that shot her husband because of the suit I was wearing, and I laughed when she said that, because I knew I only wore that suit twice ever since I had it. * * *"

Counts III and IV

The Robbery and Murder of Jack Asch

On Tuesday night, February 8, 1944, at about 9 o'clock a man (identified by three witnesses as defendant) armed with a .38

caliber revolver entered a cafe at 8201 Avalon Boulevard, Los Angeles, and announced, "This is a hold-up." The bartender, Jack Asch, at defendant's direction opened the cash register and took out money. Defendant shot Asch, took the money, and ran out. As a result of the bullet wound Asch died on about February 11, 1944. The robbery and shooting were completed and defendant ran from the cafe within three to five minutes. The three identification witnesses were seated at the bar and were from two to fifteen feet from defendant. They further testified that defendant wore a dark jacket which resembled People's Exhibit 30 (a jacket of defendant) and a dark hat.

Defendant testified, as alibi for the night of February 8, that on that evening from 7:30 until 11 or 11:30 o'clock he was at a school operated by one Nichols; that he left with Mr. and Mrs. Nichols and one June Ganahl. Mrs. Slee, a member of the school staff, Miss Ganahl, and Mrs. Nichols corroborated defendant's testimony that he was at the school on the night of February 8 and that he did not leave the building until about 11 o'clock. Defendant, however, was not continuously under the observation of any of these witnesses during the period of time when, they testified, he was at the school. Defendant and his witnesses testified that they recalled the date because on February 8 Miss Ganahl took an examination.

A police officer testified that, to check the time, he drove from the school to 8201 Avalon, entered the cafe, remained there for four minutes, and returned to the school, at no time exceeding a speed of 35 miles per hour; that the elapsed time was eight minutes.

On August 28, 1944, defendant and Nichols were confined in adjacent cells in which, unknown to them, a microphone was installed. At this time the police had not informed defendant of the dates on which the murders of which he was suspected were committed. (He was then being held on robbery charges other than those for which he is here prosecuted; it does not appear on what charge Nichols was held.) A transcript of the recorded conversation of Nichols and defendant was received in evidence and includes the following:

"Simeone: Do you remember when you closed the school up? * * * What nights did you have school? * * * Monday, Wednesday and Friday, or what?

"Nichols: Sometimes every night. * * *

"Simeone: That's where I was a couple of days, you see. * * * I know the place [the cafe at 8201 Avalon] because I went there a couple of times, and I saw the date on the folder, the *10th* [italics added] of February. * * * I wasn't operating at that time. * * * Mrs. Slee can prove I was there [at school], and if it was on a Monday, Wednesday and Friday, I can prove I was there to be there with June. * * *

"Nichols: Did that fall on one of those days?

"Simeone: I don't know. I am just hoping it falls on one of those nights. * * * Is my name on that list [the school records]?

"Nichols: Oh, sure, sure.

"Simeone: It is? Well, then, I have that beat."

Mrs. Slee's testimony as to the school records was as follows:

"Q. Was he [defendant] a student there at the school? A. Sometimes he was in classes.

"Q. Now, Mrs. Slee, you know what I mean when I say, 'Student', don't you? A. Not that I remember, that he was on the books.

"Q. As a matter of fact, you know that he wasn't don't you? A. Yes."

The transcript of the conversation of August 28 between Nichols and defendant continues:

"Simeone: * * * [The police] told me where the place was on Avalon, 8201 Avalon. * * * [O]n up to seven months ago I stopped in two or three times and nobody has ever said anything to me. * * * So if they don't remember me then how * * * are they going to remember me in February if it was me? * * * There's proof that I wasn't even there. And besides when I went to that place it was real dark. * * * Do you remember when June took that test? * * *

"Nichols: I know you were there the night she was taking the examination. * * * June is your best bet. * * * It might be on that day when you were over there [with June Ganahl].

"Simeone: It will be on that day.

"Nichols: She kept dates pretty accurately on everything, I think.

"Simeone: It will be on that day.

"Nichols: Sure.

"Simeone: * * * I have got to find out of it was after seven * * * if it was before seven I don't know but I think it was after seven and I will ask them the time, and I will say, 'Who was shot? A man or a woman? How was the guy dressed?' I will say, 'That's funny. I have been there two, three or four times, six times, and nobody ever said anything when I was in there. * * * If they couldn't identify me then, how do they know I was in there?' * * * I didn't do anything. They charged me with it."

Defendant stated to Nichols several times that he was so certain that he could "beat the two murder raps" that he intended to "dicker" with the police—to ask them to drop the robbery charges and to try him only on the murder charges.

February 10, the date on which defendant at the time of the above conversation believed the murder at 8201 Avalon was committed, was a Thursday. Mrs. Nichols testified for defendant that Monday, Wednesday, and Friday were the regularly scheduled nights on which Nichols conducted the school "and sometimes * * * on a Tuesday also." (Asch was shot on a Tuesday.) On cross-examination she testified that Nichols sometimes held classes on Saturday and Sunday nights, thus leaving Thursday the only night on which, according to her testimony, school was never held.

Count V

The Robbery of Fletcher Marsh

According to the testimony of Fletcher Marsh, at about 10 o'clock on the night of March 2, 1944, the defendant entered Mr. Marsh's cocktail lounge at 4900 West Adams Boulevard, Los Angeles. Defendant wore a tan checked sports jacket and a gray hat. He drank three or four Scotch and sodas, which were served by Marsh. Shortly before 11 o'clock defendant produced a .38 caliber revolver, forced Marsh to open the cash register, and took the brown leather folding wallet of Mr. Marsh and the money which was in the cash register. In defendant's possession when he was arrested were Mr. Marsh's driver's license and notice of draft classification.

Defendant testified that in March, 1944, he purchased from one Sova (who immediately thereafter left Los Angeles) a brown leather folding wallet which contained Marsh's driver's license "and some other credentials"; that Sova, before he handed the wallet to defendant, took from it "a lot of money"; that defendant kept the papers and threw away the wallet. Also in defendant's possession when he was arrested were two union cards bearing the name "Fletcher Marsh" which, Mr. Marsh testified, were not his. Defendant testified that he had typed the name on the cards; that he took the cards from one Hawkins on August 16, and over objection, that he obtained them in a robbery.

Miss Bobby Lee Barney testified for defendant that she had seen a worn brown pocketbook with "a lot of money in it" in Sova's possession about a week before he left Los Angeles in March or April and that she had seen defendant at Sova's home. A photograph of Sova was in evidence.

Count VI

The Robbery of Mrs. West Eichen

Mrs. West Eichen and one Zenor, a bartender, testified that shortly after 11 o'clock on the night of March 2, 1944, defendant entered the cafe of Mrs. Eichen at 5611 West Adams Boulevard, Los Angeles. Defendant wore a sport jacket with green sleeves and a brown or dark hat. He sat at the bar and drank 10 or 12 Scotch and sodas. At about 12 o'clock, when the other customers had gone, he produced a .38 caliber revolver, ordered Mrs. Eichen and Zenor to lie down behind the bar, and took money from the cash register.

Miss Barney testified for defendant that Sova had a tan sport coat with green sleeves.

Evidence Showing Collateral Offenses

The prosecution without objection introduced evidence that on the night of January 26, 1944, at about 10 o'clock defendant robbed a cafe at 1408 West 54th Street, Los Angeles. Defendant is not charged with the crimes assertedly committed on that occasion. Paul H. Mark testified that defendant, armed with a .38 caliber revolver, entered the cafe, announced, "This is a hold-up," and fired two shots downward, one of which struck Mark's leg; that the bartender at defendant's direction handed money to defendant and defendant left. According to Mark, defendant then wore a dark jacket which resembled People's Exhibit 30 (except that Mark believed the jacket had a zipper fastening, whereas defendant's jacket had button closure) and a dark hat. Two other witnesses who had been with Mark on January 26 testified to the same effect. Defendant testified that he had never been in the 54th Street cafe. Bobby Lee Barney testified that Sova owned a black jacket with zipper fastening.

Circumstantial Evidence and Admissions of Defendant

Defendant when he was arrested was carrying a .38 caliber Colt revolver (People's Exhibit 13) in a paper bag. This gun, according to the testimony of the identification witnesses, resembled the gun used by defendant in the commission of the crimes above described. Bullets taken from this revolver and bullets found in a paper bag in defendant's car were received in evidence. According to the testimony of ballistics experts of the Los Angeles Police Department, in their opinion one of the bullets which struck Martinez was fired from People's Exhibit 13; the bullet which killed Asch and a bullet found imbedded in the wooden bar of the 54th Street cafe were so badly damaged that the experts could offer no opinion as to whether they were fired from People's Exhibit 13; they were fired from a .38 caliber Colt (or a Spanish imitation) and could have been fired from People's Exhibit 13. The three bullets were reloads with characteristics similar to those of the bullets found in defendant's car when he was arrested.

Defendant testified that he obtained the gun in May, 1944 (i.e., after the commission of the crimes); that prior to that time he had no gun; that he bought the gun through a newspaper advertisement from a man who lived in the vicinity of Baldwin Park and whose name and address he did not know; that he bought the gun as a birthday present for himself and not with the intention of using it to commit robberies, although such purpose later occurred to him. Mrs. Nichols testified that in March and April she helped defendant look through newspapers in search of an advertisement of a gun for sale.

There is testimony of admissions of defendant that he owned the revolver in February and March and of contradictory statements of defendant as to when and where he bought the gun, the amount he paid for it, and the purpose for which he bought it. Defendant at one time denied to the police that he was carrying the gun when he was arrested. In explanation of his changes of story with reference to the gun, defendant testified variously that he thought the police "were joking, so I was joking back with them"; that "when I saw the officers were not trying to help me I thought I would not try to help them"; and that he wished to avoid argument with the officers. He was asked, "You remember telling the police officers that you had this gun in February, don't you?" and testified, "I may have said that; that is correct. * * * I also said I had it in March and January, too, and April. * * * I told him several months, because that was a way of trying to recall when I had it."

Other testimony of and on behalf of defendant was that he did not wear his suit or his jacket or a hat on the nights in question and that he did not drink Scotch and sodas. He admitted that he had told a doctor who examined him after his arrest that "I have been drinking quite a bit the past several months, Scotch and sodas and Bourbon and sodas."

Defendant's Contentions; Points of Law

[1,2] Defendant's argument as to the identification evidence concerns its probative force rather than its legal sufficiency. The matters to which he calls attention were considered and resolved against the defendant by the jury; their findings were approved by the trial court when it denied defendant's motion for a new trial; such findings are supported by competent evidence and we cannot disturb them. (People v. Waller, 1939, 14 Cal.2d 693, 700, 701, 96 P.2d 344; People v. Castro, 1945, Cal.App., 157 P.2d 25; 8 Cal.Jur. § 585, p. 594; 4 Cal. Jur. 10-Yr.Supp. (1943 rev.) § 581, p. 970, § 585, p. 974.)

Before we discuss separately defendant's contentions as to the evidence of collateral offenses, we note that the jury at defendant's request were erroneously told (by an instruction hereinafter quoted in full) that they could not consider any of such evidence, whether or not it was relevant. An examination of each of defendant's assignments of error discloses that no improper inquiry as to collateral offenses was allowed over objection.

[3,4] Defendant contends that the admission of the evidence of the robbery of the 54th Street cafe and the shooting of Mark on January 26 (13 days before the first of the series of crimes for which defendant was on trial) was prejudicial error. As above stated this evidence was received without objection. Defendant did not move to strike the testimony. There-

fore, he has no proper foundation on appeal to complain of its admission. (People v. Ferlin, 1928, 203 Cal. 587, 600, 265 P. 230; People v. Porter, 1932, 123 Cal.App. 618, 624, 11 P.2d 894; 8 Cal.Jur. § 516, pp. 500, 501), but even if we consider this belated objection it has no merit. Regardless of whether such evidence of the January 26 robbery was admissible as tending to show a general criminal plan or design on the part of defendant to rob cafes (see People v. Thorne, 1938, 10 Cal.2d 705, 708, 76 P.2d 491; People v. David, 1939, 12 Cal.2d 639, 647, 86 P.2d 811; People v. King, 1939, 13 Cal.2d 521, 527, 90 P.2d 291; People v. James, 1940, 40 Cal.App.2d 740, 744, 745, 105 P.2d 947), it clearly was admissible to show that defendant possessed a .38 caliber revolver prior to the time when the offenses for which he was on trial were committed. (People v. Nakis, 1920, 184 Cal. 105, 114, 193 P. 92; People v. Burkhart, 1931, 211 Cal. 726, 732, 297 P. 11; People v. Stoerkel, 1927, 87 Cal.App. 336, 341, 262 P. 825; People v. Wilson, 1941, 46 Cal.App.2d 218, 224, 115 P.2d 598.) In further corroboration of such fact there was testimony (contradicted by defendant) that defendant admitted to one Dr. Sisson that soon after his parole from Folsom State Prison in September, 1943, he bought a gun and "started out to hold up cafes and cocktail rooms."

[5] The following four instances of cross-examination of defendant as to asserted collateral offenses are assigned as error:

Defendant was asked, "Didn't you know that as an ex-convict (defendant admitted four prior convictions of felony) that you had no right to even have the possession of a gun for any purpose?" His objection was overruled and he answered, "Yes." As above stated, defendant had testified on direct examination that he bought the gun as a birthday present for himself; prior declarations of defendant, received without objection, included admissions that he bought the gun with the intention of perpetrating robberies and a denial that he was carrying a gun at the time he was arrested. The question objected to was proper inquiry into defendant's purpose in buying and possessing the gun.

[6] Defendant over objection testified on cross-examination that he obtained certain union cards on August 16, 1944, in a robbery which had no connection with the offenses for which he was on trial. On direct examination defendant had testified that in the wallet which he bought from Sova in March, 1944, were Marsh's driver's license and "some other credentials." On cross-examination he had testified that one of the union cards may have been and the other was in the wallet which he purchased from Sova. Thus the cross-examination complained of was proper not only to impeach defendant's testimony as to how he came into possession of the union cards, but also to discredit his entire story as to the manner in which he obtained Marsh's wallet. (People v. Gallagher, 1893, 100 Cal. 466, 476, 35 P. 80; People v. Morales, 1904, 143 Cal. 550, 553, 77 P. 470; People v. Madison, 1935, 3 Cal.2d 668, 678, 46 P.2d 159.)

The transcripts of a statement of defendant to police officers and of defendant's recorded conversation with Nichols, as to which there was no objection, motion to strike, or assignment of error, tend to show that defendant, with one Breckenridge, before and at the time of his arrest was engaged in attempts to cash stolen and forged checks, using stolen credentials as identification, and that it was this activity which led to his apprehension. A possible relation of this activity to the Marsh robbery (count V) is shown in the record in that on cross-examination defendant without objection testified as follows:

"Q. Calling your attention to People's Exhibit 37. * * * Is that the check that you say you were attempting to cash at the time you were arrested? A. Yes, that is correct.

"Q. Did you put Fletcher J. Marsh's name on there? A. Yes, I did.

"Q. You typed that on your typewriter? A. That is correct.

"Q. But you did not endorse the check? A. No, sir, I didn't."

[7] Defendant now contends that it was error to allow such cross-examination. Regardless of the merit or lack of merit of such contention he cannot properly for the first time on appeal assign the admission of the testimony as error. (People v. Johnson, 1933, 132 Cal.App. 265, 267, 22 P.2d 543; 8 Cal.Jur. § 516, pp. 500, 501).

[8] Defendant contends that he should not have been asked on cross-examination whether, as Dr. Sisson testified, he (defendant) admitted that soon after his parole from Folsom he bought a gun and "started out to hold up cafes." To this

question there was no objection and defendant denied having made such statement. Plainly the question was proper.

Defendant next asserts that the trial court erred to his prejudice in refusing to give certain instructions requested by defendant and in failing to give other instructions of its own motion.

[9] Defendant requested that the jury be instructed that "if, from the facts offered in this case, the jury finds that they can draw two equally reasonable conclusions, one of which points to the guilt of the defendant, and the other of which points to the innocence of the defendant, it is the duty of the jury to adopt that conclusion which is consistent with the innocence of the defendant and to find him not guilty [etc.]." The instruction was refused on the stated ground that "Where as here the evidence is direct, there is no occasion for giving the instruction." Defendant argues that as to counts I and II (robbery and murder of Martinez) the jury may not have believed the identification witnesses, in which event the sole prosecution evidence remaining for their consideration was circumstantial; i. e., the evidence connecting the bullet taken from Martinez' body with the gun which defendant had in his possession at the time of his arrest. Defendant's argument is technically sound but in the circumstances the refusal of the instruction does not warrant a reversal (Const. art. VI, § 4½), since the prosecution's case was based primarily on direct testimony of eyewitnesses and the circumstantial evidence was merely incidental and corroborative of the direct evidence. (See People v. Lapara, 1919, 181 Cal. 66, 70, 183 P. 545; People v. Holden, 1910, 13 Cal.App. 354, 359, 109 P. 495; People v. Gorman, 1916, 31 Cal.App. 762, 763, 161 P. 757; People v. Ortiz, 1923, 63 Cal.App. 662, 667, 219 P. 1024; People v. Heuss, 1928, 95 Cal.App. 680, 684, 273 P. 583; People v. Williams, 1933, 134 Cal.App. 232, 236, 25 P.2d 259; People v. Marvich, 1941, 44 Cal.App.2d 858, 861, 113 P.2d 223.)

[10] Defendant contends that the court erred in refusing the following instruction requested by him: "The defendant is charged *in this Information* with *2* counts of *Murder and 4 Counts of Robbery* and is not charged with any other offense. If the evidence has convinced you beyond a reasonable doubt that the defendant has committed some other offense, that fact should not induce you to vote for a verdict of guilty as to any count in this information unless you are convinced beyond a reasonable doubt that the offense charged in the said count was committed. The defendant is not on trial for any other offenses other than *those set forth in this Information.* The jury should not convict the defendant of such offense unless convinced of that identical offense and beyond a reasonable doubt." The quoted instruction was a proper statement of applicable law and could well have been given. But any error in refusing such instruction was cured by the giving of the following instruction which was requested by, and errs in favor of, the defendant: "Where evidence is produced against the defendant unrelated to a particular offense, but tending to show the commission of other offenses by him, no matter how great the weight of such unrelated evidence to such other offenses, it must not be considered by you in any way as affecting the guilt or innocence of the defendant as to such particular offense. Each count in the information is to be considered separately and upon the evidence as to such count only, without reference to accusations or evidence of other offenses." By the last sentence of the quoted instruction the jury were incorrectly told, in effect, that they could not consider any evidence of any collateral offense for any purpose.

[11] Finally, defendant contends that the court of its own motion should have charged the jury that the evidence of the robbery of the 54th Street cafe on January 26 could be considered only to show that defendant at that time had possession of a gun. The defendant, having failed to request such an instruction, cannot now complain that it was not given. (People v. Northey, 1888, 77 Cal. 618, 631, 19 P. 865, 20 P. 129; People v. Fultz, 1895, 109 Cal. 258, 262, 41 P. 1040; People v. Findley, 1901, 132 Cal. 301, 306, 64 P. 472; People v. James, 1940, supra, 40 Cal.App.2d 740, 746, 105 P.2d 947). Moreover, as above stated, the jury at defendant's request were instructed in general terms that they could not consider evidence of a collateral offense even for such limited and proper purpose.

For the reasons above stated, the judgment as to all counts and the order appealed from are affirmed.

SHENK, EDMONDS, CARTER, TRAYNOR, and SPENCE, JJ., concurred.

26 Cal.2d 824

Ex parte BYRNES.

Cr. 4531.

Supreme Court of California.

Aug. 14, 1945.

1. Habeas corpus ⚷=4

A writ of habeas corpus ordinarily may not be employed as substitute for appeal.

2. Habeas corpus ⚷=1

The writ of habeas corpus may be used to present law questions which cannot otherwise be reviewed or are so important as to justify extraordinary remedy.

3. Criminal law ⚷=1104(6)

One prevented by state officers from presenting record, on which his appeal, regularly taken, from judgment of conviction, can be heard, should have opportunity to present record.

4. Criminal law ⚷=1083

Timely notices of appeal from judgments of conviction gave District Court of Appeal jurisdiction, which was not affected by lack of record on appeal.

5. Criminal law ⚷=1104(6)

A defendant failing to perfect his appeals from judgments of conviction within required time after giving timely notices of appeal in 1932, was required to apply to trial court for relief from default, and determination as to whether he used due diligence rested largely on exercise of judicial discretion.

6. Criminal law ⚷=1104(6)

Where reporter's transcript was available for purpose of preparing record, which appellant was prevented by state officers from presenting on appeal from judgments of conviction, and there was nothing to indicate that reporter's transcript in another such case could not be prepared from phonographic reporter's notes, superior court was directed to hear appellant's motions for relief from default in presentation of record within 90 days after filing of appellate court's opinion.

7. Criminal law ⚷=1026

The fact that one prevented by state officers from presenting record on his appeals from convictions on two indictments served full terms of imprisonment imposed under judgments in first case did not bar his right to appeal from such judgments for purpose of clearing his name in event that trial court relieved him from default in presentation of record.

◆

In Bank.

Proceeding by Frederick John Byrnes for a writ of habeas corpus to secure his release from the state prison.

Writ discharged, and petitioner remanded to custody.

Rosalie S. Asher, of Sacramento, and Alphonse Matthews, of Los Angeles, for petitioner.

Robert W. Kenny, Atty. Gen., and Frank Richards and David K. Lener, Deputy Attys. Gen., for respondent.

EDMONDS, Justice.

In a petition for a writ of habeas corpus, Frederick John Byrnes, now an inmate of the state prison at Folsom, asserted that after his trial and conviction upon two separate indictments, he was unable to perfect his appeal from each of the judgments because, in one case, the transcript of the proceedings was not furnished to him, and, in the other case, the transcript was wrongfully taken from him by prison officials. The writ issued and as the attorney general, by answer and stipulation, has admitted the truth of the essential facts related in the petition, the question for decision concerns the status of Byrnes under these circumstances.

Byrnes is now under sentences imposed upon him in 1932 by the Superior Court of Los Angeles County following two trials. He was first convicted of three offenses separately charged in the indictment. (Case No. 48763.) A month later he was tried and convicted upon a second indictment which charged him with the commission of four other crimes. (Case No. 48765.) By its judgments, the court ordered that the sentences for these seven offenses, which include kidnapping, rape and a violation of section 288 of the Penal Code, should run consecutively.

In the first trial, Byrnes was represented by counsel appointed by the court to defend him. His counsel noticed an appeal within the required time, obtained an order for the preparation of a transcript and then withdrew from the case. No transcript was completed in the form required for an appeal, but a copy of the testimony, in several parts as written up each day by the stenographic reporter, is now on file in the office of the District Attorney of Los Angeles County. Following his conviction in the second trial, Byrnes gave timely notice of appeal, but his request for a transcript was denied upon the ground that he had each day been furnished with a record of the proceedings. However, upon the statement of Byrnes that some portions of the testimony which he had received during the trial were lost or stolen from him, at the request of the trial judge, the district attorney agreed to loan Byrnes copies of the missing volumes. The records of the district attorney's office show that there were 14 volumes of this transcript; all of them were taken from the office on August 26, 1932, and there is no information obtainable as to their present whereabouts.

Byrnes was granted a stay of execution upon each of the sentences in order that he might, before leaving the county jail, prepare his appeals. The officer then acting as chief jailor has a "faint recollection" of the petitioner reading a transcript. Other persons in the cell block were found reading this transcript, which included testimony of an obscene character. The jailor does not remember distinctly whether he had the transcript removed from the petitioner's cell or whether Byrnes made any demand for it when he left the county jail to be taken to the state prison. Upon various occasions while he was in the county jail, due to fighting and refusal to cooperate with the officers, he was removed from the cell block to the dungeon. Books and papers taken from a cell after a prisoner is removed from it are kept for a time and then destroyed. The jailor does not know where the transcript is; it may have been destroyed. In January, 1944, a search was made among old records and elsewhere but the transcript was not found.

It is urged on behalf of the petitioner that a writ of habeas corpus should be granted or an order made requiring the appeals from the judgments of conviction to be heard and determined. Necessarily, in this connection counsel argue that the petitioner's right to relief is not barred by reason of laches. More specifically, the position of the petitioner is that as the recent tendency has been to enlarge the relief obtainable upon the writ of habeas corpus beyond a consideration merely of jurisdictional questions, the prevention by state representatives of an exercise of the right of appeal constitutes a denial of due process of law and affords grounds for release from custody. Although it is conceded that, as the petitioner has served his full term for the offenses of which he was convicted in the first trial, he cannot obtain relief as to them so far as imprisonment is concerned, the question presented is not moot and he is entitled to an appeal from the judgments in that case for the purpose of clearing his name. The attorney general does not challenge the petitioner's right to prosecute the two appeals which, it is admitted, are now pending; the state's only contention is that, under the facts stated by the petitioner, he is not entitled to be released from imprisonment.

[1, 2] It is well settled that a writ of habeas corpus ordinarily may not be employed as a substitute for an appeal (In re Bell, 19 Cal.2d 488, 492, 122 P.2d 22), yet the scope of inquiry in such proceedings has been broadened rather than narrowed (Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461, 146 A.L.R. 357), and the writ may be used to present questions of law that cannot otherwise be reviewed or are so important as to justify an extraordinary remedy (In re Bell, supra, 19 Cal.2d at page 494, 122 P.2d 22; In re Silverstein, 52 Cal.App.2d 725, 126 P.2d 962). And although circumstances such as those shown in the present proceedings have not before been presented to the appellate courts of this state, in the federal courts the writ of habeas corpus has been used for the purpose of obtaining a determination of the rights of one imprisoned under a judgment which, it is asserted, has not become final because public officers prevented the presentation of an appeal.

[3] The most recent of these decisions is Boykin v. Huff, 73 App.D.C. 378, 121 F.2d 865, in which the petitioner alleged that he had been deprived unconstitutionally of an appeal. It was there held that the statutory right of appeal is not an insubstantial one, nor a matter of such small consequence that it may be given or withheld arbitrarily. And as the rulings of the trial judge in that case prevented the petitioner from perfecting an appeal, the court ordered that he should be allowed to proceed with the presentation of the record on appeal some three years after the judgment of conviction was entered. Likewise, in Tinkoff v. Zerbst, 10 Cir., 80 F.2d 464, although the court refused to order the petitioner's discharge from custody because

of the wrongful execution of his sentence during the time he was preparing an appeal, it afforded him an opportunity to complete the record upon which he relied for a reversal of the judgment of conviction rendered against him. See, also, Briggs v. White, 10 Cir., 32 F.2d 108. The conclusions reached in these cases rest upon fundamental principles of justice which compel a determination that one who has been pervented by officers of the state from presenting the record upon which his appeal, regularly taken, can be heard, should have an opportunity to do so.

[4–7] By the timely notices of appeal from the judgments of conviction under which Byrnes is now in custody, the District Court of Appeal acquired jurisdiction over the two actions, and as in the federal courts, lack of a record on appeal does not affect its jurisdiction. People v. Megugorac, 12 Cal.2d 208, 82 P.2d 1108; People v. Sonogui, 1 Cal.2d 364, 35 P.2d 123; In re Johannes, 213 Cal. 125, 1 P.2d 984; People v. Bryant, 207 Cal. 450, 278 P. 1025. At the time these notices were given, an appellant who had not perfected his appeal within the specified time was required to apply to the trial court for relief from default, and the determination as to whether he had used due diligence rested very largely upon the exercise of judicial discretion. Hohnemann v. Pacific Gas & Electric Co., 31 Cal.App.2d 692, 88 P.2d 748; Wood v. Peterson Farms Co., 131 Cal.App. 312, 21 P.2d 468. Accordingly, as it appears from the record that a reporter's transcript is available for the purpose of preparing a record in case No. 48763 and there is nothing to indicate that a reporter's transcript in case No. 48765 may not be prepared from the phonographic reporter's notes, the Superior Court of Los Angeles County is directed to hear any motion or motions made within 90 days after the date of the filing of this opinion for the purpose of securing relief from default in the presentation of the record upon appeal in either or both of the actions referred to. For although Byrnes served the full terms of imprisonment imposed under the judgments of conviction in the first action, that fact does not bar his right to an appeal from such judgments for the purpose of clearing his name (See, People v. Chamness, 109 Cal.App.Supp. 778, 288 P. 20; In re Lincoln, 102 Cal.App. 733, 283 P. 965; State v. Cohen, 45 Nev. 266, 201 P. 1027, 18 A.L.R. 867, 872) in the event that the trial court relieves him from default in the presentation of the record.

The writ of habeas corpus is discharged and the petitioner remanded to custody.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.

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70 Cal.App.2d 522

DOUILLARD v. SMITH et al.

Civ. 14754.

District Court of Appeal, Second District,
Division 1, California.

Aug. 17, 1944.

Rehearing Denied Sept. 5, 1945.

Hearing Denied Oct. 15, 1945.

1. Fraud 🔑50, 58(1), 64(1)

Fraud presents a fact question, is never presumed, and must be clearly established.

2. Fraud 🔑58(1)

A mere suspicion of fraud is never sufficient to establish it, so that plaintiff merely establishing state of facts from which inference of defendant's fraud may or may not reasonably be drawn fails to establish fraud.

3. Fraudulent conveyances 🔑299(7)

In action to quiet title to lot as against claims arising from action against plaintiff's judgment debtor for attorney's fees on ground of alleged fraudulent conspiracy to encumber title to lot, so as to prevent collection of judgment, evidence supported judgment adverse to plaintiff.

4. Fraudulent conveyances 🔑299(7)

In action to quiet title to lot on ground of alleged fraudulent conspiracy to encumber title thereto, so as to prevent collection of plaintiff's judgment, by filing of action against judgment debtor for attorney's fees, burden was on plaintiff to establish fraud and collusion and to overcome presumption of honesty and fair dealing by evidence of convincing force.

◆

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Emile A. Douillard against Lloyd C. Smith, Melanie D. Woodd and others to quiet title to real property and set aside a judgment. From a judgment for defendants Woodd and others, plaintiff appeals.

Affirmed.

J. M. Clements, Thomas Higgins, Jr., Robert E. Austin, and John N. Helnick, all of Los Angeles, for appellant.

Fred W. Heath and Daniel A. Knapp, both of Los Angeles, for respondents.

YORK, Presiding Justice.

Plaintiff appeals from an adverse judgment in an action to quiet title to real property, the second amended complaint praying that the judgment in the case of Hovey v. Woodd, hereinafter referred to, be declared "void and of no force or effect".

It is disclosed by the record herein that respondents Knapp and Heath are attorneys at law and have represented respondent Woodd in various matters since 1932. Mrs. Emily Donahue was the mother of appellant Emile A. Douillard, Frank Douillard, respondent Melanie D. Woodd, and another daughter, who predeceased Mrs. Donahue, but left two children surviving her. After Mrs. Donahue's death in 1937, her estate was probated and the assets partitioned and distributed. Immediately thereafter, the two Douillard brothers and the children of the deceased sister, demanded payment of $7,500 to them by respondent Woodd, in accordance with the latter's alleged oral agreement to do so in the event they refrained from contesting Mrs. Donahue's will when it was presented for probate by respondent Woodd. Said respondent failed to make the payment demanded, and on January 17, 1939, the Douillard brothers and the two children brought action against her to recover said sum of $7,500.

Thereupon, respondent Woodd employed respondents Heath and Knapp to defend her in said action, hereinafter referred to as the Douillard case, but no arrangements were made with respect to the payment by respondent Woodd of any attorneys' fees in connection with that case, or for services theretofore rendered by said attorneys to Mrs. Woodd.

The Douillard case was tried, and on April 2, 1940, the trial judge announced his decision for the plaintiffs therein, and on April 25, 1940, he signed a several judgment in favor of appellant Emile A. Douillard for the sum of $2,500. Meanwhile, on April 9, 1940, respondents Heath and Knapp had a conference with respondent Woodd, at which time fees for services rendered by said attorneys were discussed for the first time with respondent Woodd. Mr. Heath told Mrs. Woodd that he would like to have a settlement of his fees which he told her amounted to $4,000 or $4,500, and also that Mr. Knapp's fees totalled $3,000 or $3,500. Mrs. Woodd acknowledged that she owed attorneys' fees but thought these figures were too high, and as a result of the discussion it was decided that attorneys Knapp and Heath should assign their claims to respondent Dr. M. E. Hovey, who would bring a friendly suit against Mrs. Woodd and ask the court to fix the amount of such attorneys' fees. Such suit was filed April 11, 1940, the complaint therein alleging an indebtedness by Mrs. Woodd to attorneys Heath and Knapp in the amount of $7,000 for legal services rendered by them. Attachment issued therein against Lot 11, Tract 314, owned by respondent Woodd. Mrs. Woodd was represented by attorney Martindale. At the trial, in addition to the testimony of the respondent Heath, letters were introduced in evidence addressed by Mrs. Woodd to attorneys Heath and Knapp in which she acknowledged that their services were reasonably worth $2,500 and $1,500, respectively, whereupon judgment was rendered for the sum of $4,000 in favor of M. E. Hovey and against Mrs. Woodd. Execution on said judgment issued on July 17, 1941, but no levy was made on the real property covered by the attachment until September 8, 1942, when Lot 11, Tract 314, was sold by the sheriff of Los Angeles County to M. E. Hovey.

Meanwhile, on August 3, 1942, the judgment rendered against respondent Woodd in the Douillard case was affirmed on appeal, and on March 15, 1943, by virtue of an execution theretofore issued on said judgment on October 15, 1942, the sheriff sold said Lot 11, Tract 314, to appellant Emile A. Douillard for $1,500.

Subsequently, appellant Emile A. Douillard brought the instant action to quiet title to said Lot 11, Tract 314, against the claims arising out of the Hovey v. Woodd action, it being alleged in paragraph IV of the second amended complaint that "for the purpose of delaying plaintiff and defrauding him out of the collection of the moneys due to him from the defendant Woodd, and the collection of the judgment thereon hereinabove mentioned, the defendants Woodd, Knapp, Heath and Hovey conspired together to so cloud and encumber the title to said property that plaintiff would not be able to collect his judgment therefrom, and for the purpose of carrying into effect said conspiracy, the defendants Knapp, Heath and Hovey, filed a suit in the Superior Court of Los Angeles County on the 11th day of April, 1940, entitled: M. L. Hovey v. Melanie D. Woodd, No. 45082, wherein defendant Hovey was the plaintiff, and the defendants, Heath and Knapp, acted as his attorneys, in which it was falsely alleged that the defendant Melanie D. Woodd had been indebted to the defendants Heath and Knapp in the sum of Seven Thousand Dollars ($7,000.00) and that said Heath and Knapp had sold and assigned their claims against the defendant Woodd to the plaintiff Hovey and that nothing whatsoever had been paid thereon, and that there were no credits against said amount."

The trial court found that respondent Woodd owed respondents Heath and Knapp; that they did not conspire together "to cloud or encumber the title to said property in fraud of the rights" of appellant; that the Hovey action for attorneys' fees was not filed "for the purpose of carrying out any conspiracy, or for the purpose of defrauding" the appellant, and that the judgment therein was not procured by said respondents "for the purpose of delaying or defrauding" appellant out of the collection of his judgment.

Appellant "attacks the judgment (in the Hovey action) not because of any errors or irregularities in the case, but solely because the judgment was procured by the fraud and collusion of respondents in deceiving and misleading the court into rendering the judgment." In this connection, he urges that the whole course of conduct on the part of respondents Heath and Knapp "shows that their only purpose in filing the Hovey suit was to tie up the property of the defendant Melanie D. Woodd, before the plaintiff in the Douillard case could run an execution on it"; and that "Mrs. Woodd in entering the conspiracy and participating in the fraud and collusion confessed a judgment in favor of Hovey."

[1, 2] As has been many times declared, fraud presents a question of fact, is never presumed, and must be clearly established. "Courts have used a variety of expressions in characterizing the sufficiency of evidence to establish fraud. Thus it has been said that the evidence or the inferences to be drawn from the evidence must be clear, clear and satisfactory, clear and convincing, clear, convincing and unequivocal, full and complete, and strong and decisive. A mere suspicion of fraud is never sufficient. Consequently, when the plaintiff's case goes no further than to establish a state of facts from which the inference of fraud may or may not reasonably be drawn, he has failed to establish his charge." 12 Cal.Jur. 832, sec. 81, and authorities there cited.

[3, 4] An examination of the record discloses substantial evidence to support the findings and judgment of the trial court. Respondent Woodd admitted liability for legal services rendered in her behalf by respondents Heath and Knapp. The latter testified that they had represented Mrs. Woodd in various matters over a long period of time without receiving any compensation. Further, they made a lengthy recital of the various legal services performed by them which included an appeal from the judgment in the Douillard case. On the other hand, the evidence presented by appellant, if believed, raised merely a suspicion of fraud on the part of respondents. Having alleged fraud and collusion, the burden was upon appellant to establish his charge, and overcome the presumption of honesty and fair dealing by evidence of convincing force. Fares v. Morrison, 54 Cal.App.2d 773, 776, 129 P.2d 735, citing Hedden v. Waldeck, 9 Cal.2d 631, 72 P.2d 114. See, also, Mayock v. Splane, 56 Cal.App.2d 563, 572, 132 P.2d 827, 832, where this court asserted, quoting from American Box & Drum Co. v. Harron, 44 Cal.App.2d 370, 377, 112 P.2d 332: "'In the absence of proof of facts and circumstances which constitute fraud as a matter of law, we are not prepared to say that the trial court was incorrect in drawing an inference of fair dealing rather than of corrupt practice. In Re Estate of Ross, 199 Cal. 641, 651, 250 P. 676, 680, the court said: "It is true that the trial court is the exclusive judge of the weight to be given to the evidence, but it is also true that the presumption is in favor of honesty and fair dealing (see In re Estate of Sweetman, supra, 185 Cal. 27 [at page 28], 195 P. 918), and the burden is upon the party asserting the fraud to prove it by some substantial evidence (12 Cal.Jur. 817). The facts and circumstances shown in evidence must have given rise at least to a reasonable inference of fraud, and not a mere suspicion

thereof. Roberts v. Burr, 135 Cal. 156, 67 P. 46. Indeed, it has been held that—'If there be two inferences equally reasonable and equally susceptible of being drawn from the proved facts, the one favoring fair dealing and the other favoring corrupt practice, it is the express duty of the court or jury to draw the inference favorable to fair dealing.' Ryder v. Bamberger, 172 Cal. 791, 158 P. 753."'"

For the reasons stated, the judgment appealed from is affirmed.

DORAN and WHITE, JJ., concur.

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70 Cal.App.2d 462

PEOPLE v. BERNSTEIN.

Cr. 3902.

District Court of Appeal, Second District, Division 1, California.

Aug. 8, 1945.

Rehearing Denied Aug. 17, 1945.

Hearing Denied Sept. 7, 1945.

1. Larceny 🔑65

Evidence sustained conviction of grand theft.

2. Criminal law 🔑234

Statements by complaining witness, at preliminary hearing in grand theft prosecution, that she did not care to testify and desired to withdraw complaint, involved issue between such witness and state, and determination of issue by requiring complaining witness to testify was matter of which defendant could not complain on ground that testimony was given under compulsion, and therefore unworthy of belief.

3. Criminal law 🔑543(2)

Under Penal Code provision for admission of testimony taken at preliminary hearing, the only question for trial court's determination on issue whether such testimony was admissible at the trial was whether it was satisfactorily shown that witness who testified at preliminary hearing could not with due diligence be found in state. Pen.Code, § 686, subd. 3.

4. Criminal law 🔑1153(6)

Under Penal Code provision providing for admission of testimony taken at preliminary hearing, question whether it is satisfactorily shown that such witness cannot with due diligence be found within state is one of fact to be determined by trial court, and appellate court will not interfere unless trial court abused its discretion. Pen.Code, § 686, subd. 3.

5. Criminal law 🔑1153(6)

"Diligence" required to find absent witness, before his testimony on preliminary examination may be admitted, is a relative term, incapable of exact definition, but it depends so essentially on particular circumstances that appellate court should hesitate to disturb trial court's ruling thereon where it has any substance on which to rest. Pen. Code, § 686, subd. 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Diligence".

6. Criminal law 🔑662(6)

Procedure authorized by Penal Code for admission, in criminal case of testimony taken at preliminary hearing where it is shown that absent witness cannot with due diligence be found within state, is not repugnant to Constitution where accused is confronted by witness at preliminary hearing and given opportunity to cross-examine. Pen.Code, § 686, subd. 3.

7. States 🔑4

The state has full control over procedure in its courts, both in civil and criminal cases, subject only to qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of Constitution.

8. Criminal law 🔑543(2), 544

In grand theft prosecution, admitting testimony of absent complaining witness taken at preliminary hearing was not abuse of discretion where defendant cross-examined such witness at preliminary hearing and at time of trial witness was outside state, and evidence showed that before witness left state she had been notified to appear at trial, in absence of showing that her testimony would have been different if she had been present at trial or that any impeaching evidence had materialized since preliminary examination. Pen.Code, § 686, subd. 3.

9. Witnesses ⚷337(5)

Defendant's admission of his prior conviction of a felony, other than felony alleged in information, could be used for purposes of impeachment of his testimony.

◆

Appeal from Superior Court, Los Angeles County; Harold B. Landreth, Judge.

Hyman Bernstein was convicted of grand theft, and he appeals.

Affirmed.

Morris Lavine, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and L. G. Campbell, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Defendant was accused by information of the offense of grand theft. A trial by the court without a jury resulted in a judgment of guilty, from which defendant appeals.

[1] According to the testimony of Elizabeth Hanson, the victim of the alleged theft, as related at the preliminary hearing, she met defendant in a cocktail bar some time before the date of the offense under circumstances described as follows: "I was sitting at a bar and he walked up and sat down beside me and started talking to me." Thereafter, they were together socially seven or eight times. On the night of the offense, they sat at "the bar and drank several drinks," thence to a "chop suey place" and finally to the witness's apartment. The witness testified, as to her object in "going home" and as to the ensuing events, as follows:

"A. I had high heels and a dress, and I had had several drinks, and I said that I felt that I should go home and put my slacks on and low heel shoes on, and I wanted to take a walk, to go for a walk and get some air, and when we got in my apartment he stated, 'We better have some coffee because we could not get coffee down at the chop suey place,' and I said 'It might be a good idea', so I put the coffee pot on the fire and made the coffee and poured the coffee, to have it cooling while I changed my clothes, and when I came back and sat down at the table to drink my cup of coffee I said, 'I forgot the cream,' and he said, 'Betty, you should not put cream in coffee. You should drink it black and it will sober you up,' and I said I didn't like black coffee, and I got the cream, and when I came to the table with it he still insisted that I drink it black, and I said all right, and I took one sip of it and I said, 'Drunk or sober, I still don't like black coffee,' and he still insisted, and I said, 'Oh, all right,' and I took the cup of coffee and I drank it down with one gulp, and I don't remember ever leaving that table. I woke up at six o'clock in the morning and I was in my bedroom, in my nightgown—in my bed in my nightgown, and my door was standing open, and my brassiere, with the money I had in it pinned on me was gone, and even the brassiere was gone, and I have never been able to figure out what he wanted the brassiere for.

"Q. How much money did you have pinned in the brassiere? A. I had $580.00 rolled in a handkerchief and pinned in my brassiere * * *."

"* * * By Mr. Danoff: Did you see the defendant again after this day that you have just told us about? A. No, sir, I have never seen him until they called me to come to the police station, I believe it was Thursday last week.

"Q. And what name did you know the defendant by? A. He told me once that his name was Frank Rudeni and another time I asked him and he said Brudeni, and I said, 'I thought you said Rudeni,' and he said, 'No, honey, it is Brudeni.'"

The witness Hanson did not appear at the trial.

The alleged offense was committed June 20, 1943; defendant was arrested July 26, 1944; the date of the preliminary hearing does not appear in the record; defendant was arraigned in the Superior Court August 23, 1944; the trial was set for October 30, 1944; on said last mentioned date the trial was continued to December 6, 1944, witnesses instructed to return and a bench warrant issued for Elizabeth Hanson; on December 6th the trial was continued to January 3, 1944, due to illness of defendant's counsel, witnesses instructed to return and another bench warrant issued for the witness Hanson; on January 3, 1945, the trial proceeded and in the absence of the witness Hanson, said witness's testimony given at the preliminary hearing was introduced.

It is contended on appeal, first, that the evidence is "insufficient to sustain the verdict"; second, that the court erred in receiving the evidence taken at the preliminary hearing, that due diligence was not shown; and third, that the "use of forced evidence taken at the preliminary hearing was highly prejudicial."

With regard to the first and third above mentioned contentions, it is argued that the testimony of the witness Elizabeth Hanson was given "under court order and against her will" and that "under the circumstances, the testimony given under compulsion was of such a character as to render it unworthy of credence or belief." The record of the witness's testimony referred to reveals the following:

"The Court: Speak up loudly so we all can hear you.

"The Witness: Your Honor, I don't care to testify.

"The Court: You don't care to testify?

"The Witness: No, sir. I wish to withdraw the complaint.

"The Court: Well, it is just a little too late now. Unless you feel that any testimony that you might give would incriminate you in any way.

"Mr. Cooper: The word 'degrade' is also there.

"The Court: I don't know what you are talking about, Mr. Cooper.

"Mr. Cooper: Well, we will get it. It is in the Code section. It is in the Code of Civil Procedure as well. The witness may refuse to answer the question upon the ground that the testimony may incriminate or degrade her.

"The Court: I have asked her that. I said her answer—that she does not—that it is not on that basis that she refuses to testify. Do you refuse to testify now on the ground that your testimony might incriminate you in any crime?

"The Witness: Yes, sir.

"The Court: Or degrade you?

"The Witness: No, sir.

"The Court: Well, let us go ahead and answer the questions.

"By Mr. Danoff: Where do you live, Mrs. Hanson?

"Mr. Cooper: At that point I further object to the testimony of the witness on the ground that the transcript shows that the witness plainly claimed the privilege and that that privilege was denied her.

"The Court: The objection may be overruled.

"Mr. Cooper: That objection is to the entire testimony.

"The Court: Very well."

The witness then proceeded to testify with apparent willingness. At the conclusion of which, the record is as follows:

"Mr. Cooper: I would ask that the witness remain, if your Honor please?

"The Court: You may remain in the courtroom.

"Mr. Cooper: Your Honor, may I recall the witness?

"The Court: Yes, Mrs. Hanson, come back to the stand, will you, please?

"The Witness: Yes, sir.

"The Court: Mr. Cooper, do you still want to ask this witness the reason why she answered that she felt she didn't want to testify?

"Mr. Cooper: Yes.

"A. Well, I will tell you. Did you ever hear of a person that didn't want to let the rest of the world know that she was a big fool? That happened to be my reason.

"The Court: Anything further?

"Mr. Cooper: No, that is all.

"Mr. Danoff: Now may this witness be excused?

"The Court: All right, you may be excused, Mrs. Hanson."

[2] The witness's attitude as indicated by the expressions, "Your Honor, I don't care to testify," and "I wish to withdraw the complaint," presented a matter with which the defendant was not concerned. Such a situation involves an issue between plaintiff's witness and the state. The determination of such issue is not a matter about which the defendant may be heard to complain. Such an incident may provide argument as to credibility but it in no manner affects the rights of the defendant. There is nothing about the witness's testimony that suggests any inherent improbability as a matter of law. The evidence is sufficient to sustain the judgment.

With regard to the second contention, namely, that the court erred in receiving in evidence the transcript of the testimony given at the preliminary examination, the record discloses that the witness Hanson was subpoenaed. Although the subpoena was not produced, Officer Flanigan testified:

"Q. About when did you first have a subpoena for her, do you recall? A. Sometime last fall, at the time I served her originally I don't remember the date I served her at Apartment 111, 1830 North Cahuenga Boulevard.

"Q. That was sometime last fall? A. Yes, sir.

"Q. Did she appear in court at any time that you know of after that, did you see her in court at any time? A. No, sir, she was not there that morning, she may have come later."

Deputy Sheriff Barron testified with regard to service of the bench warrant referred to that—

"I received a warrant for her on October the 30th and I went and found her at that time" * * * "when I served the warrant she told me she had been in court on the day she was supposed to be and after a little questioning I called the court to verify that fact and they informed me after checking that the Bailiff had seen her in court on that day.

"Q. Had she been ordered back in court on December 8th? A. December 6th, I think it was.

"Q. December 6th? A. Yes, sir. * * *

"Q. Then when you went out with the warrant did you serve the warrant? A. I found Mrs. Hanson had been sick.

"Q. Yes. A. Yes.

"Q. What happened then? A. I phoned the court and verified, she said she had been in court on the day that she was supposed to be and I called the court by phone and talked to the judge over there and finally he talked with the bailiff and the bailiff said she had been in court, she came late and he had told her to come back, to return on December 6th. I was informed of that by the court.

"Q. That was what you learned from the court? A. Yes, sir.

"Q. In other words, she was notified to return on December 6th? A. Yes, sir."

[3] The witness did not appear on December 6th nor at any time thereafter. It was established by competent evidence that she had left the state and had gone to Illinois. On the showing briefly outlined above, the transcript of the witness's testimony given at the preliminary examination was admitted in evidence. Under the provisions of paragraph 3 of section 686 of the Penal Code, only one question was presented for the trial court's determination, as revealed by the record herein, namely, was it "satisfactorily shown to the court" that such witness could not, "with due diligence be found within the state." With reference to the same question presented in People v. Lewandowski, 143 Cal. 574, 576, 77 P. 467, 468, Mr. Justice Angellotti observed: "That the right of a defendant to be confronted in person by the witnesses against him is a most important one, and that the trial court should be fully satisfied by the evidence that the absent witness cannot with due diligence be found in the state, before allowing the deposition of such witness, taken on the preliminary examination, to be read, may be freely conceded."

[4] "The question, however, as to whether it is satisfactorily shown that such witness cannot with due diligence be found within the state, is a question of fact that is addressed to the trial court, to be determined by it from evidence introduced before it (People v. Plyler, 126 Cal. 379, 58 P. 904); and with the determination of that question of fact by the trial court, this court will not interfere, unless the evidence thereon is such as to satisfy the court that the trial court abused the discretion confided to it in holding that due diligence had been used, and that the witness could not be found. People v. Witty, 138 Cal. 576, 72 P. 177; People v. Reilly, 106 Cal. 648, 40 P. 13." The foregoing rule has been uniformly upheld. See People v. Day, 219 Cal. 562, 27 P.2d 909; People v. Barker, 144 Cal. 705, 78 P. 266; People v. Padilla, 81 Cal. App. 528, 254 P. 585; People v. Ramos, 52 Cal.App. 491, 199 P. 544; People v. Boyd, 16 Cal.App. 130, 116 P. 323.

[5] In Heintz v. Cooper, 104 Cal. 668, 669, 38 P. 511, 512, in an appeal by plaintiff in a civil action from an order granting a new trial, the court, on the subject of "diligence" observed that: "'Diligence' is a relative term, incapable of exact definition. What would amount to due diligence under one state of facts would fall absolutely short of it under another and different state of facts. It depends, therefore, so essentially upon the particular circumstances of each case, with all their distinct and varying phases and bearings, as they have appeared to the lower court at the trial and throughout the conduct of the cause, in determining whether diligence has been used in any particular instance, that this court should hesitate to disturb a ruling upon this ground

where it has any substance whatever upon which to rest. The presumption is that the discretion has been properly exercised, and that presumption must be overcome by a clear want of facts before the order will be disturbed." The above quotation is cited in People v. Boyd, and People v. Ramos, supra. And the Day case, supra, cites the Ramos case, supra, with regard to the same subject.

The rule is statutory and prevails in most of the states. See 79 A.L.R. 1411; 90 A.L.R. 379, 122 A.L.R. 440 and 23 C.J.S., Criminal Law, § 999.

[6-8] Nor is the procedure allowing the introduction of such evidence repugnant to pertinent constitutional provisions, where, as here, the defendant was confronted by the witness and given an opportunity to and did, in fact, cross examine the witness. "The state has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal Constitution." Brown v. New Jersey, 175 U.S. 174, 20 S.Ct. 77, 78, 44 L.Ed. 119. Under the authorities and, by virtue of the record herein, it cannot be held that the trial court abused its discretion by admitting in evidence the former testimony of the absent witness. It should be noted in this connection that there was no showing that the testimony in question would have been any different if the absent witness had been present at the trial, nor, that evidence of an impeaching character had materialized since the preliminary examination, nor, that in any other respect valid grounds for objection to the admission of such testimony were present.

[9] The defendant denied knowing, or, of ever having met Elizabeth Hanson. The information alleged the prior conviction of a felony which was not established at the trial but, on cross-examination the defendant admitted the conviction of a felony other than the one alleged. Such admission amounted to a well established form of impeachment.

There are no prejudicial errors in the record and the judgment is affirmed, as is the order denying the motion for a new trial.

YORK, P. J., and WHITE, J., concur.

70 Cal.App.2d 563

CORY v. CORY. *

Civ. 7150; Sac. 5704.

District Court of Appeal, Third District, California.

Aug. 18, 1945.

1. Divorce ⚷303(2)

The fact that adherents of particular religious group may be excluded from membership in organizations built on other dissenting religious groups' creeds gives court no right to determine that religious teachings of divorced adherent of such group will not be for her children's best interests so as to preclude award of their custody to her.

2. Divorce ⚷303(2)

The courts may not deprive divorced parents of their children's custody because of disagreement with parents as to their religious views, at least so long as their teachings do not conflict with laws of land.

3. Divorce ⚷303(3)

On divorced husband's motion to modify interlocutory divorce decree as to provision awarding wife custody of parties' minor children, trial court abused its discretion in concluding that wife was unfit to have children's custody because of her teachings, as member of Jehovah Witnesses, that it was wrong to salute the flag, to kill, and to participate in wars.

4. Divorce ⚷298(1)

Generally, best interests of divorced parents' minor children in respect to their temporal, mental, and moral welfare govern in awarding their custody.

5. Divorce ⚷298(6)

As between parents adversely claiming their minor children's custody in divorce suit, neither is entitled thereto as of right, but custody of child of tender years should be given to its mother, if other things are equal. Civ.Code, § 138.

6. Divorce ⚷296, 312

What is for best interests of divorced parents' minor children rests in trial court's sound discretion in awarding custody thereof, and such discretion will not be disturbed on appeal, in absence of showing that it was abused.

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* Subsequent opinion 162 P.2d 497.

7. Divorce ⚷303(2)

The superior court's order, providing for custody of divorced parents' minor children, should not be disturbed unless change of circumstances is shown.

8. Divorce ⚷303(3)

A party moving to modify interlocutory divorce decree as to custody of parties' minor children has burden to show such change of circumstances as justifies change of custody.

9. Divorce ⚷312

On appeal from order modifying interlocutory divorce decree as to custody of parties' minor children, all presumptions are in favor of reasonableness of original decree.

10. Constitutional law ⚷84
Divorce ⚷303(3)

The superior court, in depriving mother of her minor children's custody because of her religious convictions by order modifying interlocutory decree granting her divorce, deprived her of constitutional right and abused its judicial discretion. U.S.C.A.Const. Amend. 1.

◆

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action for divorce by Kathleen B. Cory against Melvin H. Cory. From an order modifying an interlocutory divorce decree for plaintiff as to the custody of the parties' minor children on defendant's motion, plaintiff appeals.

Reversed.

Subsequent opinion, 162 P.2d 497.

Clarence E. Rust, of Oakland, for appellant.

A. L. Wirin, of Los Angeles, and Wayne M. Collins, of San Francisco, amici curiae for appellant.

Lawrence J. Skirving, of Sacramento, for respondent.

ADAMS, Presiding Justice.

On April 13, 1943, in an action for divorce brought by Kathleen B. Cory against Melvin H. Cory, an interlocutory decree of divorce was granted to plaintiff on the grounds of defendant's extreme cruelty, defendant having been served with summons and failed to appear. The custody of two minor children of the parties, a boy aged about five years and a girl aged about two and onehalf years, was awarded to plaintiff.

On or about April 24, 1944, Melvin H. Cory filed a notice of motion to modify the aforementioned interlocutory decree, and in support thereof filed an affidavit in which he averred that the place where the children were living was an unfit and improper place; that plaintiff was a member of the Jehovah Witness sect and was teaching the children to disrespect the United States of America and the flag of the United States; that he once found plaintiff's home crowded with preachers of the aforesaid sect and there was not sufficient room for the children; that he (defendant) had a good place to keep said children where they would be taught to respect the United States and its flag; and that it would be to the best interest of said children that their custody be awarded to him.

Plaintiff countered with an affidavit alleging that the home where the children were living with her was a fit and proper place, and she a fit and proper person to have their custody, and that it was for their best interest that they remain with her. She admitted that she was a member of Jehovah's Witnesses, but otherwise denied the allegations of defendant's affidavit. A hearing was had on May 23 and 24, 1944, at the conclusion of which the court filed findings of fact and conclusions of law in which it was found as follows:

"3. That the plaintiff has been teaching the said minor children to refuse to give allegiance to the flag of the United States and to the United States, and to refuse to defend the flag and to refuse to defend the United States against its enemies when at war; said plaintiff believes, and has also taught and will continue to teach the said children of the parties hereto to defend in times of peril only persons who believe as she does, and to this end to sacrifice their lives, if need be, but not to raise a hand in defense of their country, or the flag it represents, even in times of war when the existence of our nation is threatened. On the other hand the father objects to such teaching being imbued in their immature minds, and desires that said children be reared as loyal Americans to respect and salute the flag of their country and to defend it when called upon to do so by the Government thereof;

"That while the mother of said children is a moral person, the teachings which she is trying to impress upon the said minors will not be for their best interest or for their welfare. That the teachings of the father will be for their best interests and for the welfare of said children;

"That the teachings of the said plaintiff so far as the minor son is concerned has already so imbued him with disrespect for the flag and unpatriotic thoughts that when the flag is displayed he becomes ill at ease and greatly agitated;

"That the said teaching of plaintiff will not only prevent the said minors from becoming loyal American citizens, but will prevent them, should they later in life desire to join, from joining any of our leading character building groups and organizations, as well as all the leading fraternal organizations and fraternities. That such character building organizations tend greatly to prevent delinquency in children who otherwise might be drawn into such class, and they also teach other matters which are invaluable throughout life to their members. That plaintiff, if given the exclusive custody of said children, will deprive said children of the benefits of the teachings of such groups as above mentioned, and will tend to prevent said minors from associating with loyal Americans;

"That the said minor girl is too young as yet to be impressed with the teachings of plaintiff, and she will suffer no harm or detriment until she has reached the school age of six years;

"That for the reasons stated the mother is not a fit and proper person to have the sole custody of the said children, but on the other hand the father is a fit and proper person to have their care and custody after they reach school age of six years. Under the facts found it is fit and proper that the father have the custody of said minor boy for the school term; and that as soon as the minor girl reaches the age of six years that he also have her custody and control during the school term, all for the purposes aforesaid; and it is further ordered that the mother have the custody of said minors during the vacation period." (Italics ours.)

The interlocutory decree of divorce was modified accordingly and plaintiff has appealed on the ground that the trial court abused its discretion, that the evidence does not support the findings and the findings do not support the order and judgment.

A review of the testimony in the case reveals that no evidence was produced by petitioner to support the allegations of his affidavit that the place where the children were living was an unfit or improper place, and as for the allegation that Mrs. Cory was teaching the children to disrespect the United States and its flag, she testified as follows:

"I respect the Flag, and as far as flags go my pledge goes and my salute goes to Jehovah. Whether it was the American Flag or any other flag my salute would be to Jehovah and not the flag." Under questioning by the court she testified as follows:

"The Court: * * * Q. Mrs. Cory, I presume you do know, and it is a matter of judicial notice, apparently, that the religion of the Jehovah Witnesses is not to salute the Flag. You know that, don't you? A. Yes. We would not salute the Flag.

"Q. You would not salute the Flag under any circumstances. You would stand up? A. I would stand at attention and respect the Flag.

"Q. But you would not salute it? A. No. I salute no flag.

"Q. You would not teach, you would not permit the children to salute the Flag? A. I would teach them the way I believe.

"Q. In other words you would teach them not to salute the Flag, to stand up, and not salute the Flag? A. I would teach them to respect it, but not salute it.

"Q. How about a war? Would you teach them that it was against your religion to go to war, that they should not support the war in case of emergency, war with another country? A. That is right.

"Q. In other words, you would bring the children up so they would be I presume what we call conscientious objectors against war? A. Yes. The Bible tells us, 'Thou Shalt Not Kill.'

"Q. I am not concerned with the Bible. I am trying to find what you think about it and how you are going to raise these children. So if the children were old enough now to be called for the Service what would be your attitude on that? A. If they were old enough it would be their decision, not mine.

"Q. You would not discourage them? A. That would be their decision.

"Q. I am talking about you raising them. A. I would raise them not to fight any wars.

"Q. Even to protect their own country? A. That is right. * * *

"Q. Well, anyhow Mrs. Cory your teachings would be I presume as you say, that you would teach them to respect the Flag, but not to do anything in a military way or otherwise to protect the Flag, or to have anything to do with the Flag. That would be your teachings, wouldn't it? A. Not to put the Flag first.

"Q. Well, put the Flag any place. According to your teachings the Flag is a piece of bunting, according to your teachings? A. It represents the powers of this world to us.

"Q. Represents the powers of this world? A. The American Flag would be representing the worldly element, and I believe that we should have nothing to do with the worldly element. * * *

"Q. Well, if there was a parade going by, and the Flag was going by, how would you teach the children to act about that time? A. I would have them stand at attention. * * *

"Q. I am not trying to find out what the teachings of the Witnesses of Jehovah are. I am just trying to find out what you would teach these children. Would you ever fly the Flag, according to your teachings to your children, at your home? A. We have the Flag in our home, yes.

"Q. You have it on display? A. We have two small flags in our home.

"Q. And why do you put those out? A. We respect it.

"Q. Well, in what way, Mrs. Cory, do you respect it? A. Well, we believe, we 'render unto Caesar the things that are Caesar's and unto God the things that are God's', the way our study of the Bible has brought it out to us. * * *

"Q. Well, let me ask you this—I don't want to take too long—as a matter of fact I presume from your statements and other things, that you would raise these children to respect the flag but under no circumstances to salute it, is that it? A. That is it.

"Q. Because you think that, religiously, that it is wrong to salute anything, is that it? A. That is it.

"Q. And so it wouldn't make any difference, no matter what circumstances existed, the children would be taught never to salute the Flag? A. I am trying to live a Christian life the way it seems to me."

As for the finding of the trial court that the teachings of appellant have so imbued the minor son with disrespect for the flag and unpatriotic thoughts that when it is displayed he becomes ill at ease and greatly agitated, the only testimony upon which such a conclusion could be based is testimony of respondent and his woman friend who accompanied him when he took the children to a movie, that when the flag was shown on the screen the little boy at first clapped, but later said he wanted to go home, that "Mama says that flag is no good." However, during the hearing the court interrogated the children as follows:

"Jimmie, you see this flag? Do you know what it is? Don't you know what kind of flag it is? [James Dean Cory] A. American.

"Q. American Flag? A. Yes.

"Q. What do you think about it? Does your Mama tell you anything about the Flag? A. (Nods No.)

"Q. Do you think it is all right? A. (Nods Yes.)

"Q. The American Flag? A. Yes.

"Q. Well, who has been talking to you about that, your mama? A. She don't remember.

"Q. Oh, yes, Jimmie; now you know about this Flag, don't you? A. Yes, but I don't remember.

"Q. Don't remember what? A. What mama said.

"Q. Don't remember what mama said. Well, do you believe in saluting the Flag? A. I don't know.

"Q. You don't know. How old are you, Jimmie? A. Six.

"Q. Six years old. Well, when all the children at school salute the Flag, do you salute it?

"Mr. Dwyer: He doesn't go to school, your Honor. He has not started to school yet.

"The Court: Q. Have you started to school? A. No.

"Q. Does your mama tell you much about the Flag, Jimmie? A. I don't know.

"Q. Don't tell me you don't remember, Jimmie. A. I don't know.

"Q. Don't be scared. We are just talking it over. You know about this Flag, don't you? Don't you know anything about it? A. (Nods No.)

"Q. How about your sister? How old is Sister? A. Three.

"Q. Three.

"The Court: I suppose Sister is too young. Sister, do you know anything about the Flag?

"Barbara Kay Cory: (Nods No.)"

[1] As to the finding of the trial court that the teachings of the children's mother will prevent them from becoming "loyal American citizens," and will prevent them from joining any of our leading character building groups and organizations as well as the leading fraternal organizations, and will tend to prevent them from associating with "loyal Americans," these are but generalizations and conclusions, without definition as to what constitute "loyal American citizens," "loyal Americans," etc., it being assumed, apparently, that those who refuse to *salute* the flag and do not believe in war because of adherence to the commandment that "Thou shalt not kill," are for these reasons alone to be considered as "disloyal Americans," and not "good American citizens." But Jehovah's Witnesses are not the only religious group that, adhering with what we might believe to be too strict adherence to the teachings of Christ, refuse, to a greater or less extent, to participate in waging war. One need not go far back into the history of this country to find men conceded to be great Americans who were taught such principles as a part of the religious faith of their fathers and mothers and the religious organizations of which they were members. A striking example of this should occur to the mind of anyone familiar with the religious background of a living American whom history will doubtless record as one of the greatest military leaders of all time. As for the conclusion that appellant's teachings will prevent these children from joining "our leading character building organizations"—whatever they may be—adherence to the teachings of any one religious group may have the effect of excluding its adherents from membership in organizations built upon the creeds of other dissenting religious groups, but such fact should have no bearing upon the rights of parents to bring their children up in their own faith, nor justify courts in arrogating to themselves the right to determine that the religious teachings of such parents will not be for the best interests of their children. Aside from the fact that she is a Jehovah's Witness there is no contention that appellant is not a fit and proper person to have the custody of her infant children. The court stated, as above set forth, that she is a moral person, and her teachings of the scriptures to her children may, in themselves, be quite as "character building" as would membership in the groups and organizations of whose benefits the trial court fears these children may be deprived if left in their mother's custody.

The conclusion seems inescapable that appellant has been deprived of the custody of said children solely because she is a Jehovah's Witness, and, in the opinion of the trial court, the beliefs of the followers of that faith are inimical to the welfare of their children because they do not salute the flag and are unwilling to fight for their country. If it is right to take these children from their mother's custody for the reasons stated, then by the same course of reasoning we must conclude that it would be right and proper to deprive all Jehovah's Witnesses of custody of their offspring lest they become disloyal citizens. Also it would seem to follow that the teachings of this group should be prevented by the state as inimical to the public welfare.

[2] We have been cited to no case, and believe none will be found, wherein it has been held that the courts may deprive parents of the custody of their offspring because of a disagreement with such parents as to their religious views, at least, as long as their teachings do not conflict with the laws of the land. While respondent argues in his brief that there is no religious issue in this case, and asserts that the question is whether a father should have the right to have his children taught the "principles of good citizenship," it is patent that both respondent and the trial court are of the opinion that the religious teachings of appellant are incompatible with what *they* consider the "principles of good citizenship."

It is true that the trial court did say:

"Now, I don't have to decide a question of religion at all. It is a question of whether or not the mother or the father should have something to say about bringing up these children and their welfare, if it is right to teach them those things—well, that is one thing—if it is right to teach them, as I call it, non-patriotism, because after all if you are passive on these things you might as well be against them. * * * I am not going to interfere in any way with their religion, but I do say these children have a right to be brought up to choose what they want before they become a member of the faith that they have described here.

"And I am not going to ask the woman to change the religion, * * * But these children are at least going to be given a chance to understand while they are young these other matters. * * *

"I don't want her to change her religion. All I want her to do is to agree, to say whether she would agree to teach these children, like the other hundred million children are taught, to not only respect the Flag but to salute the Flag when the Flag goes by, or wherever they are so that, as I say, they could join a thousand institutions which they would not be able to join otherwise, so that they would be able to work actively for this Flag in case of danger. * * *

"Let her think it over. I am not anxious to have the children taken. I want her to agree, if the children are kept with her part of the time, or all of the time, I want her to agree to teach them like other children are taught, to respect the Flag and salute the Flag, and defend the country when it has to be defended, and not be a shirker in war, not passive but active."

[3] While the court in the foregoing disclaims any desire to interfere with plaintiff's religious views, and attempts to base his decision on "patriotism," it is apparent that he considers it unpatriotic to refuse to *salute* the flag, and believes that a mother who teaches her children that it is wrong to kill and right to refuse to participate in wars, is unfit to have the custody of her children; for only on these grounds has it found that she "is not a fit and proper person to have the sole custody of the said children." In so concluding we think the said court abused its discretion. Differ as we may, and, we might say, as most of us do, as to the wisdom and soundness of the reasoning of plaintiff and her fellow Witnesses, it is not for courts to say that her religious convictions and those of her associates are necessarily such as to jeopardize the interests of their children.

As to the refusal of Jehovah's Witnesses to *salute* the flag, the Supreme Court of the United States, in West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628, 147 A.L.R. 674, in holding that the action of the Board of Education in requiring public school pupils to salute the flag while reciting a pledge of allegiance, under penalty of expulsion, transcended constitutional limitations and invaded the sphere of intellect of which it is the purpose of the First and Fourteenth Amendments of the Constitution to reserve from all official control, said, 319 U.S. at pages 640, 641, 63 S.Ct. at page 1186, 87 L.Ed. 1639, 147 A.L.R. 674:

"Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard."

Also, 319 U.S. at pages 641, 642, 63 S.Ct. at page 1187, 87 L.Ed. 1639, 147 A.L.R. 674:

"To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom.

The test of its substance is the right to differ as to things that touch the heart of the existing order.

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."

And Mr. Justice Murphy, in his concurring opinion, said, 319 U.S. at pages 645-646, 63 S.Ct. at page 1189, 87 L.Ed. 1641, 147 A.L.R. 674:

"Without wishing to disparage the purposes and intentions of those who hope to inculcate sentiments of loyalty and patriotism by requiring a declaration of allegiance as a feature of public education, or unduly belittle the benefits that may accrue therefrom, I am impelled to conclude that such a requirement is not essential to the maintenance of effective government and orderly society. To many it is deeply distasteful to join in a public chorus of affirmation of private belief. By some, including the members of this sect, it is apparently regarded as incompatible with a primary religious obligation and therefore a restriction on religious freedom. Official compulsion to affirm what is contrary to one's religious beliefs is the antithesis of freedom of worship which, it is well to recall, was achieved in this country only after what Jefferson characterized as the 'severest contests in which I have ever been engaged.'

"I am unable to agree that the benefits that may accrue to society from the compulsory flag salute are sufficiently definite and tangible to justify the invasion of freedom and privacy that is entailed or to compensate for a restraint on the freedom of the individual to be vocal or silent according to his conscience or personal inclination."

In Stone v. Stone, 16 Wash.2d 315, 133 P.2d 526, the court had before it a situation similar to that presented in the case before us, the question being whether the trial court, in a divorce proceeding in which a decree had been entered in favor of the husband, was justified in awarding the custody of the children of the contesting parties to the father because the mother was a member of Jehovah's Witnesses whose teachings, the court felt, were inimical to the rearing of children as American citizens. The Supreme Court, in reversing the judgment of the trial court, stated, 133 P.2d at page 527:

"Jehovah's Witnesses has existed since about 1878, and as we understand it, its members' refusal to salute the flag is not because they do not honor the flag, but because of an honest conviction, based upon their interpretation of the Bible, that saluting the flag is making it an image of the power to which one looks for salvation, and that to salute such an image ignores Almighty God, from whom alone salvation proceeds. Jehovah's Witnesses do not teach any violation of the laws of the state which are in harmony with God's laws, but if the law of the state is in direct violation of God's law, they will obey God's law first and all the time."

The court also cited and quoted from Reynolds v. Rayborn, Tex.Civ.App., 116 S.W.2d 836, 838, in which case a father had been deprived of the custody of a twelve year old daughter, because both father and child were Jehovah's Witnesses and refused to salute the flag of the United States. The court there said, in reversing the order of the trial court:

"History is replete with the bigotry, intolerance, and dogmatism of religious sects, and the pages thereof are strewn with martyrs who died for their faith. The divergence in creeds, the evils growing from a union of church and state, and the conflicts for supremacy waged between the two were studied and considered by the colonial pioneers who established the independence of these United States. They profited by peoples whose experiences in government had failed, as well as by the achievements of those whose governments had been more successful, and to avoid the griefs and disasters arising from the bigotry and religious intolerance of the preceding ages, they provided in our fundamental laws, Amendment 1 of the Constitution, of the United States, that the 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.'"

Reference was then made to a provision of the Texas Constitution, Vernon's Ann. St.Const. art. 1, § 6, which, in substance, like Art. I, section 4, of the California Constitution, guarantees the free exercise and enjoyment of religious profession and worship without discrimination or preference, and the court added:

"The flag is emblematic of the justice, greatness, and power of the United States —these, together, guarantee the political liberty of the citizen, but the flag is no less symbolic of the justice, greatness, and power of our country when they guarantee to the citizen freedom of conscience in religion—the right to worship his God according to the dictates of his conscience. Beyond my comprehension are the vagaries of people who claim and accept the protection of their government in order to worship God according to the dictates of their conscience, but refuse to salute their country's flag in recognition of such protection. Yet, however reprehensible to us such conduct may be, their constitutional right must be held sacred; when this ceases, religious freedom ceases."

While it is apparent in this case that the court considered the fitness of the mother to have the custody of her children, and found that the teachings of the father will be for the best interests and welfare of these children, the record is singularly barren of any evidence to show the fitness of the father to have such custody. It seems to have been assumed that if the children are given into his care it will naturally follow that they will be reared to be good and loyal American citizens, without any predilections which would disqualify them from joining any of the character building groups or fraternal organizations referred to by the trial court. But there is no evidence as to what the father purposes to teach these children or what he wants them to be taught. The court refused to admit proffered evidence to show the grounds upon which the divorce was granted to plaintiff, and that respondent left appellant on account of another woman with whom he was living. Cory admitted that he had written a letter to Mrs. Cory in which he had told her that he had been drunk for a week, though he denied that such statement was true. He said that he did not himself go to church when living with Mrs. Cory, but that when he did go to church he attended the Catholic church. He admitted that he had at the time no home of his own to which to take the children, but stated that he was trying to get an apartment and if successful his sister, whose husband was absent on military service, would live with him and take care of them; but there was no showing as to what said sister would teach them, what her religious beliefs were, if any, or that she was especially fitted to or would teach the children to be patriotic and good and loyal American citizens, or have them join the Boy or Girl Scouts, etc.

[4-6] It is generally recognized that in awarding the custody of children what appears to be for their best interests in respect to their temporal, mental and moral welfare shall govern; that as between parents adversely claiming custody, neither parent is entitled to it as of right, but, other things being equal, if a child is of tender years it should be given to its mother. This rule is set forth in section 138 of our Civil Code, and has been stated and applied by the courts in innumerable cases. It has often been stated, as well, that what is for the best interests of children is a matter resting in the sound judicial discretion of the trial court, and that such discretion will not be disturbed on appeal in the absence of a showing that it has been abused. As to what constitutes an abuse of discretion perhaps no general rule has yet been formulated which is applicable to all cases, but appellate courts, not infrequently, have held that trial courts have abused their discretion in awarding custody of children. See Washburn v. Washburn, 49 Cal.App.2d 581, 122 P.2d 96; Moon v. Moon, 62 Cal.App.2d 185, 144 P.2d 596; Stever v. Stever, 6 Cal.2d 166, 56 P.2d 1229.

[7-9] It also has been held in numerous decisions in this state, that where a court has, by its order, once provided for the custody of children, such order should not be disturbed unless a change of circumstances has been shown; that the burden is on the moving party to show such change of circumstances as justifies a change of custody; and that all presumptions are in favor of the reasonableness of the original decree. Prouty v. Prouty, 16 Cal.2d 190, 193, 105 P.2d 295; Foster v. Foster, 8 Cal.2d 719, 726, 727, 68 P.2d 719; Olson v. Olson, 95 Cal.App. 594, 597, 272 P. 1113; Gavel v. Gavel, 123 Cal.App. 589, 11 P.2d 654; Moon v. Moon, supra; Washburn v. Washburn, supra.

[10] We think that in this case the trial court—probably because of his own intense patriotism and loyalty to his country in time of war, and a not unnatural irritation at the attitude of mind of persons who, though they blandly accept the protection of a government which guarantees them the right to religious freedom, are unwilling to fight for its preservation, and who

in the light of the present world conflict still insist that by inaction their rights and their lives will be preserved by a divine providence without the necessity of fighting for them—lost sight of the constitutional provisions which guarantee religious freedom to all, and, in depriving this mother of the custody of her children because of her religious convictions, has deprived her of a constitutional right which she may not be compelled to exercise only conditionally, and in so doing has exceeded the bounds of wise judicial discretion.

The order appealed from is reversed.

PEEK and THOMPSON, JJ., concur.

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70 Cal.App.2d 576

PY v. PLEITNER et al.

Civ. 12805.

District Court of Appeal, First District,
Division 2, California.

Aug. 20, 1945.

Rehearing Denied Sept. 19, 1945.

Hearing Denied Oct. 18, 1945.

1. Mortgages 🔑329

Where obligation in suit was secured by an ordinary deed of trust with right of sale on default, it was not subject to rules relating to mortgage foreclosures.

2. Mortgages 🔑591(2)

When, by terms of deed of trust, trustees are granted power to sell without judicial proceeding, a sale made in accordance with deed does not carry the right of redemption.

3. Mortgages 🔑137, 138, 345, 424, 591(3)

A "deed of trust" differs from a "mortgage" in that the title passes from trustor to trustee under a deed of trust, while, in case of mortgage, mortgagor retains title; the statute of limitations never runs against power of sale in a deed of trust, while it does run against a mortgage; and mortgagor has a statutory right of redemption after foreclosure, while no such right exists under a deed of trust. Code Civ.Proc. § 702.

See Words and Phrases, Permanent Edition, for all other definitions of "Deed of Trust" and "Mortgage".

4. Mortgages 🔑369(1)

A trustee's sale under a deed of trust is open to attack in a court of equity, and court will view the proceeding with extreme care to see that rights of trustor are fully protected.

5. Mortgages 🔑364

Where property was bid in at $5,000 at trustee's sale under deed of trust, which bid trustee accepted as full settlement of obligation of trustor, thereby satisfying trustor's indebtedness, and, after interest, attorneys' fees, and expenses of sale were deducted, trustor was paid balance which she retained, trustor suffered no injury from failure of purchaser to pay but $800 in cash.

6. Appeal and error 🔑882(19)

Where trustor, in trial court, in attack on trustee's sale under deed of trust, offered no evidence of value or nature of property on issue of adequacy of price, trustor could not complain on appeal that price was inadequate.

7. Appeal and error 🔑169

An appellate court is merely a court of review and cannot determine issues which were not offered or heard in trial court.

8. Mortgages 🔑356

The separation by a public highway of a tract of land subject to a trust deed does not require the posting of a notice of trustee's sale on each section in the absence of any statutory requirement to that effect.

9. Mortgages 🔑356

Where, from all that appeared in record, property conveyed by trustor to trustee under trust deed consisted of a single holding owned and operated by trustor as a single ranch, no part of which was described in trust deed in a manner as to show or make it appear probable that it was not a part of one integral tract of land, the posting of but one notice of trustee's sale on the land was sufficient even though land was divided by a highway.

10. Appeal and error 🔑1073(1)

Where original judgment in action to set aside trustee's sale, which judgment adjudged that purchaser at sale was absolute owner of property, was allegedly lost, plaintiff was not prejudiced by judgment appearing in clerk's transcript, which judgment differed from original in that it contained a writ of possession, since, in any event, purchaser would have been entitled to such writ.

11. Jury ⚷26

Under code section declaring that a trial by jury is waived by failing to deposit with clerk ten days prior to date set for trial a sum equal to one day's jury fee, where plaintiff delayed in making deposit until day set for trial, court properly denied her demand for trial by jury. Code Civ.Proc. § 631.

12. Mortgages ⚷369(7)

In action to set aside trustee's sale under deed of trust, evidence failed to show that trustor made a sufficient tender of sum due after notice of default or made any tender within period of three months following date of recordation of notice of default so as to authorize relief. Civ.Code, § 2924c.

13. Mortgages ⚷369(7)

Trustor, in action to set aside trustee's sale under deed of trust, had burden to show that she complied with requirement of code for a tender of amount due within three months after date of recordation of notice of default. Civ.Code, § 2924c.

14. Mortgages ⚷369(4)

A tender of indebtedness is a prerequisite to a judgment canceling a sale under deed of trust. Civ.Code, § 2924c.

15. Equity ⚷66

Where trustor elected to default in her contractual obligations secured by a deed of trust on her property and, after trustee's sale of property, sought relief in a court of equity without offering to do equity on her own part by tendering payment of the debt secured, trustor was not entitled to relief. Civ.Code, § 2924c.

16. Appeal and error ⚷712

Negotiations made after trial, and which were not evidenced by documents duly made a part of reporter's transcript or certified by trial judge or clerk of court, cannot be considered on appeal.

◆

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by Marie LePleux Py against Henry August Pleitner and others to set aside a sale of realty made under a deed of trust, for damages, and for other relief. From an adjudication that defendant L. E. Gibson, purchaser at trustee's sale, was absolute owner of property and denying all relief prayed, plaintiff appeals.

Affirmed.

Marie LePleux Py, of San Francisco, in pro. per.

Cyril Roche, of Hayward, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued in propria persona to set aside a sale of real property made under a deed of trust, and for damages sustained as a result of such sale. Defendant Gibson who was the purchaser at the trustee's sale, was adjudged absolute owner of the property, and plaintiff was denied all relief prayed.

The controversy arises out of a promissory note dated November 5, 1941, executed by plaintiff as evidence of a loan to her of $4200, secured by a deed of trust covering real property. The note called for payment of monthly instalments of $42 including interest at 6% and plaintiff agreed to pay taxes, insurance and, in event of default, attorney's fees and trustee's expenses of sale. Plaintiff paid instalments until June 6, 1942, when she defaulted on payments of insurance, taxes and subsequent payments on the note. Notice of default and of intention to sell under the deed of trust was recorded October 17, 1942, and a copy was mailed to plaintiff. Notice of time and place of sale was duly published and a copy was posted on the premises. Several continuances of the sale were granted upon request of an attorney then representing plaintiff and a sale was made on the court house steps on July 28, 1943, to an agent of defendant Gibson. At that time $800 was paid in cash, and Gibson's note and deed of trust was accepted for the balance of the $5000 bid. After the principal, interest, costs of sale, and attorney's fees were deducted, plaintiff was paid the sum of $113.23 which she retained while the litigation was pending. The trial court found that the sale was fairly conducted in accordance with law and the deed of trust.

[1-3] Appellant devotes a large part of her brief to the argument that the statu-

tory proceedings governing the foreclosure of mortgages was not followed, and that she was denied the right of redemption. The obligation in suit was secured by an ordinary deed of trust with the right of sale on default. As such it was not subject to the rules relating to mortgage foreclosures. And when, by the terms of the deed, the trustees are granted the power to sell without judicial proceedings, a sale made in accordance with the deed does not carry the right of redemption. The distinction between the two kinds of security is recognized in Bank of Italy, etc., Ass'n v. Bentley, 217 Cal. 644, 655, 20 P.2d 940, 944, where the supreme court said: "Thus it has been held that a deed of trust differs from a mortgage in that title passes to the trustee in case of a deed of trust, while, in the case of a mortgage, the mortgagor retains title; that the statute of limitations never runs against the power of sale in a deed of trust, while it does run against a mortgage; and that a mortgagor has a statutory right of redemption after foreclosure (Code Civ.Proc. § 702), while no such right exists under a deed of trust. See, generally, Kidd Trust Deeds & Mortgages in California, 3 Cal.L.Rev. 381. See, also, 12 Cal.L.Rev. 307; 20 Cal.L.Rev. 31; 5 So.Cal.L.Rev. 227."

[4, 5] But a sale conducted under these conditions is open to attack in a court of equity and the court will view the proceedings with extreme care to see that the rights of the trustor are fully protected. Here the first attack made upon the sale is that the full purchase price was not paid in cash. The property was bid in at $5000. Eight hundred dollars was paid in cash and a note and mortgage taken for the balance. The original trustee accepted full settlement of the obligation, appellant's indebtedness was satisfied, and, after interest, attorney's fees, and expenses of sale were deducted, appellant was paid the balance which she retained. She has therefore suffered no injury from the failure of the purchaser to pay the full purchase price in cash.

[6, 7] Next she argues that the bidding was collusive since the value of the property was far above $5000, and she states in her brief that the property consists of a seven and one-half and two and one-half acre tract, divided by a roadway, that it is situated on a main arterial highway, that on the seven and one-half acre tract are a seven room house, a four room cottage, an apricot orchard of 120 trees, two wells, three pigeon houses, a tool shed, and other buildings. On the two and one-half acre tract is a $5000 filling station and the two story "Alameda County Landmark." No evidence either of the value or nature of the property was introduced in the trial court. Plaintiff did not take the stand and did not tender the issue to the trial court that the price paid at the sale was inadequate. It is axiomatic that an appellate court is merely a court of review and that it can not determine issues which were not offered or heard in the trial court.

[8, 9] Another attack upon the conduct of the sale relates to the posting of the notice of sale. Appellant states that the property consists of two non-contiguous parcels separated by a public highway, and that the notice of sale was posted on but one. This issue does not appear to have been tendered to the trial court and no finding was made in relation to it. It does appear that the deed of trust described the property as consisting of two parcels, but it does not appear that they were non-contiguous. If the separation of a tract of land by a public highway should require the posting of a notice of sale on each, the statute would so specify. Crandall v. Title Guarantee & Trust Co., 2 Cal.App.2d 96, 37 P.2d 519. From all that appears here the property conveyed consisted of a single holding owned and operated by appellant as a single ranch, no part of which is described in the trust deed "in such a manner as to show or to make it appear probable that it is not a part of one integral tract of land." Security-First Nat. Bank of Los Angeles v. De La Cuesta, 15 Cal.App.2d 302, 306, 59 P.2d 542, 544.

[10] Appellant attacks the form of the judgment which appears in the clerk's transcript. It is conceded that this differs from the original judgment in that it contains a writ of possession. Respondent states outside the record that the original judgment was "lost." Appellant views this explanation with just suspicion and argues that it is evidence of a preconceived conspiracy on the part of all the respondents to deprive her of her property and to defeat her legal remedies. But the record does not support the argument. The clerk's transcript discloses that the findings of fact and conclusions of law were signed and filed on March 8, 1944. On the same day the judgment was entered and filed by the clerk, though not docketed until eight days

later. When or how the original judgment was "lost," or how it differed from the one appealed from does not appear. Respondents are content to rest on the statement that it is immaterial, since the purchaser was entitled to a writ of possession. This cannot be disputed and if the judgment were silent in that respect the purchaser could have applied for such a writ. On the record before us we cannot find that appellant has suffered any injury by the asserted irregularity in the manner of the entry of the judgment.

[11] Appellant contends that she was denied due process by the denial of her demand for a jury trial. The record discloses that on November 9, 1943, appellant filed her written demand for a trial by jury. On December 20, 1943, the cause was set for trial before a jury on January 3, 1944, and written notice was served on appellant on the same day. On the day set for trial the appellant deposited the jury fees and thereupon demanded a trial by jury which was denied. Section 631 of the Code of Civil Procedure provides that a trial by jury is waived by failing to deposit with the clerk ten days prior to the date set for trial, a sum equal to one day's jury fees. Having failed to deposit the necessary sum at the prescribed time, appellant cannot now assert that she was denied a jury trial by any error of the trial court. Norland v. Gould, 200 Cal. 706, 708, 254 P. 560; Harmon v. Hopkins, 116 Cal.App. 184, 187, 2 P.2d 540. In holding that the trial court did not err in denying appellant's demand for a jury trial we do not imply that this cause of action is one in which she would be entitled as of right to a trial by jury if the jury fees had been deposited within the time prescribed in the Code.

[12, 13] Throughout her briefs appellant suggests that she was injured by respondents' refusal to accept her tender of the amount due made after notice of default. We have been unable to find any evidence that a sufficient tender was made, or that any tender was made within the period of three months following the date of recordation of notice of default, as required by section 2924c of the Civil Code. The issue was not properly raised in the complaint and hence the findings do not cover it. The burden of proof was on appellant to show that she complied with the terms of the Code section and this burden she has failed to sustain.

[14, 15] None of the foregoing procedural objections raised by appellant would justify a reversal of the judgment. They are generally supported by the citation of authorities from other jurisdictions which do not bear analysis under our prevailing statutes. We appreciate the unfortunate position in which appellant finds herself because she did not seek legal advice to protect her legal rights. Whether from lack of knowledge of her legal rights and duties, or from choice, the appellant elected to default in her contractual obligations and then sought relief in a court of equity without, however, offering to do equity on her own part. The rule in this state is settled that a tender of the indebtedness is a prerequisite to a judgment canceling a sale under a deed of trust. Leonard v. Bank of America, 16 Cal.App.2d 341, 60 P.2d 325; American Trust Co. v. DeAlbergaria, 123 Cal.App. 76, 10 P.2d 1016; Shimpones v. Stickney, 219 Cal. 637, 28 P.2d 673. In the latter case the supreme court said 219 Cal. at page 649, 28 P.2d at page 678: "It is settled in California that a mortgagor cannot quiet his title against the mortgagee without paying the debt secured. See a long list of cases sustaining the equitable rule as variously applied collated in 10 Cal.Jur. p. 512 et seq. It was clearly erroneous to quiet her title under the circumstances of her refusal to do equity."

[16] Though appellant frequently refers in her briefs (and in letters and other uncertified papers left with the clerk of this court) to her offer to pay the indebtedness, the record does not disclose more than an offer made after judgment to pay in part. Such negotiations as were made after the trial and which are not evidenced by documents duly made a part of the reporter's transcript or certified by the trial judge or the clerk of court cannot be considered on this appeal.

There is no prejudicial error apparent on the record before us.

The judgment is affirmed.

GOODELL, J., and DOOLING, Justice pro tem., concur.

70 Cal.App.2d 534

PEOPLE v. TRIPLETT.

Cr. 1910.

District Court of Appeal, Third District, California.

Aug. 17, 1945.

1. Sodomy 🔑5

Indictment charging defendant with copulating his penis with the mouth of another person was not fatally defective on ground that it did not state sex of such other person, since offense would be committed irrespective of whether person was a male or a female. Pen.Code, §§ 288a, 950–952.

2. Criminal law 🔑1186(4)

Indictment charging defendant with sex offenses with "Earl Barnett" and "Richard Hassell" was not fatally defective because it failed to allege that names represented persons, where objection was not urged upon a motion for new trial and it did not appear that defendant was misled. Pen.Code, §§ 288a, 950–952, 1404; Const. art. 6, § 4½.

3. Criminal law 🔑1186(4)

Courts do not favor technical constructions which go to the form rather than to the substance, particularly where a defendant has been tried and convicted.

4. Criminal law 🔑1169(1)

In prosecution for sex offenses, admission of two photographs of defendant found in home of person with whom defendant allegedly committed offense charged, introduced merely to show that defendant made a voluntary confession after such pictures were shown to him, was not prejudicial to defendant notwithstanding in one of them defendant was nude. Pen.Code, § 288a.

5. Criminal law 🔑531(3)

Evidence supported finding that confession made by defendant while arrested was freely and voluntarily made.

6. Criminal law 🔑736(2)

Admissibility of a confession made by defendant while arrested is a preliminary question for the trial court.

7. Criminal law 🔑736(2)

To determine whether confession made by defendant while arrested was freely and voluntarily made, is for the trier of facts.

8. Criminal law 🔑520(1), 522(1)

Even where there have been threats and inducements, a confession is not necessarily inadmissible if, at time it is made, such threats and inducements have ceased to operate upon defendant to bring about his statement of guilt.

9. Criminal law 🔑518(1)

Failure to advise defendant that his statements might be used against him is not ground for holding that his confession was not free and voluntary.

10. Sodomy 🔑6

Evidence supported conviction of copulating penis with mouth of another person. Pen.Code, § 288a.

11. Criminal law 🔑1159(2, 4)

The sufficiency of evidence and the veracity of a witness are matters for the trial court, even though testimony of witness is contradicted.

12. Criminal law 🔑507(1)

In prosecution for sexual offenses, as to acts testified to by witness between defendant and another, the witness was not an "accomplice" whose testimony was required to be corroborated in order to sustain defendant's conviction. Pen.Code, § 288a.

See Words and Phrases, Permanent Edition, for all other definitions of "Accomplice".

13. Criminal law 🔑511(7)

Confession of defendant is sufficient corroboration of accomplice's testimony.

14. Criminal law 🔑260(11)

In prosecution for sex offenses, finding that defendant did not establish an alibi was supported by evidence and hence could not be disturbed on appeal. Pen.Code, § 288a.

15. Criminal law 🔑554

In prosecution for sex offenses, trial court was not compelled to believe defendant's testimony establishing an alibi, especially in view of defendant's admission at the trial that a previous confession was true. Pen.Code, § 288a.

16. Indictment and information 🔑176

Where time is not of essence of crime charged, the people may prove that act was committed at any time before the indictment, and within period of limitation.

17. Indictment and Information ⚷176

Conviction of sex offense was not unauthorized on ground of fatal variance between allegations of indictment and proof, where proof, although establishing different time of commission of offense than alleged in indictment, established commission of offense before the indictment. Pen.Code, § 288a.

◆

Appeal from Superior Court, Sacramento County; Raymond T. Coughlin, Judge.

Harold Triplett was convicted in three counts of copulating his penis with the mouth of another person and his motion for a new trial was denied, and he appeals.

Affirmed.

Busick & Busick, of Sacramento, for appellant.

Robt. W. Kenny, Atty. Gen., and Ward Sullivan, Deputy Atty. Gen., for respondent.

PER CURIAM.

In an indictment filed in the county of Sacramento, defendant was charged, in three counts, with violations of section 288a of the Penal Code. All of the offenses were alleged to have been committed "on or about the month of July, A. D. 1943," the first with Earl Barnett, and the other two with Richard Hassell.

Defendant demurred to the indictment on the grounds that the facts stated in each count did not constitute a public offense and that said indictment did not substantially conform to sections 950, 951 and 952 of the Penal Code. The demurrer was overruled, and defendant waived a jury trial. After trial by the court he was duly convicted and thereafter filed a motion for a new trial, the grounds therefor being that the court erred in admitting in evidence an alleged confession of the defendant and in admitting two photographs, that it erred in overruling defendant's demurrer to the indictment, and that the judgment of conviction was contrary to the evidence and contrary to law. The motion for a new trial was denied, and defendant has appealed from the order denying such new trial, and from that alone, the court having granted defendant's motion for probation.

[1, 2] Before this court appellant urges, first, that the trial court should have sustained his demurrer to the indictment for the reason that such indictment did not state the sex of Earl Barnett and Richard Hassell. Section 288a of the Penal Code provides that anyone participating in the act of copulating the mouth of one person with the sexual organ of another is punishable as therein provided. Defendant was charged with copulating his penis with the mouths of Earl Barnett and Richard Hassell. There is nothing in the statute that requires that in order to commit the offense therein stated, the person whose mouth is so copulated must be a male. The offense would be committed if the copulation were with the mouth of a female. There is, therefore, nothing in the point that the sex of Barnett and Hassell was not alleged. Appellant also contends that the indictment does not state an offense because it does not allege that Barnett and Hassell were persons—that their names might have been the names of dogs or horses, or of models in shop windows. We are not impressed with this argument. It was not urged upon the trial court upon the motion for a new trial, and it does not appear that defendant was misled to such an extreme, or that he could have believed that such was the case. He cites People v. Smink, 105 Cal.App. 784, 288 P. 873, and People v. Hopwood, 130 Cal.App. 168, 19 P.2d 824, but neither case is pertinent. In the Smink case it does not appear what the allegations of the information were except that they omitted to state the name and sex of the persons upon whom the crimes were committed. In any event the pleading was there held sufficient, in the absence of demurrer or motion in arrest of judgment. In the Hopwood case the charge was not a violation of section 288a, but of section 286 of the Penal Code, and the allegations of the information were entirely different from those in the indictment before us. Also in that case the record of the trial was not before the appellate court which was, therefore, unable to say that there had been no such miscarriage of justice as justified the application of Art. VI, section 4½, of the Constitution.

In the case before us the reporter's transcript was made a part of the record on appeal and presents a proper case for application of the rule laid down in the constitutional provision, that no new trial shall be granted for any error as to matter of pleading or for any error as to matter of procedure, "unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." Also see Penal Code, sec. 1404.

[3] Courts do not favor technical constructions which go to the form rather than to the substance, particularly where a defendant has been tried and convicted. 14 Cal.Jur. 48, 49. And it does not appear that in this case defendant was in any manner misled by the allegations of the indictment. His demurrer was not based upon uncertainty, but only upon the ground that no public offense was stated. The most that could be said in criticism of the indictment is that there was an imperfect allegation of a material fact rather than a total failure to set forth an essential element. People v. Fuski, 49 Cal.App. 4, 7, 192 P. 552.

[4] As for the second ground for reversal—that the trial court erred in admitting in evidence two photographs of defendant which were found in the home of Earl Barnett with whom one of defendant's offenses was committed—appellant fails to state in his brief that these two photographs were introduced solely for the limited purpose of showing that after his arrest he changed his story and admitted the commission of the offenses charged after he was shown these pictures, and in relation to the contention that his later statement was freely and voluntarily made. There is nothing obscene about them, though in one of them, taken by Barnett, defendant is nude. Their introduction for the limited purpose for which they were offered could have resulted in no prejudice justifying the granting of a new trial, and appellant submits no authorities in support of his argument that their admission was error.

[5] The third ground for reversal urged by appellant is that his confession was not freely and voluntarily made. The trial court went fully into this matter and, under the evidence, the question whether the confession was freely and voluntarily made became one of fact for the trial court whose conclusion finds ample support in the evidence. Its weight and the veracity of the respective witnesses were for the trial court. At the trial defendant said that he thought it would be easier for him if he made the statement admitting the offenses, and that the statement made after he was shown the photographs was true. There is no evidence that any threats or promises of reward were made to defendant, or that he was coerced. The fact that he was questioned in the night time after his arrest at Barnett's home does not justify a conclusion that his statement was not voluntary even though he did testify that he was excited and nervous. His treatment by the arresting officers and those who took his statements seems to have been fair and reasonable under the circumstances, and the fact that defendant at first denied any participation in or knowledge of the sex practices carried on in Barnett's home, and later made his admissions after he was shown the photographs found at Barnett's, justifies the inference that his decision to tell the truth was made after due deliberation and because he had decided that his best interests would be served by so doing.

Appellant relies upon People v. Day, 125 Cal.App. 106, 13 P.2d 855; People v. Dye, 119 Cal.App. 262, 6 P.2d 313; People v. Quan Gim Gow, 23 Cal.App. 507, 138 P. 918; 8 Cal.Jur. 111, sec. 202; and People v. Jones, 24 Cal.2d 601, 150 P.2d 801, but they are not persuasive here.

[6-8] In the Day case the uncontradicted evidence regarding the treatment to which the defendant was submitted for a period of some ten days prior to her alleged confession and while she was in custody without any charge filed against her, is in no sense comparable to the evidence in the case before us. It furnishes no precedent of value. In the Dye case, also, the facts are materially different. Also in that very case the court said that the admissibility of a confession is a preliminary question for the trial court, citing People v. Ferdinand, 194 Cal. 555, 567, 229 P. 341, and that it is for the trier of facts to determine whether it was freely and voluntarily made; also that, though threats and inducements and any illegal process whereby, through external means of pressure the free will of a defendant has been overcome, may render a confession inadmissible, even where there have been threats and inducements a confession is not necessarily inadmissible if, at the time it is made, such threats and inducements have ceased to operate upon defendant to bring about his statement of guilt.

[9] It is also urged by appellant that his confession should not have been admitted because he was not advised that his statements might be used against him. But that failure to so advise a defendant is not

ground for holding that his confession was not free and voluntary was held in People v. Hoyt, 20 Cal.2d 306, 314, 125 P.2d 29, where other cases to the same effect are cited. See People v. Booth, 72 Cal.App. 160, 168, 236 P. 987; People v. Ramirez, 113 Cal.App. 204, 207, 298 P. 60; People v. Clark, 28 Cal.App. 735, 736, 153 P. 980. In People v. McLachlan, 13 Cal.2d 45, 87 P.2d 825, defendant contended that his confession was not free and voluntary because the officers who had him in custody told him it would be better for him to confess and if he would they would assist him in procuring hospitalization for injuries from which he was suffering; but the court said, 13 Cal.2d at page 51, 87 P.2d at page 828:

"Whatever strength there may have been in the contention that the confession was not voluntary was nullified by the fact that the defendant took the stand at the trial and made admissions which cannot be regarded otherwise than as a confession of his commission of the crime. The question as to whether or not the confession was properly obtained in the presence of the four officers was a matter within the province of the court to decide, and there being no inherent improbability as to the truth of the testimony given in support of its admission, we would not be justified in reversing the cause on the ground that the confession was not obtained in the manner prescribed by the statute."

That case is similar to the one before us in that McLachlan made his confession after he was confronted with the facts of the case and told of the discovery, in his toilet, of the shoes of the child with whose murder he was charged. Here defendant made his confession after being shown the nude photograph of himself found in Barnett's house; and at the trial he admitted the truth of the confession.

[10-13] A further contention of appellant is that the evidence is insufficient to sustain the conviction—that there is no evidence that the crime was committed during the last of August or the first of September, except the testimony of Richard Hassell, which, he argues, contains certain inconsistencies. But the sufficiency of the evidence and the veracity of the witness Hassell were matters for the trial court; and though Hassell was contradicted in some respects by others who denied being present at the time when Hassell stated they were, it was for the trial court to decide whose testimony it would accept. Also appellant asserts that Hassel was an accomplice and that his testimony lacks the necessary corroboration. As to acts testified to by Hassell between Barnett and defendant, Hassell was not an accomplice, and if he was an accomplice to the offenses charged in counts 2 and 3, defendant's confession was sufficient to constitute corroboration. In People v. White, 48 Cal. App.2d 90, 119 P.2d 383, the court said that the evidence of the corpus delicti, the forgery of checks, might be proven by an accomplice, and that defendant's confession, and his admission at the trial that it was true, was sufficient corroboration of his commission of the forgery. Also see People v. Andrew, 43 Cal.App.2d 126, 129, 130, 110 P.2d 459; People v. Pritchard, 58 Cal. App.2d 791, 792, 137 P.2d 697; People v. Negra, 208 Cal. 64, 69, 70, 280 P. 354; People v. Armstrong, 114 Cal. 570, 46 P. 611; People v. Sullivan, 144 Cal. 471, 473, 77 P. 1000; People v. King, 33 Cal.App.2d 538, 542, 92 P.2d 510; People v. Todd, 9 Cal. App.2d 237, 242, 49 P.2d 611.

[14, 15] Appellant also contends that the evidence produced by him as to his whereabouts during the months of August and September, 1943, is sufficient to establish an alibi, and to show that he could not have committed the offenses charged at the times alleged and testified to by Hassell. But the veracity of defendant's witnesses and the sufficiency of this evidence were also for the trial court. Furthermore, while the evidence of the alibi witnesses was that defendant was employed during August and September of 1943, and worked at night, admittedly there were certain periods when he was absent from his work even at night, for he did not work Sundays, and he was absent a few times allegedly because of sickness; and though he endeavored to show that during absences for sickness he was at his home, the trial court was not compelled to believe this testimony, especially in view of defendant's own admission at the trial that the admissions made by him in his previous statement were true. We cannot say, as matter of law, that it was impossible under the evidence for defendant to have committed the offenses charged, nor can we say that the trial court should have accepted the testimony of the alibi witnesses rather than that of Hassell.

[16, 17] Finally it is urged by appellant that there is a fatal variance between the allegations of the indictment and the proof;

that the indictment charged the commission of the offenses "during or about the month of July, A. D. 1943," that defendant's admissions did not cover that period and that Hassell's testimony was that they were committed the last of August or first of September. But what Hassell said was that it was "in about August 1943"; that he was positive that it was in August, and that it was in the evening, but that he could not state the day of the week. The statement given by defendant was that he had engaged in immoral activity at Barnett's with Hassell "over a year ago," under circumstances similar to those testified to by Hassell—a strip poker party, where the penalties imposed consisted in performing the acts charged in the indictment. He admitted that the pictures of him taken by Barnett might have been taken in July, 1943, but he could not fix the time. Also he could not fix the time when he committed the acts with Hassell, but said it was previous to the taking of the pictures; that it was some time during 1943. We think this evidence was sufficient to show the commission of the offense "on or about July" as charged. Unless an offense is such only if committed on a certain day, such, for instance, as the sale of liquor on an election day, it is immaterial that the proof does not show the exact day or month or even the year. It is said in 14 Cal.Jur. 97, sec. 73, that if time is not of the essence of the crime charged the people may prove that the act was committed at any time before the indictment or information, and within the period of limitation. Also see People v. Allen, 144 Cal. 298, 301, 77 P. 948; People v. Rice, 73 Cal. 220, 221, 14 P. 851; People v. Branch, 77 Cal.App. 384, 392, 246 P. 811; People v. Tracy, 50 Cal.App.2d 460, 465, 123 P.2d 138; People v. Black, 45 Cal.App.2d 87, 104, 113 P.2d 746. Appellant relies upon People v. Morris, 3 Cal.App. 1, 84 P. 463, and People v. Waits, 18 Cal.App.2d 20, 62 P.2d 1054, but, as pointed out in People v. Ralls, 21 Cal.App.2d 674, at page 678, 70 P.2d 265, they are both distinguishable, as in both of them the testimony fixed the time of the commission of the offense at a definite hour on a definite day. In the case before us neither Hassell nor defendant was able to fix the day of the commission of the offenses. Assuming that Hassell's testimony fixed the time as an evening in August or September, 1943, defendant's attempt to prove an alibi was not affected thereby as his alibi testimony purports to cover both of those months. The question of fact as to whether defendant established an alibi was for the trial court as the trier of facts, and its conclusion will not be disturbed on appeal.

Respondent contends that the sufficiency of the indictment is not reviewable on appeal from an order denying a new trial where, as here, no judgment was entered (citing People v. Duncan, 50 Cal.App.2d 184, 186, 187, 122 P.2d 587; People v. Turner, 39 Cal. 370, 371; People v. Sanchez, 23 Cal.App. 742, 743, 139 P. 820; People v. Darcy, 59 Cal.App.2d 342, 139 P.2d 118; People v. Weiskopf, 60 Cal.App.2d 214, 140 P.2d 201); but as we are satisfied that the appeal is without merit it is not necessary to pass upon that question.

The order denying a new trial is affirmed.

70 Cal.App.2d 553

PEOPLE v. BUTLER.

Cr. No. 2337.

District Court of Appeal, First District, Division 1, California.

Aug. 18, 1945.

1. Criminal law 🔑1001
Robbery 🔑30

Evidence that defendant deliberately and with premeditation enticed complaining witness to hotel room for purpose of robbing him and without provocation slugged, seriously injured, and robbed him, plus defendant's plea of guilty, justified trial court in fixing degree of crime as second-degree robbery and in denying probation to defendant in view of his prior criminal record. Pen.Code, § 213.

2. Criminal law 🔑274

Affidavit supporting motion for leave to withdraw plea of guilty after conviction of second-degree robbery, alleging that defendant pleaded guilty on advice of counsel and in belief that navy boys charged with felonies had been returned to navy after pleading guilty, did not authorize withdrawal of guilty plea after conviction, where it was not contended that prosecuting officials or trial judge contributed to defendant's belief and defendant knew that prosecuting officials considered case an aggravated one. Pen.Code, § 213.

3. Criminal law ⚷274

That other trial judges had on occasion, after considering facts, accepted pleas of guilty to lesser offenses or granted probation to service men, did not create a custom on which defendant, who was in navy, was entitled to rely when charged with second-degree robbery, and fact that trial judge refused to follow such supposed custom did not so far mislead defendant as to entitle him, as a matter of law, to withdraw plea of guilty after conviction and sentence to imprisonment. Pen.Code, § 213.

4. Criminal law ⚷274

A plea of guilty may be withdrawn for mistake, ignorance, or inadvertence, or any other factor overreaching defendant's free and clear judgment.

5. Criminal law ⚷274

Though permission to withdraw plea of guilty is within trial court's discretion, courts generally are liberal in allowing such plea to be withdrawn, especially where there is doubt of defendant's guilt.

6. Criminal law ⚷998

Defendant's motion to vacate judgment and for leave to withdraw plea of guilty is in nature of writ of error coram nobis, and judgment will be vacated only where some fact exists which, if before court, would have prevented rendition of judgment and which without defendant's fault or negligence was not presented in court.

7. Criminal law ⚷998

The fact of mistake, fraud, or duress as ground for vacating judgment of conviction on plea of guilty must be established by convincing evidence, and appellate court may properly conclude that motion therefor was properly denied where defendant acted with knowledge or on advice of his attorney.

8. Criminal law ⚷274

That defendant was allegedly induced to enter guilty plea solely on representation of his attorney does not entitle defendant to withdraw such plea.

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

Edward Butler was convicted, on his plea of guilty, of second-degree robbery, and, from orders denying his motions to be permitted to withdraw his plea of guilty and to vacate the judgment, he appeals.

Affirmed.

Joseph P. Lacey, Harmon D. Skillin, and George Olshausen, all of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., David K. Lener, Deputy Atty. Gen., and Edmund G. Brown, Dist. Atty., and James F. Brennan, Chief Trial Deputy Dist. Atty., and Edmund Dunning, Asst. Dist. Atty., all of San Francisco, for respondent.

PETERS, Presiding Justice.

Defendant appeals from a judgment of conviction of second degree robbery and from orders denying his motions to be permitted to withdraw his plea of guilty and to vacate the judgment. There is no merit in these appeals.

Defendant and Patricia Hollis, on July 20, 1944, were charged by information with robbery in that on May 23, 1944, they forcibly took from one Ben Rodriguez $60 in money, an automobile, and a wrist watch of the value of $680. Several continuances to plea were granted. On August 7, 1944, the defendant pleaded not guilty. The trial was thereafter continued until October 6, 1944. On that date the co-defendant Hollis was a fugitive from justice. The defendant, through his counsel, requested that he be permitted to withdraw his plea of not guilty and substitute therefore the plea of guilty. This request was granted. A hearing was then held to determine the degree of the crime and, after such hearing, the court determined the crime to be second degree robbery. Such offense is punishable by imprisonment in the state prison for not less than one year (§ 213, Penal Code), no discretion being granted, as in the case of second degree burglary (Penal Code, § 461), to imprison in the county jail. The court thereupon sentenced defendant to San Quentin for the term prescribed by law. Defendant then moved for probation. The sentence was set aside and argument on the motion for probation put over to October 10th. On that date the court took further evidence from the arresting officer, considered the past record of the defendant, which showed that defendant some fourteen years before had been fined $2,000 for taking an automobile without the owner's consent, and, on another occasion, had been convicted of an assault with a deadly weapon for which he served six months in the county jail, listened to the arguments of counsel, and denied probation. The defendant was then re-sentenced to the state prison, the only lawful sentence that could be imposed for such a crime where probation has been denied. Defendant then orally moved to vacate the judgment and requested permission to withdraw his plea of guilty. In support of these motions one of his attorneys took the stand. He testified that the defendant was in the Navy, and that he had advised him "that he could have reasonable assurance that he would be—could be returned to the Navy after the possibility of serving some time in the County Jail. * * * I interviewed the defendant on several occasions in the County Jail, and gave him all of the encouragement that I could, and I told him that in my opinion and from my experience and from what I believe had gone on in prior actions of the courts of this City and County, on prior occasions —

"The Court: How does that affect me?

"Mr. Lacey: There were other boys in the Navy and there [are] other members in this court who had sent the men to the Navy on similar or like charges.

"Based upon what I had heard in the matter, I so advised this boy that the best thing to do here was to plead guilty and ask for leniency of the court."

The lawyer went on to testify that defendant had told him that on the night of the robbery "he was so far under the influence of liquor that he did not know what had happened"; that the defendant had told him that he had no knowledge of the assault, and had no recollection of taking the watch from the complaining witness; that his companion must have taken the money. The motions were denied, and defendant filed a notice of appeal.

Thereafter defendant filed a written notice for a hearing de novo of his motions. These motions were supported by the affidavit of defendant. The deputy district attorney filed a counter-affidavit. On November 2, 1944, the court held a hearing and denied the motions. Defendant appeals from the order of denial.

[1] The factual background of this case as disclosed by the testimony of the complaining witness, the investigating officer and of defendant is as follows: On the evening of May 23, 1944, defendant and Patricia Hollis were drinking in various taverns. Defendant testified that he had met Patricia for the first time that night. The investigating officer testified that in fact the girl and defendant had been registered at a Pine Street hotel as husband and wife prior to May 23rd. Sometime during the evening the complaining witness Rodriguez met the defendant and Patricia and the two men and the girl made the rounds of several taverns. About closing time the defendant invited Rodriguez to his and Patricia's hotel room to continue their drinking activities. Rodriguez gave defendant $10 to buy some liquor and then the three proceeded to a hotel, driving in Rodriguez's automobile. At the hotel Patricia registered herself and defendant under a fictitious name as husband and wife, and the three proceeded to the hotel room. Rodriguez testified that they had a couple of drinks and the girl was getting another drink when defendant, without provocation, and without warning, hit him on the chin and knocked him unconscious. He was unconscious for several hours and when he came to, $60 or $65, his wrist watch, and his automobile were gone. His jaw was badly fractured and permanently injured. He was in the hospital for a month and a half, and off work another month. Two operations were necessary. He also testified that when hit by defendant the keys to his automobile were in his pocket. Several days after these occurrences defendant and Patricia admittedly pawned Rodriguez's watch.

The arresting officer testified that after arresting defendant and Patricia he questioned them and they told conflicting stories; that defendant admitted hitting Rodriguez, but claimed he did so because Rodriguez got familiar with the girl; that the girl told him, in the presence of defendant, that nothing like that had happened; that Rodriguez, neither by words or actions, had insulted her; that defendant remained mute; that defendant admitted taking the automobile and driving to another hotel, and admitted pawning the watch.

Defendant's version of the affair was that he had met Patricia for the first time that night; that then they met Rodriguez; that the three made the rounds of several taverns; that they then went to the hotel where Patricia registered them as man and wife; that Rodriguez was molesting the girl and he ordered Rodriguez to leave and he refused to do so; that after hitting Rodriguez he did not take the keys to the car because with the owner's consent he already had them; that he did not take the money or the watch; that he did not see the girl take them; that several days later the girl told him that she had taken the watch.

This testimony was all introduced on the hearing to determine the degree of the crime. It is obvious that on this evidence the trial court was justified in believing that this was a most aggravated case. It is a reasonable, if not an inevitable, inference from the evidence that this defendant and his co-defendant deliberately and with premeditation enticed Rodriguez to the hotel room for the purpose of robbing him; that defendant slugged Rodriguez without provocation and for the purpose of robbing him; that defendant and Patricia then robbed Rodriguez, stole his automobile, went to another hotel where they registered as man and wife, and then, several days thereafter, sought to capitalize on their venture by pawning the watch. The victim was seriously injured. That this testimony, plus the plea of guilty, justified the trial court in fixing the degree of the crime as second degree robbery and in denying probation is too obvious to require further comment.

[2] On October 6th, which was the day set for the trial of defendant and the day he pleaded guilty, the record shows that the following occurred: It developed that the co-defendant Patricia Hollis had jumped bail and was a fugitive. The court determined to try defendant on his plea of not guilty. Before the plea of not guilty had been withdrawn the court stated: "'Somebody said this is an outrageous case." Shortly thereafter the deputy district attorney stated: "If he pleads guilty to second degree robbery they can't take him in the Navy. I understand, Judge, that this is a very aggravated case." After these preliminaries the defendant withdrew his plea of not guilty and pleaded guilty to robbery.

In his affidavit in support of his last motion to vacate the judgment and to be permitted to withdraw his plea of guilty the defendant avers that he is 30 years of age; that he is in the Navy and stationed at Treasure Island; that he pleaded guilty on the advice of counsel; that he is not guilty of robbery. He then sets forth his version of the facts, including a statement that he was intoxicated on the night in question. He also avers that the three persons consumed nearly a quart of whisky, and that Rodriguez began to pay "attentions" to Patricia; that an argument arose; that Rodriguez attempted to strike defendant and defendant hit him back. This is the first time, so far as the record shows, that defendant ever claimed he struck in self-defense. He avers that he did not take the money, the keys, or the watch, but admits taking the automobile and driving to another hotel with Patricia where the two spent the balance of the night. He again states that several days later Patricia told him that she had taken the watch, and the two pawned it. He avers that he told his counsel these facts and was informed by them that these facts would constitute a defense. In explaining why he pleaded guilty he avers that in the discussions with his counsel he was "informed that the Navy boys charged with felonies in this city and county were being turned over by the Superior Courts to the Navy and that they believed and so advised affiant that he had every justification for hoping that would be the ultimate disposition of the charge"; that on several occasions while affiant was in the county jail his counsel told him that "he should hope" to have this disposition made of his case; that his counsel told him that it was their belief and the belief of "many other persons" that service men accused of felonies were customarily permitted to return to the service; that he told his counsel that he had heard of many cases of persons in the armed forces accused of burglary or robbery who had been permitted by the courts to return to the service and that "he, himself, believed and hoped that he would receive similar lenient consideration"; that affiant is informed and believes that between 15 and 20 defendants accused of felony charges in San Francisco have been returned to the service, naming four such persons by name; that a week before he was sentenced he knew a defendant charged with burglary who, upon a plea of guilty, was permitted to re-enter the Navy; that he discussed his case with this accused person and was advised by him to plead guilty and that if he did so he probably would be permitted to re-enter the Navy at once; that cellmates told him of similar cases; that it was the general belief of inmates of the county jail that members of the armed forces charged with burglary or robbery, upon a plea of guilty, would be returned to the service; that during this period he "continuously hoped and believed" that he would be permitted to plead guilty to a lesser offense and be returned to the Navy; that on the day of his trial and after a short consultation with his attorneys, he entered the plea of guilty believing and anticipating that he would immediately be returned to the Navy; that before entering the plea his counsel told him "that he should have every reason to expect and hope that such disposition would be made of his matter as would result in his prompt return to the Navy for a continuance of his service therein. That thereupon and by reason of the matters and things set forth and not by reason of any consciousness of guilt of the charge, affiant, honestly and sincerely believing that he would be permitted to return to the Navy for combat service in defense of his country agreed to withdraw his plea of not guilty heretofore entered and enter a plea of guilty to the instant charge."

This affidavit and the testimony of attorney Lacey on the oral motion constitute the basis of defendant's contention that the trial court abused its discretion in refusing to permit him to withdraw his plea of guilty after he had ascertained that probation would not be granted. The counteraffidavit of the deputy district attorney avers that prior to the date defendant pleaded guilty he informed defendant's attorney that his office would not accept a plea to guilty to any lesser offense than the one charged; that neither he, nor anyone on the district attorney's staff, has ever suggested to the attorney for defendant, or to the defendant, that defendant would be permitted to return to the Navy if he pleaded guilty; that neither the court nor the district attorney made any representation concerning, or made any reference to, the degree of punishment that would be imposed if defendant pleaded guilty.

[3] It will be noted that it is not contended that the prosecuting officials or the trial judge in any way contributed to defendant's belief that he would not be sent to state prison if he pleaded guilty—in fact, the record shows, that defendant knew before he withdrew his not guilty plea that the prosecuting officials considered the case a most aggravated one and would accept no plea less than second degree robbery, —an offense punishable only in the state prison. Although it is alleged that some other servicemen charged with robbery or burglary had been permitted to plead guilty to a lesser offense and were then returned to the Navy, it is not alleged that the facts of these cases were the same or similar to those in this most aggravated case, or that other servicemen charged with these offenses had not been sent to San Quentin. It seems to be the thought of appellant that because some judges other than this trial judge had on occasion, after considering the facts of particular cases, accepted pleas of guilty to lesser offenses or granted probation to servicemen, that a custom had been created upon which he was entitled to rely, and that when this trial judge, on the facts of this particular case, refused to follow this supposed custom, he was so far misled that he is entitled, as a matter of law, to withdraw his plea of guilty. Defendant cannot thus be permitted to make a mockery of the legal processes. This defendant pleaded guilty knowing or chargeable with knowledge that the only sentence that could lawfully be imposed for second degree robbery was imprisonment in the state prison. He and his counsel undoubtedly hoped that probation would be granted. If probation were denied, however, they could then move to withdraw the plea of guilty. In this fashion they could find out on the hearing fixing the degree of the crime what evidence the prosecution had. They knew that Patricia was a fugitive from justice and all blame could be placed on her shoulders because Rodriguez was unconscious after the blow and Patricia was not there to defend herself. After the court very properly had denied probation they then sought to withdraw their plea of guilty. Under the circumstances here existing the trial judge very properly denied the motion.

[4-8] The law applicable to this problem is well-settled. A plea of guilty may be withdrawn for mistake, ignorance or inadvertence or any other factor overreaching defendant's free and clear judgment. Although the permission to withdraw the plea is within the trial court's discretion, courts are, in general, liberal in allowing the plea to be withdrawn, especially where there is doubt of defendant's guilt. A motion to vacate judgment and withdraw a plea of guilty is in the nature of a writ of error coram nobis. The judgment will be vacated only where some fact exists which, if before the court, would

have prevented rendition of judgment, and which, without fault or negligence of the party, was not presented in court. The fact of mistake, fraud, or duress must be established by convincing evidence in order to entitle the defendant to relief from a guilty plea, and the appellate court may conclude that it is properly denied where defendant acted with knowledge or on the advice of his attorney. People v. Sandoval, 200 Cal. 730, 254 P. 893; People v. Deutsch, 16 Cal.App.2d 121, 60 P.2d 155; People v. McCrory, 41 Cal. 458. Defendant cites a few cases from outside the state holding that a defendant induced to enter a guilty plea solely on the representations of his attorney should be permitted to withdraw it. That is not the law in this state. People v. Miller, 114 Cal. 10, 45 P. 986; Ex parte Hough, 24 Cal.2d 522, 150 P.2d 448; People v. Gottlieb, 25 Cal.App.2d 411, 77 P.2d 489.

The law applicable to this entire problem has been recently restated by the Supreme Court in People v. Gilbert, 25 Cal.2d 422, 154 P.2d 657. In that case the defendants pleaded guilty to murder and were sentenced to the death penalty. After the judgment became final they sought to withdraw their pleas of guilty. On the motions the trial court reduced the punishment to life imprisonment. Conflicting affidavits were filed before the trial court. Those of defendants unequivocally charged that their lawyer had informed them that he had reached a definite agreement with the trial judge for a life sentence if they would plead guilty. The affidavits of the judge and deputy district attorney admitted discussing the matter with defendants' counsel and making statements that at least could be interpreted as indicating they believed a life sentence was all that was called for. The Supreme Court properly indicated that under such circumstances the free will and judgment of the defendants were overreached. In so holding, the court stated the proper rule as follows (25 Cal.2d at page 442, 154 P.2d at page 667):

"The record discloses evidence tending to show that the free will and judgment of one or both defendants were overreached by unjustified representations of their counsel seemingly corroborated by acts and statements of the court and deputy district attorney. While it is true that mere advice or assurances by a private attorney will not vitiate a plea entered in reliance thereon (see People v. Miller, 114 Cal. 10, 16, 45 P. 986; Ex parte Hough, 24 Cal.2d 522, 531, 150 P.2d 448; People v. Gottlieb, 25 Cal.App.2d 411, 415, 77 P.2d 489, we are of the view that a contrary rule should prevail if the statements of the attorney amount to an unqualified factual representation (which is untrue) that the state or a responsible officer thereof, such as a judge of competent authority or a district attorney, has entered into a bargain purporting to commit the state to give the defendant a reward, in the form of immunity or a lesser punishment than he might otherwise receive, in exchange for a plea of guilty, where such representation is apparently substantially corroborated by acts or statements of a responsible state officer, is in good faith relied upon by the defendant, and actually operates to preclude the exercise of free will and judgment on the part of the defendant.

"The most critical point is substantial deprivation of the exercise of the free will and judgment of the party through an act participated in by the state. Mere advice and persuasion or the expression of matters of opinion by his own attorney will not suffice to vitiate the plea. Neither will unwarranted or even wilfully false statements of factual matters by his attorney suffice. The private attorney is selected by the party and is his agent. But if the representation of the private attorney presents a purported commitment by a responsible state officer which if actually made would vitiate the plea and if the acts or statements of such state officer, although innocently done or made, apparently corroborate the representation, are in good faith and without negligence relied upon by the defendant, and in truth operate to prevent the exercise of his free will and judgment, then the state in its solicitude for fairness will not accept the benefit of a plea so given."

Defendant in this present case fails to bring himself within this rule. Here there were no representations by the trial court or the prosecuting officials corroborating the representations of the private attorney. Here the defendant and his counsel, made the mistake of relying, if they did, on the fact that, because other judges in cases involving different facts had seen fit to grant leniency, this judge would follow such supposed custom.

The judgment and orders appealed from are affirmed.

KNIGHT and WARD, JJ., concur.

70 Cal.App.2d 585

McINTOSH v. McINTOSH et al.
KELL et al. v. McINTOSH.

Civ. 7140; Sac. 5696.

District Court of Appeal, Third District, California.

Aug. 25, 1945.

Appeal and error 🔑780(2)

Where interveners, after their appeal from an order vacating a previous order permitting them to intervene in a divorce action to have determined their title or interest in some of the property involved in divorce litigation was submitted, disposed of their interest in the property and were no longer interested in the appeal, appeal was dismissed.

◆

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by Alice A. McIntosh against James C. McIntosh and others for divorce, wherein Hattie B. Kell and Marjorie A. McIntosh intervened, alleging title or an interest in some of the property described and involved in the complaint for divorce. From an order vacating a previous order by which interveners were permitted to file their complaint in intervention, interveners appeal.

Appeal dismissed.

Smallpage & Macomber, of Stockton, for plaintiffs in intervention, appellants.

Jones & Quinn, of Stockton, for defendant in intervention, respondent.

PER CURIAM.

This is an appeal by the intervenors from an order vacating a previous order permitting them to file in the above entitled divorce suit, their complaint in intervention alleging title or an interest in some of the property which is described and involved in the complaint for divorce.

After the appeal was submitted the intervenors' attorneys advised this court their clients had disposed of all their interest in the property and that they "have no further interest in this proceeding." In a written communication to this court, plaintiff's attorney concedes that the intervenors have disposed of their interest in the property. Since the appellants have disposed of their interest in the property and they are no longer interested in the appeal, no useful purpose will be subserved by determining the issues on appeal.

It is therefore ordered that the appeal be and it is hereby dismissed.

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70 Cal.App.2d 497

EASTERN-COLUMBIA, Inc., v. LOS ANGELES COUNTY et al.

Civ. 14256.

District Court of Appeal, Second District, Division 1, California.

Aug. 13, 1945.

Hearing Denied Oct. 11, 1945.

1. Taxation 🔑543(1, 7)

In action against county and city for refund of personal property taxes paid under protest after rejection of plaintiff's claims for refund by county board of equalization, superior court erred in trying de novo question of alleged overvaluation of property, as sole issue before court was whether board's decision was constructively fraudulent and, in determining such issue, court was limited to consideration of record of proceedings before board.

2. Taxation 🔑493(4)

A county tax assessor's alleged fraudulent overvaluation of property will not be set aside by court after county board of equalization has determined true value of property in exercise of its honest judgment, as such determination is conclusive on question of fairness of valuation and injury to taxpayer.

3. Taxation 🔑485(3)

Evidence before county board of equalization on application for reduction of personal property tax assessment on ground of alleged fraudulent overvaluation and discrimination by county tax assessor was sufficient to sustain finding that property was assessed at 40 per cent. of its value, pursuant to usual practice, not at 50 per cent. thereof, as claimed by owner suing for refund of taxes paid under protest.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Eastern-Columbia, Inc., against the County of Los Angeles, the City of Los Angeles, and another for refund of personal property taxes paid under protest. Judgment for plaintiff, and named defendants appeal.

Reversed.

J. H. O'Connor, Co. Counsel, Gordon Boller, Deputy Co. Counsel, Ray L. Chesebro, City Atty., and Louis A. Babior, Deputy City Atty., all of Los Angeles, for appellants.

Holbrook & Tarr, Leslie R. Tarr, and Freda B. Walbrecht, all of Los Angeles, for respondent.

YORK, Presiding Justice.

This is an appeal by the defendants, County of Los Angeles and City of Los Angeles, from a judgment in favor of plaintiff corporation which grants a refund of taxes paid by it under protest on personal property for the fiscal year 1940-41.

The corporate respondent is engaged in the merchandising of furniture, household goods and wearing apparel, maintaining stocks of such merchandise distributed between its principal place of business in the City of Los Angeles and eleven branch stores situate in the cities of Los Angeles, Huntington Park, Pasadena and Long Beach, as well as in unincorporated county territory. Respondent took exception to the County Assessor's method of valuation and to the assessed value he placed on its stock of merchandise for tax purposes for the fiscal year 1940–41, claiming that the Assessor in valuing said personal property on the basis of respondent's inventory did not assess at the usual forty per cent thereof, but instead used the factor of fifty per cent. Accordingly, respondent filed an application for reduction of such assessment from $416,865 to $333,480 with the Board of Supervisors of Los Angeles County sitting as a County Board of Equalization. After a hearing, the Board denied the application; taxes were extended against the assessed property and were paid by respondent under protest. Thereafter claims for a refund of that portion of the taxes computed on the asserted overvaluation having been rejected, the respondent instituted the instant action "For refund of taxes paid under protest and for refund of taxes illegally collected", on the ground that said taxes were void, excessive, fraudulent and unconstitutional.

The complaint alleged that it was the uniform practice of the Assessor to determine the full cash value of stocks of merchandise owned by merchants operating in the County "by taking the book inventory thereof, if maintained in accordance with the landed cost or market * * * and by applying to such inventory for assessment purposes the factor of 40 per cent thereof, arriving, for assessment purposes, at a full cash value of the equivalent of 40 per cent of such book inventory value"; that this method was used by the Assessor in computing assessments of competing merchants, but that in the case of respondent, the Assessor arbitrarily applied the factor of 50 per cent of the book inventory in order to determine the full cash value of respondent's merchandise for assessment purposes, and in so using such special method of assessment and in arriving at an assessed valuation of respondent's merchandise, the Assessor did so intentionally in order "to discriminate against and to defraud plaintiff, and to cause plaintiff to pay an undue and disproportionate amount of the tax burden properly imposed upon plaintiff for governmental purposes for said tax year of 1940-41; that said assessments * * * actually placed on plaintiff's merchandise were excessive, discriminatory and void * * * in violation of plaintiff's rights to due process of law." It was also alleged that upon hearing of respondent's application for reduction of such assessed valuations, the Board of Equalization, disregarding the evidence presented to it, denied the application thereby adopting the "illegal, erroneous, fraudulent and special method employed by said Assessor * * * and in intentionally adopting, ratifying and approving the illegal, erroneous, fraudulent and special method of assessing plaintiff's merchandise different from that employed * * * in assessing other merchants' merchandise in the County of Los Angeles for said tax year 1940–41, said Board did intentionally discriminate against plaintiff."

At the trial, which consumed fifty-two days, respondent introduced the transcript of all the evidence presented to the Board of Equalization at the hearing on its application for reduction of the assessment. In addition thereto, respondent was permitted to introduce the testimony of twenty-two witnesses, none of whom had testified at the hearing before the Board, as well as fifty exhibits which had not been offered at said hearing. Appellants objected that receipt of such testimony and such evidence would constitute a trial de novo of the question of the equalized assessment of the assessed property and a collateral attack upon the quasi-judicial determination of the Board that the assessment of such property was equalized and not disproportionate to the assessment of other property, and that such testimony and evidence would not prove or tend to prove fraud or fraudulent conduct, either actual or constructive, on the part of said Board in making its determination and denying said application.

The judgment is for a sum which represents the difference between the amount of taxes paid based on the assessment calculated at 50 per cent, and the amount based on an assessment calculated at 40 per cent of the inventory figure.

The cause is presented to this court upon a Transcript on Appeal which contains the usual Clerk's Transcript, and an Engrossed Bill of Exceptions containing all of the evidence produced at the hearing before the Board of Equalization, appellants' specifications of error, together with the following stipulation:

"It is stipulated by and between the plaintiff and the defendants County of Los Angeles and City of Los Angeles, through their attorneys, as follows:

"That Appellants have not included in their Bill of Exceptions any of the evidence of value or methods of assessment presented for the first time to the Superior Court and not presented to the Board of Equalization for the reason that Appellants are basing their appeal upon the proposition that granting a trial de novo was error.

"It is stipulated and agreed that if granting a trial de novo was not error then the findings and judgment of the above entitled Court relative to the fair, equalized assessed value of the property are supported by substantial although conflicting evidence. Dated: November 4th, 1942 * * * Filed Dec. 18, 1942."

The position of appellants, as declared in their opening brief, is that "under established rule of law the assessor's valuation of property for tax purposes which, upon the property owner's application to the County Board of Equalization for reduction, has been confirmed and approved, is conclusive on the question of value and is not thereafter subject to question or attack upon claim or suit for tax refund, and that the Board's determination of equalization of assessment is not subject to collateral attack. The conduct of the trial court herein, we respectfully submit, was clear violation of such established rule." Appellants urge that the duty of the trial court "is to review the proceedings before the County Board of Equalization and to ascertain and determine whether that body, *upon the evidence which was before it,* so grossly abused its judicial discretion that its conclusion regarding the matter was tantamount to no conclusion at all but constituted a constructive fraud upon the litigant." (Italics included.)

In the case of Universal Consolidated Oil Co. v. Byram, 25 Cal.2d 353, 153 P.2d 746, 752, the Supreme Court in a decision filed December 5, 1944, held that a taxpayer has no right to a trial de novo in the superior court to resolve conflicting issues of fact as to the taxable value of his property; reversed a judgment of the trial court in favor of plaintiffs and remanded the cause to the board of equalization "for further consideration and action in accordance with due process of law."

In the cited case, plaintiffs charged that the particular method of assessment used in relation to their oil leases "produced valuations which were unfair, unjust and excessive as compared with other property holdings of substantially the same character and value and similarly situated in the county, and so imposed an unequal burden upon the complainants," resulting in an invasion of their constitutional rights to due process and equal protection of the laws. At the trial before the superior court, plaintiffs introduced in evidence their applications to the board of equalization for reduced valuations, the reporter's transcript of the testimony at the hearing before such board and certain exhibits there presented. In addition, further evidence was introduced, over the objection of the defendant, as to the assessor's method of assessment of the leases in question and as to the relative value of the plaintiffs' and adjacent leasehold interests. After a full hearing, the trial court found in favor of plaintiffs on all material issues in dispute and made considerable reductions in the challenged valuations.

In announcing its decision upon appeal from the trial court's judgment, the supreme court stated at page 356 of 25 Cal. 2d, at page 748 of 153 P.2d, that: "The principal point in controversy between the parties concerns the propriety of the plaintiffs' recourse to the court for relief from the adverse determination of the county board of equalization. It must be conceded, of course, that it is well settled in this state that to the authorized county board of equalization has been confided the duty of determining 'the value of the property under consideration for assessment purposes upon such basis as is used in regard to other property, so as to make all the assessments as equal and fair as is practicable'; that in discharging this duty, 'the board is exercising judicial functions, and its decision as to the value of the property and the fairness of the assessment, so far as amount is concerned, constitutes an independent and conclusive judgment of the tribunal created by law for the determination of that question,' adjudicating necessarily that 'the property is assessed at the same value proportionately as all the other property in the county'; that such adjudication 'cannot be avoided, unless the board has proceeded "arbitrarily and in willful disregard of the law intended for their guidance and control, with the evident purpose of imposing unequal burdens upon certain of the taxpayers" * * * or unless there be something equivalent to fraud in the action of the board'; and that 'Mere errors in honest judgment as to the value of the property will not obviate the binding effect of the conclusion of the board.' Los Angeles, etc., Co. v. County of Los Angeles, 162 Cal. 164, 169, 170, 121 P. 384, 386, 9 A.L.R. 1277; see, also, Southern Pac. Land Co. v. San Diego County, 183 Cal. 543, 546, 191 P. 931; Birch v. County of Orange, 186 Cal. 736, 741, 200 P. 647; Wild Goose Country Club v. County of Butte, 60 Cal.App. 339, 342, 212 P. 711; Merchants Trust Co. v. Hopkins, 103 Cal. App. 473, 477, 478, 284 P. 1072; Montgomery Ward & Co. v. Welch, 17 Cal. App.2d 127, 132, 61 P.2d 790; Southern Cal. Tel. Co. v. Los Angeles County, 45 Cal.App.2d 111, 116, 117, 113 P.2d 773. While not classifiable with any aspect of fraud or bad faith, the lack of due process distinguishing the procedural phase of these equalization matters as submitted to the board furnishes an equally appropriate basis for the court's intervention in protection of the plaintiff's constitutional rights." In reviewing the record before the board, it was revealed that certain members of the board expressed their understanding that they were passing upon applications which presented a point of law rather than matters of equalization, the court concluding that such conduct of the board resulted in a denial of procedural due process, i.e. (25 Cal.2d at page 362, 153 P.2d at page 751): "The decision of the board was simply that it had nothing to decide, and it accordingly failed to function as an equalization tribunal. * * * *But the mistake of the board in the respect noted does not sanction the court's undertaking to resolve the conflicting issues of fact bearing upon the taxable value of the plaintiffs' leasehold interests.* As appears from the numerous authorities cited in the forepart of this opinion, the respective county board of equalization is the fact-finding body designated by law to remedy excessive assessments (Cal.Const. art. XIII, § 9), and when that tribunal, after due hearing and within the limits of reasonable discretion, makes *its findings on the facts,* such decision is final and conclusive. * * * While considerations of procedural due process here nullify the force of the authorized tribunal's ruling and sustain its avoidance by the court in response to the plaintiffs' applications for relief therefrom, the intent of the law governing equalization proceedings would require that these cases be remanded to the board for completion upon the basis of the evidence submitted at the hearing before it."

In support of the contentions advanced by them in the instant appeal, appellants cite the decision of this court in Eastern-Columbia, Inc., v. County of Los Angeles, 61 Cal.App.2d 734, 143 P.2d 992, 995. That action was very similar to the one now under consideration: a refund being sought on 1940-41 taxes levied on parcels of improved real property, based on the claim that "notwithstanding good and substantial evidence presented * * * to the Board of Equalization, that board, in disregard of the evidence adduced, did arbitrarily and wilfully deny the application for redress and did accordingly intentionally impose upon plaintiff such an unfair and unequal burden of taxation as to amount to constructive fraud."

It was there held, 61 Cal.App.2d at page 743, 143 P.2d at page 997: "Where, as in the instant case, the taxpayer feels he has just cause for complaint, the law has set up a tribunal composed of the Board of Supervisors, sitting as a Board of Equalization, to determine the facts. When such board, after due hearing, and within the limits of reasonable discretion, has made its findings on the facts such decision is final and conclusive. Before the decision of the Board, constituting as it does an independent and conclusive judgment abrogating and taking the place of the judgment of the assessor, will be set aside by the courts on review, even though there be error or mistake, there must be proof of actual fraud, or such arbitrary, unreasonable or grossly oppressive action, which wilfully transgresses or disregards the law, and amounts to constructive fraud. Hammond Lumber Co. v. County of Los Angeles, supra, 104 Cal.App. [235], at page 241, 285 P. 896. Where, as here, the assessment is not wholly void, an action such as the present one, though partaking of an action to recover a tax paid under protest is in fact, and properly so, a proceeding to review the decision of the Board of Equalization. In such a proceeding the function of the trial court therefore was to determine whether a correct method of valuing the land and improvements was followed, and then, to ascertain whether there was substantial evidence before the Equalization Board to justify the assessment as made. Hammond Lumber Co. v. County of Los Angeles, supra, 104 Cal.App. at pages 241 and 242, 285 P. 896. * * * As we have pointed out, a proceeding such as the instant one, savors of certiorari or review. *The sole issue before the court was, therefore, whether the decision of the Board of Equalization was based on fraud or the equivalent of fraud. And that determination must be based upon the evidence at the trial of the proceedings had before the board.*" (Emphasis added.)

[1] Following the reasoning and the rules of law enunciated by the cases hereinbefore discussed, it was error for the court below to try de novo the question of the alleged overvaluation of respondent's personal property. The sole issue before the trial court was whether the decision of the board of equalization was constructively fraudulent, and in its determination of that issue, the court was limited to a consideration of the record of the proceedings had before such board.

[2] "A fraudulent overvaluation of property by an assessor will not be set aside where it appears that the board of equalization has brought its honest judgment to bear on the matter, and determined the true value of the property. Such action by the board is conclusive on the question of fairness of valuation and hence on the question of injury to the taxpayer by the attempted fraud of the assessor." 9 A.L.R. 1284. See, also Los Angeles Gas & Electric Co. v. County of Los Angeles, 162 Cal. 164, 121 P. 384, 9 A.L.R. 1277.

On this question of conclusiveness of determination of the board of equalization in the face of an allegation of fraud, it is stated in 21 Cal.Law Rev. 285: "The general rule, to which California adheres, precludes the review of assessments by the courts if the method pursued is that prescribed by law. An exception to the rule is recognized where the action of the board is fraudulent or constitutes 'something equivalent to fraud'. While an arbitrary and excessive assessment is not, of itself, invalid, the California cases seemingly establish the proposition that the 'equivalent of fraud' will be found where the taxpayer affirmatively proves to the board of equalization, but without obtaining proper relief, that there is a substantial discrimination and inequality between the assessment assailed and assessments on like property similarly situated. When a substantial discrimination is proven, relief is given regardless af the motives actuating the members of the board. It is immaterial whether the unequal burden results from a gross abuse of discretion, gross error or negligence. An assessment twice in amount of that placed on like property similarly situated has been held to be a substantial discrimination." (Citing numerous authorities.) See, also, 24 Cal.Jur. 243, 246, secs. 228 and 230.

In an annotated article entitled "Judicial Review of Determinations by County Boards of Equalization," under the authorship of W. Sumner Holbrook, Jr., Esq., appearing in 14 So. Cal.Law Rev. 276 at 286, it is asserted: "Proper methods of assessment are matters of law, not of fact. San Diego & Arizona Ry. v. Board of Equalization, 165 Cal. 560, 564, 132 P. 1044. Correctness of the Assessor's methods is always reviewable in a court of law, provided, of course, that the taxpayer has demonstrated that, by reason of the method employed, discrimination in assessment as to his property has occurred. Blinn Lumber Co. v. County of Los Angeles, 216

Cal. 474, 483, 14 P.2d 512, 84 A.L.R. 1304, 1309. On the other hand, there is nothing for the court to review, even if the Assessor's method be shown to be wrong, if no discrimination resulting therefrom was shown to the Board. Wild Goose Country Club v. County of Butte, 60 Cal.App. 339, 343, 212 P. 711."

[3] An examination of the record of the proceedings before the Board of Equalization in the instant case, discloses that the Board exercised its fair and impartial judgment upon the evidence presented to it and that such evidence failed to show that any discrimination resulted to respondent.

Respondent's application before the Board alleged an over-assessment of its property. Upon the hearing respondent alleged that the assessment was calculated at 50% instead of at 40% of the property value as shown by the company's inventory. The testimony of respondent's tax agent, Mr. Minteer, and its Comptroller, Mr. Harper, as to its position in this regard is as follows:

"Mr. Minteer: On this particular merchandise, we are asking that it be reduced from a 50 per cent assessment to I think a 40 per cent assessment and Mr. Harper an official of the company is here representing them. Is that 40 per cent of the actual cost?

"Mr. Harper: Book value. It is taken from our books and records. They have assessed our merchandise at 50 per cent and we find many instances where they have made assessments of merchandise at 40 per cent, and we have the figures here to substantiate it.

"Mr. West (Deputy Assessor): We have gone through their books and we have a complete record of them. It is not the Assessor's contention that this is a 50 per cent assessment. Here is a large inventory prepared partly at cost and partly under the retail method and we find that there is a net valuation of inventory of $5,234,572.00 which was increased 22 per cent average mark-down, and allowing 22 per cent for *a*bsolescence, we made a 50 per cent assessment after allowing for the *a*bsolescence. * * *

"Mr. West: When we assess the ordinary corporation we find they carry their merchandise on the books at cost and they only inventory at the end of the fiscal or current year. We go in there and make an allowance of 20 per cent for obsolescence in such current stock and assess the balance at half, that is equal to 40 per cent, but if we find a firm has already taken obsolescence out of the inventory and has got it down to market value as of the first Monday in March, we take and assess that inventory at half. That is the contention the assessor is making here. This firm not only had obsolescence written out but has underpriced it.

"Mr. Ford (Member of the Board): Do I understand that these people in making their inventory deducted this obsolescence first before they gave you the figures whereas all of the other firms do not?

"Mr. West: That is the contention. * * *

"Mr. Krutel (Deputy Assessor): I asked Mr. Harper if he hadn't allocated all items of obsolescence before taking the inventory and he said he had.

"Mr. Minteer: I don't remember that statement.

"Chairman McDonough: Was that question asked you, Mr. Harper?

"Mr. Harper: That question was asked me and I said certain depreciation had been taken care of. That is true of everybody.

* * * * *

"Mr. Ford: Let me ask Mr. West, as I understand Mr. Harper his contention is that the practice of many concerns comparable to this concern is actually to take allowance for this obsolescence before the figures reach you, and then the inference is that you do take the figures in which obsolescence has been allowed from the total actual value and deduct 20 per cent for further obsolescence?

"Mr. West: Not where an allowance has already been taken.

"Mr. Ford: What figure do you start with?

"Mr. West: We start with the inventory figure as computed on their books carried under the accepted principles of accounting.

"Mr. Ford: Showing no obsolescence.

"Mr. West: They will show obsolescence in the last final inventory but not such unusual obsolescence as is shown in these books.

"Mr. Ford: They do it more extremely.

"Mr. West: That seems to be the whole thing. The great percentage they deduct in computing their inventory is exorbitant as compared with other stores.

"Mr. Smith (Member of the Board): When you take a firm doing business on a cost basis you take the cost and deduct 20 per cent for obsolescence?

"Mr. West: That is right.

"Mr. Smith: And then you take half of that figure?

"Mr. West: Take half of that figure. * * *

"Mr. West: For this particular firm this year, as I understand it, instead of taking a write-down of 40 per cent or whatever the normal percentage was, they reduced some of the articles 63 per cent and they attained what we would give them in the matter, that additional 20 per cent obsolescence and now they want another 20 per cent on top of that. Have I stated that fairly?

"Mr. Buehner (Deputy Assessor): Yes. * * *

"Mr. Smith: They have taken the 20 per cent as they went along item by item. That is what you mean? They marked it down so as to take the normal reduction of 20 per cent that you would give them on the cost inventory?

"Mr. West: They mark it down greater than the average mark down so that the average write off would show that additional 20 per cent.

"Mr. Smith: Yes, but instead of taking an inventory with normal mark down and then 20 per cent off to arrive at an assessment figure, they have taken it item by item and have reached the same answer by taking it off on each item as they went along? * * *

"Mr. Boller (Deputy County Counsel): And now they come to the Assessor and ask him to give them 20 per cent."

While it is true, as stated in Los Angeles Gas & Electric Co. v. County of Los Angeles, 162 Cal. 164, 121 P. 384, 9 A.L.R. 1277: "A taxpayer may assail in the courts an assessment which was fraudulently and corruptly made with the intention of discriminating against him for the purpose of causing him to pay more than his share of the public taxes"—no evidence of discrimination or disproportionate assessment was produced before the Board in the instant cause. Respondent's witnesses testified that the assessment of other firms was upon a 40 per cent valuation and that respondent's assessment was upon a 50 per cent valuation, but they offered no evidence to support that stand. Appellants' witnesses testified that respondent had received its 20 per cent obsolescence depreciation *before assessment* by taking such deduction itself in the valuation on its own books; other merchants received their 20 per cent obsolescence depreciation *in the process of assessment* by the Assessor's deduction thereof from their book figure, which had not theretofore been so reduced. In other words, the evidence before the Board was amply sufficient to sustain a finding that respondent's property was assessed at 40 per cent of its value, instead of at 50 per cent, as claimed.

In the light of the conclusion reached after a consideration of the evidence produced at the hearing before the board of equalization, it would appear that the denial by such Board of respondent's application was justified, and that no corrupt or fraudulent motive could be attributed to the Board for such action.

For the reasons stated, the judgment is reversed.

DORAN and WHITE, JJ., concur.

Hearing denied; SCHAUER, J., dissenting.

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70 Cal.App.2d 589

BURNSED v. MURRAY et al.

Civ. 14776.

District Court of Appeal, Second District, Division 1, California.

Aug. 27, 1945.

Hearing Denied Oct. 25, 1945.

1. Appeal and error ⇨1002

Where there is a conflict in the evidence, the verdict of jury is controlling and cannot be set aside by reviewing court.

2. Automobiles ⇨244(6)

In action for injuries sustained by pedestrian when struck by automobile at street intersection, conflicting evidence sustained verdict in favor of driver and owner of automobile. Vehicle Code, St.1935, p. 93.

3. Appeal and error ⚿933(1)
New trial ⚿71

On motion for new trial, trial court was not bound by verdict of jury on conflicting evidence, and appellate court must assume that when such motion was made and denied trial court weighed and considered the evidence in the light of the only contention there made that it was insufficient to sustain the verdict.

◆

Appeal from Superior Court, Los Angeles County; William B. McKesson, Judge.

Action by Ora Burnsed against Warren James Murray and another for personal injuries sustained by pedestrian when struck by automobile in an intersection. Verdict and judgment for defendants, and plaintiff appeals.

Judgment affirmed.

Samuel A. Rosenthal and Albert A. Horn, both of Los Angeles, for appellant.

Nourse & Jones, of Los Angeles, for respondents.

DRAPEAU, Justice pro tem.

Action for personal injuries caused by an automobile running down a pedestrian in an intersection.

There are two defendants, but one is the owner of the automobile and is sued to recover on her liability under the Vehicle Code, St.1935, p. 93, for permitting the other defendant, driver of the car, to operate it. Therefore, we will speak of the defendant driver as the defendant.

The plaintiff, a "newsboy" 58 years of age, testified that on the night of the accident shortly after midnight he was selling papers at the intersection of Santa Monica Boulevard and Highland Avenue in the city of Los Angeles; that a lady stopped her car across the street from where he was standing, and blew her horn to signal to him that she wanted to buy a paper; that at this particular intersection there was in operation a signal system of red and green lights controlling traffic; that he waited until the traffic light opposite him was green, then he crossed the street, being at all times in the cross-walk; that while in the cross-walk he was struck by defendant's automobile.

Two policemen who apprehended and questioned the defendant at the intersection testified that he was intoxicated, under the influence of alcohol. A physician who examined the defendant shortly after the accident likewise testified that he was intoxicated.

Damages to the plaintiff were very severe. He sustained a broken leg, which was in traction for a long time, serious injuries to his shoulder and head, and was still in the hospital when the case was tried. At the date of the trial he was suffering from tuberculosis, which might account for the length of time he remained in the hospital.

The defendant's case consisted mainly of his own testimony. He testified that he left his office in Hollywood about 11 p. m. on the night of the accident, having worked all day; that he went to a cafe and stayed there twenty-five or thirty minutes and while there consumed five glasses of beer; that he left the cafe driving the automobile in question and approached the intersection where the accident happened; that at that point he stopped on the red signal and proceeded only when the signal turned to green; that in traversing the intersection he changed gears from low to second, and was just going into high when he felt his car strike something, whereupon he stopped and pulled over to the curb and got out of the car and went back. There is a minor conflict in the testimony here, the police officers stating that the defendant told them he proceeded down the street and turned around and came back.

The defendant then testified that he felt that he had absolute control of his car, that he knew he had had something to drink, but was not drunk; that he was traveling 15 to 18 miles an hour and his brakes were in excellent condition.

Argument was had, instructions given, and the matter submitted to an all-woman jury, which rendered its verdict in favor of the defendant. Motion was made for a new trial and denied.

On this appeal no complaint is made as to instructions, or anything else in the conduct of the trial, except that appellant feels the jury must have gone "haywire." A careful reading of the transcript on appeal demonstrates that unless the evidence is insufficient to support the verdict there is no error in the record.

[1] Respondent stands upon the well known rule that when there is a conflict in the evidence, the verdict of the jury is controlling and may not be set aside by a re-

viewing court. Kling v. Crown Finance Corporation, 63 Cal.App.2d 33, 146 P.2d 54; Darling v. Pacific Electric Railway, 197 Cal. 702, 242 P. 703; and also, Kapitan v. Smith, 70 Cal.App.2d 454, 161 P.2d 270.

[2] Under the testimony in this case, the rule is binding upon this court.

[3] Moreover, on the motion for a new trial the trial court was not bound, as in this court, by the rule of conflicting evidence. It is to be assumed that when the motion was made and denied, the trial court weighed and considered the evidence in the light of the only contention here made, that it was insufficient to sustain the verdict. Morgan v. Los Angeles Pac. Co., 13 Cal. App. 12, 108 P. 735; Witter v. Redwine, 14 Cal.App. 393, 112 P. 311; In re Estate of Bainbridge, 169 Cal. 166, 146 P. 427; Malloway v. Hughes, 125 Cal.App. 573, 13 P. 2d 1062; see 20 Cal.L.Rev. 558.

The judgment is affirmed.

YORK, P. J., and DORAN, J., concur.

* * *

70 Cal.App.2d 583

PEOPLE v. ASH.

Cr. 3926.

District Court of Appeal, Second District, Division 2, California.

Aug. 22, 1945.

1. Infants 🔑13

To constitute a violation of statute, making it a felony to commit a lewd or lascivious act upon or with the body of a child, accused need not touch the naked body of prosecuting witness, but it is sufficient that a lewd or lascivious act is committed upon or with the body, or some part or member thereof, of a child under 14 years of age. Pen.Code, § 288.

2. Infants 🔑20

Evidence, though it did not show that accused touched with his tongue the sexual organs of prosecuting witness, was sufficient to sustain conviction of violating statute making it a felony to commit a lewd or lascivious act upon or with the body of a child under 14 years of age. Pen.Code, § 288.

3. Criminal law 🔑1153(2)
Witnesses 🔑40(2)

Whether a child under ten years of age is capable of receiving just impressions of the facts respecting which he is to be examined, and relating them truthfully, rests in the sound discretion of trial judge, whose decision in such respect will not be disturbed on appeal in absence of a showing of abuse of such discretion.

4. Witnesses 🔑40(1)

Trial court properly received testimony of five-year-old prosecuting witness in prosecution for committing a lewd or lascivious act upon or with the body of a child, where prosecuting witness on voir dire examination demonstrated that she knew the difference between the truth and a lie and that she would be punished if she told a lie. Pen.Code, § 288.

5. Criminal law 🔑304(2)

That in every large community there are certain abnormal individuals who participate in lewd and lascivious acts upon or with the body of a child is a matter of common knowledge. Pen.Code, § 288.

6. Infants 🔑20

Testimony of five-year-old prosecuting witness as to lewd and lascivious acts committed upon her by accused was not inherently improbable, though it disclosed that accused followed an abnormal and depraved course of conduct. Pen.Code, § 288.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Milo E. Ash was convicted of violating Pen.Code, § 288, and he appeals.

Judgment affirmed.

Robert W. Kenny, of San Francisco, and Frank Richards, of Los Angeles, for plaintiff.

Milo E. Ash, in pro. per., for appellant.

McCOMB, Justice.

From a judgment of guilty of violating section 286 of the Penal Code after trial before the court without a jury, defendant appeals.

In his opening brief defendant says:

"Briefly summarized the evidence discloses that Carol Morton of the age of five years was invited to defendant's room, which was on the premises of his employment and where she was visiting. That while there he had her lay down on the bed where he removed her panties and used his tongue on her, indicating between her legs. That he then placed his tongue in her mouth and asked her to do the same."

Defendant relies for reversal of the judgment on three propositions, which will be stated and answered hereunder seriatim:

First: *In view of the holding in People v. Angier, 44 Cal.App.2d 417, 420, 112 P.2d 659, 660, defendant was not guilty of violating section 288 of the Penal Code, since the evidence as set forth above does not show that defendant touched with his tongue the sexual organ of the complaining witness.*

[1] This proposition is untenable. People v. Angier, supra, had reference to a violation of section 288a of the Penal Code, which makes it a penal offense for any person to participate in the "act of copulating the mouth of one person with the sexual organ of another." The cited case had no reference to section 288 of the Penal Code, which makes it a felony for any person to commit a lewd or lascivious act upon or with the body, or any part or member thereof, of a child under the age of fourteen years with intent of arousing, appealing to or gratifying the lust or passions or sexual desires of such person or child. (People v. Bronson, 69 Cal.App. 83, 86, 230 P. 213; People v. Lanham, 137 Cal.App. 737, 740, 31 P.2d 410). It is now established that it is not necessary in order to constitute a violation of section 288 of the Penal Code that the defendant touch the naked body of the prosecuting witness, it being sufficient that a lewd or lascivious act is committed upon or with the body, or some part or member thereof, of a child under the age of fourteen years. (People v. Dabner, 25 Cal.App. 630, 632 et seq., 144 P. 975.)

[2] In view of the foregoing rule and the facts which defendant in his brief concedes the evidence discloses as to the acts which took place, there can be no doubt that there is substantial evidence to sustain the trial court's finding that defendant was guilty of violating section 288 of the Penal Code.

Second: *The prosecuting witness, a female five years of age, was not qualified to testify as a witness.*

[3, 4] This proposition is likewise untenable and is governed by the settled law in California that whether or not a child under the age of ten years is capable of (a) receiving just impressions of the facts respecting which the child is to be examined and (b) relating them truthfully is a question the determination of which rests in the sound discretion of the trial judge; and in the absence of a showing of an abuse of this discretion by the trial judge his decision will not be disturbed on appeal. (People v. Morcumb, 28 Cal.App.2d 465, 467, 82 P.2d 714.) An examination of the record in the instant case discloses that the prosecuting witness on her voir dire examination demonstrated that she knew the difference between telling the truth and telling a lie and that she would be punished should she tell a lie. Therefore her testimony was properly received by the trial court.

Third: *The prosecuting witness' testimony was inherently improbable.*

[5, 6] This proposition is likewise without merit. It is to be conceded that such acts as those described by the prosecuting witness are not ordinarily indulged in by the average normal human being. However, it is a matter of common knowledge that in every large community there are certain abnormal individuals who participate in such acts as those described by the complaining witness, and therefore there is no inherent improbability in the evidence which discloses that defendant followed such an abnormal and depraved course of conduct.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and W. J. WOOD, J., concur.

SERNS v. SERNS.
Civ. 14855.

District Court of Appeal, Second District, Division 2, California.
Aug. 17, 1944.

Rehearing Denied Sept. 6, 1945.

Hearing Denied Oct. 15, 1945.

1. Divorce ⚷184(10)

In action for divorce, finding of trial court is binding if supported by sufficient evidence.

2. Divorce ⚷27(5)

In passing upon a finding of the infliction of grievous mental suffering by one party upon the other, trial court must consider all the circumstances of the case, including intelligence and refinement of the party charging cruelty.

3. Divorce ⚷184(6)

In action for divorce on ground of extreme cruelty, trial court's conclusion as to whether grievous mental suffering has been inflicted on one party by the other, will not be reversed on appeal unless the evidence is so slight as to indicate an abuse of discretion.

4. Divorce ⚷130

Conflicting evidence sustained trial court's findings in favor of husband on his cross-complaint for divorce on ground of extreme cruelty.

5. Divorce ⚷127(4)

In wife's contested action for divorce wherein husband filed cross-complaint for divorce on ground of extreme cruelty, the record disclosed ample evidence to corroborate testimony of husband.

6. Divorce ⚷127(4)

The extent of the corroboration necessary for granting a divorce is not defined by statute, but corroboration of all the acts of cruelty charged by party to whom divorce is granted is not necessary, and, where a number of charges of cruelty have been made, corroboration of a single act of cruelty may be sufficient.

7. Divorce ⚷127(4)

The principal object of corroboration rule in divorce actions is to prevent collusion, and, where the evidence in a contested action clearly shows absence of collusion, the court is justified in granting decree upon evidence which is only slightly corroborated if otherwise satisfied that prevailing party is entitled to a decree.

◆

Appeal from Superior Court, Santa Barbara County; W. L. Bradshaw, Judge.

Action for divorce by Adelaide T. Serns against Arthur E. Serns, wherein defendant filed a cross-complaint for divorce. From a judgment granting a decree of divorce to defendant on his cross-complaint, plaintiff appeals.

Judgment affirmed.

Raymond D. Williamson and Arthur J. Healy, both of San Francisco, and Leland Crawford and Henry T. Bailey, both of Santa Barbara, for appellant.

W. P. Butcher, of Santa Barbara, for respondent.

W. J. WOOD, Acting Presiding Justice.

This is an appeal from a judgment granting a decree of divorce to the cross-complainant on the ground of extreme cruelty. Appellant now asserts that the evidence is insufficient to support the findings and that the corroboration is insufficient to comply with the requirements of the law. At the time of their marriage, October 5, 1940, respondent was fifty-three years of age and appellant was forty-nine years old, both parties having been previously married. From the testimony of respondent it appears that appellant was extravagant in her living expenditures to such an extent that his practice as a physician was insufficient and he had to draw upon reserve funds. During all the period following the marriage he was in poor health; he did not care to argue with his wife and because he remained silent she called him a mouse. Appellant urged him to change the type of his practice and leave Santa Barbara. On at least one occasion she slapped him; she complained of his clothing and his table manners; she was jealous of his secretary, a young woman who with her brother had been left orphaned when they were fifteen years of age and respondent had since been helping them, giving the girl a job with him doing secretarial work. Notwithstanding this appellant wanted him to discharge his secretary. On various occasions when patients called at his home appellant surreptitiously listened in on conversations between him and his patients, and finally she told him to leave. Appellant in her testimony admitted that she had slapped respondent because she "thought he needed a good lesson". She also admitted listening in on his telephone conversations; admitted that she nagged him and stated that she had "persistently" argued with him on one subject for five days.

[1-4] The evidence in the case is conflicting and in an action for divorce, like other actions, a finding of the trial court is binding if supported by sufficient evidence. This includes the finding of the infliction of grievous mental suffering by one party upon the other. In passing upon this particular finding the trial court must consider all the circumstances of the case, including the intelligence and refinement of the party charging cruelty. The conclusion reached by the trial court will not be reversed on appeal unless the evidence is so slight as to indicate an abuse of discretion. Keener v. Keener, 18 Cal.2d 445, 116 P.2d 1. The evidence outlined above is ample to give support to the findings of the trial court.

[5] The record dicloses ample evidence to corroborate the testimony of respondent. The witness Ruth Steinert corroborated respondent's testimony that he was told to leave when she stated that appellant had called the office and given directions to "tell the doctor to get a truck to get his things". The household maid, Nellie Arrellanes, furnished corroboration for the testimony that appellant had listened in on the telephone conversations. T. H. Canfield, a business associate of respondent, testified concerning appellant's financial extravagances.

[6, 7] The extent of the corroboration necessary for the granting of a decree of divorce is not defined in any of our statutes. It is not necessary to corroborate all the acts of cruelty charged by the party to whom the decree is granted. Where a number of charges of cruelty have been made, corroboration of a single act of cruelty may be sufficient. Ungemach v. Ungemach, 61 Cal.App.2d 29, 142 P.2d 99; Keener v. Keener, supra. Moreover, the rule requiring corroboration is not so strictly applied in hotly contested divorce actions as it is in actions where a decree is demanded upon the default of the opposing party. The principal object of the corroboration rule is to prevent collusion between the parties, and where it is clear from the evidence in a contested action that there is no collusion the court is justified in granting the decree upon evidence which is only slightly corroborated if otherwise the court is satisfied that the prevailing party is entitled to a decree. Minnich v. Minnich, 127 Cal.App. 1, 15 P.2d 804; Ungemach v. Ungemach, supra.

The judgment is affirmed.

McCOMB, J., concurs.

WESTERN COAL & MINING CO. v. JONES.

Civ. 3386.

District Court of Appeal, Fourth District, California.

Aug. 28, 1945.

Rehearing Denied Sept. 17, 1945.

Hearing Granted Oct. 25, 1945.

1. Limitation of actions ⟹149(1)

An ackowledgment of a debt barred by limitations which was conditioned upon the exchange of corporate stock held as security for the debt, but which did not contain an expression of willingness to pay nor any words from which a promise to pay could be implied, was insufficient to remove bar of limitations.

2. Limitation of actions ⟹151(4)

Where the statute of limitations has already run upon a note and where reliance is placed on a new promise to pay which is thereafter made, the action must be based upon a new obligation rather than upon original note.

3. Limitation of actions ⟹151(1)

Where holder of notes, which were secured by corporate stock, prepared agreement or consent by which, on reorganization of corporation, new stock was substituted for old stock as security for notes, which agreement or consent was relied on by holder to remove maker's obligation on notes from bar of limitations, any ambiguity therein was chargeable to holder.

4. Limitation of actions ⟹148(1)

An acknowledgment which is sufficient to renew an obligation after it has been barred by limitations must be one which is a direct, distinct, unqualified, and unconditional admission of the existence and justness of the debt and of the party's willingness to pay the same.

5. Limitation of actions ⚷148(3)

The willingness of maker of note that holder should retain such security as was already given him was not the equivalent of a willingness, after statute of limitations had run, to acknowledge and agree to pay full amount of original debt regardless of how much might be obtained from security which had been given, so as to remove obligation from bar of limitations.

6. Bills and notes ⚷137(1)

The clause "this note may be extended from time to time without notice", and without releasing any of the parties appearing in note, does not provide for an automatic extension, but calls for some affirmative act by holder in order to exercise right to extend, which extension must be for a definite time.

7. Bills and notes ⚷137(1)

The phrase "from time to time", appearing in clause of note giving the holder a right to extend note from time to time, means from one specific time to another.

See Words and Phrases, Permanent Edition, for all other definitions of "From Time to Time".

8. Limitation of actions ⚷48(1)

The provision in note which was due on January 3, 1934, that note might be extended from time to time without notice, did not authorize holder, after taking no action for nearly seven years and after discovering that security was inadequate, to eventually decide to consider the application of a credit on the note on July 19, 1940, as constituting a definite extension from due date to date of application of credit so as to remove obligation from bar of limitations.

9. Limitation of actions ⚷48(1)

Where there was no evidence of any affirmative act by holder of note to extend it, and approximately seven years passed after due date before any action was taken, note was barred by limitations notwithstanding provision therein that it could be extended from time to time without notice.

◆

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Action by Western Coal & Mining Company against George H. Jones to recover on three notes. From a judgment for defendant, plaintiff appeals. On the appeal, defendant moved to abate the proceeding.

Judgment affirmed and motion to abate denied.

Whitelaw & Whitelaw, of El Centro, for appellant.

Harry W. Horton, of El Centro, for respondent.

BARNARD, Presiding Justice.

This is an action to collect on three promissory notes, each of which had been assigned to the plaintiff by the original payee. The principal amount of these notes was $15,000, $10,000 and $213,000, respectively. The first two matured on January 2, 1934, and the third matured on January 3, 1934.

These notes, all payable at St. Louis, Missouri, were signed by the defendant and three other men and were secured by certain stock in the S. A. Gerrard Company, a corporation, which stock had been pledged for this purpose through a trust arrangement with a trust company.

In 1938, the S. A. Gerrard Company was reorganized and with the consent of this defendant certain new stock in that company was exchanged for the old stock and was deposited with the trust company and substituted for the old stock as security for these notes.

The new stock thus substituted was duly sold in 1940 and the proceeds were credited on these notes on July 19, 1940, $10.48 being credited on the first note, $6.97 on the second note, and $148.58 on the third note. No other payment was ever made on any of these notes and no demand for payment was ever made prior to the bringing of this action on October 20, 1941.

The defendant set up a number of defenses, including one that any action was barred by the statute of limitations. After a trial, judgment was entered in favor of the defendant based upon findings and conclusions to the effect that the statute of limitations had run against each of the notes, and that there had been no new or continuing contract sufficient to take this case out of the operation of the statute. From this judgment the plaintiff has appealed.

The appellant contends that the findings and conclusions of law referred to are erroneous and not supported by the evidence. This contention is based on the respondent's consent to the substitution of the new stock in the S. A. Gerrard Company for the old stock in connection with the reorganization of that company.

On December 13, 1938, the appellant wrote to the respondent stating that it was enclosing a form of agreement for his signature "covering the exchange of stock in the S. A. Gerrard Company pursuant to the Plan or Reorganization" and asking the defendant and his wife to sign the agreement "so that there may be no question about the authority for the exchange, the endorsement of the new stock by you and Mrs. Jones, and its return to us in place of the stock we now hold as collateral" on the notes. The agreement which was enclosed, and which had been prepared by the appellant or its attorney, was signed and returned by the respondent. It reads as follows:

"——— 1938

"Western Coal and Mining Company
"Missouri Pacific Building
"St. Louis, Missouri

"Gentlemen:

"The undersigned, in consideration of your consenting and agreeing to the Plan of Reorganization proposed by The S. A. Gerrard Company submitted by that Company on or about July 25, 1938 to the Income Debenture holders and the Stockholders of said Company, does hereby agree that, upon Western Coal and Mining Company delivering to The S. A. Gerrard Company the certificates for the Common Stock of the S. A. Gerrard Company which Western Coal and Mining Company holds as security for the obligations of the undersigned, and others, to the Western Coal and Mining Company, for exchange for the new Common Stock of The S. A. Gerrard Company pursuant to the said Plan of Reorganization, to endorse, in blank, ready for transfer, the certificates for said new Common Stock issued in exchange for said deposited stock; such endorsement to be in, substantially, the same manner and for the same purpose that said deposited Common Stock has been endorsed by the undersigned.

"Said new Common Stock, when so endorsed and when received by Western Coal and Mining Company, will be deemed substituted by Western Coal and Mining Company, as holder of the certain notes signed by the undersigned and other parties and without releasing or in anywise impairing the liability of the undersigned under said notes; and said new Common Stock so deposited under said notes shall be as fully subject to the lien of said notes as if specifically referred to and described in said notes.

"(Sgd) George H. Jones."

The letter from the appellant transmitting this agreement does not ask for or mention any acknowledgment of the debt for which the stock had been pledged, any admission of the justice of that debt, or any expression of willingness to pay the same. The request contained therein is merely for the respondent's consent to a substitution of stock in the reorganized company, as proposed, for the old stock held as security, with an agreement to endorse the new stock to enable such an exchange to be made. The agreement is to the same effect and provides for the respondent's consent to this substitution in the form of the same security, with a provision that such a substitution should not change the appellant's position, and should not impair the liability of the respondent as it then existed. The agreement provides only for the respondent's consent to this substitution in the form of the same security and for nothing else. While the respondent consented to such a substitution, thereby agreeing that the appellant's security should remain the same regardless of any technical change in form, he in no way expressed a willingness to change his own position in any other respect. While he was willing that the appellant should retain whatever security it then had, he neither was asked for nor gave any admission or acknowledgment of the justness of the debt or of his willingness or intention to pay that debt or any part of it, other than and except as he had already paid it by giving the security, which was the sole matter considered in these documents.

[1] This view was upheld by the Supreme Court of Arizona in another action on these same notes, involving a consideration of these same documents, which was brought against another of the makers of these notes. Western Coal & Mining Co. v. Hilvert, 60 Ariz. 537, 142 P.2d 411. We are in accord with the views therein expressed.

[2] It is well settled in this state that where the statute of limitations has already run upon a note and where reliance

is placed on a new promise to pay which is thereafter made the action must be based upon the new obligation rather than upon the original note. McCormick v. Brown, 36 Cal. 180, 95 Am.Dec. 170; Curtis v. City of Sacramento, 70 Cal. 412, 11 P. 748; Lambert v. Schmalz, 118 Cal. 33, 50 P. 13; Sanford v. Bergin, 156 Cal. 43, 103 P. 333.

[3] Since the appellant prepared the agreement or consent here relied upon, any ambiguity or insufficiency therein is chargeable to it. Golden West Credit & Adjustment Co. v. Peardon, 138 Cal.App. 481, 32 P.2d 1105; Cockrill v. Boas, 213 Cal. 490, 2 P.2d 774; Weil v. California Bank, 219 Cal. 538, 27 P.2d 904; Hunt v. United Bank & Trust Co., 210 Cal. 108, 291 P. 184.

[4] An acknowledgment which is sufficient to renew an obligation after it has been barred by the statute of limitations must be one which is a direct, distinct, unqualified and unconditional admission of the existence and justice of the debt and of the party's willingness to pay the same. Many cases support this proposition, of which only a few need be cited in addition to those heretofore referred to. Pierce v. Merrill, 128 Cal. 473, 61 P. 67, 79 Am.St. Rep. 63; Textile Nat. Bank v. Lawrence, 49 Cal.App. 84, 192 P. 880; Clunin v. First Federal Trust Co., 189 Cal. 248, 207 P. 1009; Fontana Land Co. v. Laughlin, 199 Cal. 625, 250 P. 669, 48 A.L.R. 1308; In re Estate of Azevedo, 17 Cal.App.2d 710, 62 P.2d 1058; Heiser v. McAlpine, 20 Cal. App.2d 467, 67 P.2d 141.

[5] There is a wide difference between a willingness that a creditor should retain such security as has already been given him and a willingness, after the statute of limitations has run, to acknowledge and agree to pay the full amount of an original debt regardless of how much may be obtained from the security which has been given. The appellant cites certain cases in which it has been held that the giving of new and additional security is a sufficient acknowledgment and expression of a willingness to pay to constitute a renewal of the obligation. Those cases are not applicable here. No new or additional security was given and the only thing that appears is a consent to a change in the form of the security already given which, in practical effect, left the parties and the security in exactly the same position they were in before the exchange was made. No admission or acknowledgment here appears which is sufficient to establish a new obligation after the bar of the statute had come into effect.

The appellant further contends that the court's findings with respect to the third note are without support for the reason that this note, by its own terms, provides for extensions from time to time which prevented the statute from running. The body of this note reads as follows:

"213,000.00 St. Louis, Mo. January 3, 1933 on demand after date, and if no demand is made, then on the 3rd day of January, 1934, we promise to pay to the order of Festus J. Wade, Jr., at the office of First National Bank in St. Louis, the sum of Two Hundred and Thirteen Thousand Dollars for value, with interest from date at the rate of six per cent (6%) per annum, payable semi-annually until maturity, and at the rate of eight per cent per annum after maturity until paid. Demand for payment, protest and notice of dishonor are hereby waived by all parties, whether as signers, endorsers, guarantors, or in any other capacity, and this note may be extended from time to time without notice and without releasing any of said parties. If this note be not paid at maturity, the parties hereto agree to pay, in addition, all costs of collection and ten per cent attorney's fees."

While the complaint contains an allegation that "said note was extended from the time of the maturity thereof to July 19, 1940," no effort was made to prove such an extension and there is an entire absence of evidence in that regard aside from the terms of the note itself. It was, and is, the appellant's position that no action on its part was necessary and that the provision "this note may be extended from time to time without notice and without releasing any of said parties" was self-executing and constituted an automatic extension of the time for paying the note with a consequent waiver of the statute of limitations. While it is contended that the appellant had the right to consider the due date as extended to July 19, 1940, the date when the proceeds from the sale of the security were credited on the note, it is conceded that no affirmative action of any kind was taken by the appellant and that no resolution or other affirmative act was made or taken by its board of directors, or by any of its agents, to thus extend the time for payment of this note.

In support of its contention that the terms of this note provide for an automatic extension thereof the appellant relies on Hasman v. Canman, 136 Cal.App. 91, 28 P.2d 372, 373. That case involved a note which provided that if it was not paid at maturity "it is hereby renewed from year to year, at the option of the holder, until paid, and during such year the makers thereof shall not have the right to pay the same." The court held that the contract itself definitely provided for its own extension and that the forbearance of the owner to sue, together with the fact that she had collected the interest after the due date, was sufficient evidence of her exercise of the option to renew the note from year to year. The note here in question, instead of definitely providing for any extension for a specific time, provides that "this note may be extended from time to time without notice." This provision is contained in a clause relating to the waiver of protest and notice of dishonor in case of nonpayment. This clause seems to have been intended as a full and complete waiver of the technical formalities that might otherwise be necessary to bind any parties who might be merely endorsers or guarantors, regardless of whether or not the date of payment should be extended. While this clause provides that no demand or notice is necessary, the main provision with respect to payment is that the note is payable on demand and if no demand is made then it is payable on January 3, 1934. The language used is rather ambiguous, and the expression "may be extended from time to time without notice and without releasing any of said parties" may have been intended to obviate the necessity of any notice of extension being given to those who were endorsers or guarantors.

[6-8] In any event, the note does not provide for an automatic extension but at best provides that it "may be extended from time to time." Although a right to extend may have been thus given, the exercise of that right called for some affirmative act. Any such extension may not be for an indefinite time. It is from "time to time," which means from one specific time to another. Such a fixing of time cannot be automatic and clearly calls for a definite and concrete act in extending the time to a specific date. If we assume that the holder of the note could perform this act at any reasonable time after the note otherwise became due, the act would still have to be performed before the right to do so had become barred by the statute. Nothing in the terms of this note supports the appellant's contention that it had a right, after taking no action of any kind for nearly seven years, and after discovering that the security was inadequate, to eventually decide to consider the application of a credit on the notes on July 19, 1940, as constituting, respectively, a definite extension from January 3, 1934, to July 19, 1940.

[9] The respondent relies on such cases as Woollomes v. Gomes, 26 Cal.App.2d 461, 79 A.2d 728; California State Bank v. Webber, 110 Cal. 538, 42 P. 1066; Trinity County Bank v. Haas, 151 Cal. 553, 91 P. 385; and Stalder v. Riverside Groves, etc., Water Co., 167 Cal. 560, 140 P. 252, in which, generally speaking, it was held that from the form of the document in question, in each case, it could not be said that it was within the contemplation of the parties that the time of payment should be indefinitely postponed. While these cases are distinguishable in certain particulars from the one now before us, the principles behind those cases are more nearly applicable here than are those found applicable in Hasman v. Canman. We think the language used in the note here in question, taken in its entirety, does not indicate an intention to provide for an automatic and indefinite extension of the time of payment or for one indefinitely existing only in the mind of the holder. It clearly provides that any such extension may be from time to time, which indicates a definite extension for a particular time and not one arising from the fact that the holder may later simply assume that an extension has previously been granted. Whether or not any notice was necessary some act on the part of the holder was required and one that would make a definite extension to a specific date. There is an entire lack of evidence as to any such affirmative act and the allegation of the complaint to which we have referred was not sustained by proof.

The judgment is affirmed. The respondent's motion to abate the proceedings is denied.

MARKS and GRIFFIN, JJ., concur.

26 Cal.2d 809

MacISAAC et al. v. POZZO et al.

L. A. 18991.

Supreme Court of California.

Aug. 10, 1945.

1. Pleading 🔑345(1), 350(1)

A motion by plaintiff for judgment on the pleadings is in nature of a general demurrer, and the motion must be denied if defendant's pleadings raise a material issue or set up affirmative matter constituting a defense.

2. Pleading 🔑350(3)

For purpose of ruling on plaintiffs' motion for judgment on the pleadings, trial court was required to treat all of defendants' allegations as true, and, since plaintiffs admitted untruth of their own allegations in so far as they had been controverted, all such averments would be disregarded whether there was a direct and specific denial or an indirect denial by virtue of affirmative allegations of a contrary state of facts.

3. Joint adventures 🔑4(1)

If contract was obtained by agents of original joint venture dividing profits on a 50-50 basis who were acting in its behalf and for its benefit, defendants were entitled to an equal share in benefits of the contract, and, if they were induced by plaintiffs' alleged fraud and concealment to execute a subsequent joint venture agreement for a lesser share, they were entitled to relief upon discovering the fraud.

4. Pleading 🔑345(1)

Where plaintiffs sought declaratory relief as to construction and validity of a second joint venture agreement reducing defendants' share from that provided in first agreement, and defendants pleaded that second agreement was invalid because it was obtained by fraud, defendants raised an issue of fact which required determination, and hence it was error to grant plaintiffs' motion for judgment on pleadings, regardless of how defective defendants' pleadings might have been in connection with their right to other relief.

5. Action 🔑6

Where plaintiffs sought declaratory relief as to construction and validity of second joint venture agreement reducing defendants' share from that provided in first agreement, plaintiffs opened the door, and, unless the right to rescind was lost or waived, defendants were entitled to seek rescission as a defense to the action and as basis for recovery pursuant to original agreement.

6. Joint adventures 🔑5(1)

Where defendants were entitled in any event to retain what they had received under a second joint venture agreement reducing defendants' share from that provided in first agreement, defendants were not required to offer to restore such amount as a condition to rescission of second agreement.

7. Joint adventures 🔑5(2)

Where defendants alleged in their cross-complaint a misapplication of funds of original joint venture in connection with services performed under a contract and prayed for an accounting, cross-complaint stated cause of action for an accounting regardless of whether defendant had proper grounds for damages or rescission of a second joint venture agreement reducing defendants' share from that provided in first agreement.

8. Pleading 🔑345(1), 350(3)

Although defendants failed to expressly seek rescission of second joint venture agreement reducing defendant's share from that provided in first joint venture agreement or specifically ask for damages in cross-complaint, defendants were entitled to any relief warranted by facts pleaded, and their failure to ask for proper relief was not fatal to their cause, and hence trial court erred in granting plaintiffs' motion for judgment on pleadings without affording defendants an opportunity to amend.

9. Pleading 🔑344

Where facts indicate that party probably has a good cause of action or defense, but that it has been pleaded defectively, and defects have not been called to his attention by demurrer or by notice of motion for judgment on the pleadings, trial court should not grant motion for judgment on pleadings without first giving the party an opportunity to elect whether he will stand on his pleadings or amend them.

10. Appeal and error 🔑236(2)

The question whether trial court abused its discretion in denying permission to defendants to amend their answer and cross-complaint was open on appeal even though there was no tender of proposed pleadings. Code Civ.Proc. § 472c.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Donald MacIsaac and another against Emile A. Pozzo and another for declaratory relief, wherein the defendants filed a cross-complaint. From a judgment for plaintiffs on the pleadings, the defendants appeal.

Reversed with directions.

Prior opinion, Cal.App., 156 P.2d 43.

H. G. Redwine and Gwyn S. Redwine, both of Hollywood, for appellants.

A. L. Abrahams and Henry B. Ely, both of Los Angeles, for respondents.

GIBSON, Chief Justice.

Defendants have appealed from a judgment on the pleadings in an action brought by plaintiffs for declaratory relief.

The complaint alleged that the parties entered into a joint venture agreement for the construction of a civilian housing project, the profits to be divided equally between the parties; that a month or so later they entered into a second joint venture agreement which provided that certain facilities of the original joint venture should be used in the performance of a job for the Utah Fuel Company, profits to be divided 85 per cent to plaintiffs and 15 per cent to defendants; that partial payments made on account of the Utah Fuel job were divided on the 85%-15% basis; that defendants have prevented the Utah Fuel Company from settling the amount of the balance owing to plaintiffs and defendants until the respective rights of plaintiffs and defendants therein have been determined; that an actual controversy exists relating to the legal rights and duties of plaintiffs and defendants and to their respective rights in and to the moneys heretofore paid and still unpaid under their contract with the Utah Fuel Company; that it is the contention of defendants that the second joint venture agreement is invalid and not enforceable and that they are entitled to receive one-half of all moneys heretofore paid and which may hereafter be paid pursuant to the terms of the contract of the parties with the Utah Fuel Company; that it is the contention of plaintiffs that the second joint venture agreement is an enforceable contract and that plaintiffs are entitled to receive 85 per cent and defendants 15 per cent of the moneys heretofore collected and still due from Utah Fuel Company. Plaintiffs prayed that the court make a declaration of the respective rights and duties of plaintiffs and defendants and determine the validity of the second joint venture agreement.

Defendants filed an answer which alleged that the Utah Fuel job was negotiated by agents who were acting on behalf of the original joint venture, and whose compensation, traveling and other expenses were paid by that venture, that plaintiffs fraudulently represented that they had obtained the Utah Fuel job by reason of a recommendation from the Kaiser Company, but would allow defendants 15 per cent of the profits if they would permit the original joint venture facilities to be used, otherwise plaintiffs would take the job and defendants would have no interest therein; that defendants were induced to execute the second joint venture agreement by plaintiffs' fraud and by their concealment of the fact that the Utah Fuel job had been negotiated for and obtained by agents of the original joint venture; that before any money was collected defendants informed plaintiffs that they were entitled to and expected to receive 50 per cent of the profits, and that when the job was completed they expected that such an adjustment would be made; that the second joint venture agreement is invalid because of the circumstances surrounding its execution; and that defendants are entitled to receive one-half of all moneys heretofore paid or which may be paid hereafter by the Utah Fuel Company.

The defendants also filed a cross-complaint which, after restating the facts pleaded in the answer, alleged that the original joint venture agreement was executed under an oral understanding that the parties would contract for other work; that, if the second joint venture agreement is not set aside plaintiffs will by their fraud and concealment become unjustly enriched at the defendants' expense; that certain costs and expenses of the Utah Fuel job had been paid from funds of the original venture and not repaid; and that plaintiffs had received $4,300 from the original venture as purported compensation for performing the Utah Fuel job. The prayer of the cross-complaint was for the difference between what defendants had received and 50 per cent of the moneys already paid under the Utah Fuel contract, for a declaration that defendants were entitled to 50 per cent of all further payments to be made thereunder, for an order requiring plaintiffs to repay $4,300 to the original joint venture, for a full and complete accounting, and for such other and further relief as defendants might be entitled to in the premises.

When the case came on for trial, plaintiffs moved for judgment on the pleadings on the ground that the cross-complaint did not state any cause of action against plaintiffs, and that the answer to the complaint raised no issue of law whatever. The motion was granted. The defendants requested leave to amend their answer to conform with the trial court's expressed opinion regarding the pleadings, but the request was denied. No demurrer was filed to defendants' pleadings, and no notice had been given of the intention to move for judgment on the pleadings.

[1, 2] A motion by plaintiff for judgment on the pleadings is in the nature of a general demurrer, and the motion must be denied if the defendant's pleadings raise a material issue or set up affirmative matter constituting a defense. Cohn v. Klein, 209 Cal. 421, 424, 287 P. 459; Cass v. Rochester, 174 Cal. 358, 360, 163 P. 212; Neale v. Morrow, 174 Cal. 49, 54, 161 P. 1165. For the purpose of ruling on the motion, the trial court must treat all of defendant's allegations as being true, and since the moving party admits the untruth of his own allegations insofar as they have been controverted, all such averments must be disregarded whether there is a direct and specific denial or an indirect denial by virtue of affirmative allegations of a contrary state of facts.

[3] It clearly appears from the pleadings that the parties were joint venturers under the original agreement and this relationship existed when the Utah Fuel contract and the second joint venture agreement were executed. They therefore occupied a fiduciary relationship similar in many respects to that of partners, and each owed to the other the duty of highest loyalty and utmost good faith, being charged not to take any unfair advantage or secret profit. Universal Sales Corporation v. California Press Mfg. Co., 20 Cal.2d 751, 772, 128 P.2d 665; Richards v. Fraser, 122 Cal. 456, 55 P. 246; Ford & McNamara, Inc. v. Wilson, 119 Cal.App. 475, 6 P.2d 996; Menefee v. Oxnam, 42 Cal.App. 81, 183 P. 379; see, also, Zeibak v. Nasser, 12 Cal.2d 1, 12, 82 P.2d 375. Hence if, as alleged, the Utah Fuel contract was obtained by agents of the original joint venture who were acting in its behalf and for its benefit, defendants were entitled to an equal share in the benefits of that contract, and if they were induced by plaintiffs' fraud and concealment to execute an agreement for a lesser share, they were entitled to relief upon discovering the fraud.

[4] Plaintiffs argue, however, that a contract induced by fraud is enforceable unless rescinded; that defendants did not seek rescission or establish a right thereto; that they have neither alleged nor asked for damages; and, therefore, that the court properly declared the second joint venture agreement to be a valid and subsisting contract.

This argument ignores the nature of plaintiffs' action and assumes that defendants were required to seek some specific affirmative relief as a defense. Plaintiffs sought declaratory relief as to the construction and validity of an agreement, which defendants allege was induced by fraud. When the defendants pleaded that the second agreement was invalid and unenforceable because it was obtained by fraud, they raised an issue of fact which required determination. If those pleaded facts were true, plaintiffs clearly were not entitled to a declaration that the contract was valid in all respects, and hence it was error to grant their motion for judgment on the pleadings, regardless of how defective defendants' pleadings may have been in connection with their rights to other relief. Since it appears, however, that defendants are seeking affirmative relief of some kind and the questions with reference thereto are earnestly argued by the parties and must ultimately be solved, we will consider the sufficiency of the pleadings in that regard.

Defendants allege facts appropriate to an action for rescission or for damages for fraud, and they ask the court to declare that they are entitled to one-half of the profits of the joint venture. Their pleadings, however, do not clearly indicate the legal theory upon which their claim is based.

On the theory of damages for fraud, the defendants have alleged, in effect, the existence of the original joint venture, the obtaining of the Utah Fuel job by agents acting for and on behalf of that venture, the violation of plaintiffs' fiduciary duty by their fraud and concealment, defendants' reliance on the representation, and its falsity. While the pleadings do not employ the word "damages" it may be that defendants intend to claim as damages the amount they would have received under the original joint venture but for the fraud of plaintiffs.

[5, 6] As to the remedy of rescission, the pleadings are likewise indefinite, but they are not entirely inadequate. There is no positive and express assertion that rescission has been or is being sought, or that any notice described or intended as a notice of rescission was given. Defendants allege, however, in substance, that as soon as they discovered the fraud they notified plaintiffs that they would not be bound by the provisions of the second agreement relating to the division of profits and that they were entitled to an equal share of the profits and expected an adjustment when the Utah Fuel job was completed. Moreover, when plaintiffs brought the action seeking to establish the validity of the second joint venture agreement they opened the door, and unless the right to rescind was lost or waived defendants were entitled to seek rescission as a defense to the action and as the basis for recovery. See Rosemead Co., v. Shipley Co., 207 Cal. 414, 420, 278 P. 1038; McNeese v. McNeese, 190 Cal. 402, 405, 213 P. 36; Hayt v. Bentel, 164 Cal. 680, 687, 130 P. 432; Boulevard Land Co. v. King, 125 Cal.App. 224, 228, 13 P.2d 864; see also, Elrod-Oas Home Bldg. Co. v. Mensor, 120 Cal.App. 485, 489, 8 P.2d 171; Rest., Contracts, § 480. It is apparent that no offer to restore was necessary as a condition to rescission, since defendants are entitled, in any event, to retain what they have already received. Matteson v. Wagoner, 147 Cal. 739, 744, 82 P. 436; Richards v. Fraser, 122 Cal. 456, 461, 55 P. 246.

[7] Defendants by their cross-complaint allege, among other things, a misapplication of the funds of the original joint venture in connection with services performed under the Utah Fuel contract and prayed for accounting. If these allegations are true, defendants would appear to be entitled to such accounting regardless of whether they have proper grounds for damages or rescission.

[8] Although defendants do not expressly seek rescission or specifically ask for damages, they are nevertheless entitled to any relief warranted by the facts pleaded, and their failure to ask for the proper relief is not fatal to their cause. See Buxbom v. Smith, 23 Cal.2d 535, 542, 145 P.2d 305; Pascoe v. Morrisson, 219 Cal. 54, 58, 25 P.2d 9; Zellner v. Wassman, 184 Cal. 80, 88, 193 P. 84; Nathan v. Dierssen, 164 Cal. 607, 611, 130 P. 12. They may seek to rescind and ask for damages in the alternative if they fail to establish a right to rescission. See Wulfjen v. Dolton, 24 Cal.2d 891, 896, 151 P.2d 846; Bancroft v. Woodward, 183 Cal. 99, 102, 190 P. 445; Hjorth v. Bernstein, 44 Cal.App.2d 561, 565, 112 P.2d 643. Under the circumstances, it was clearly error for the court to grant the motion for judgment on the pleadings without affording defendants an opportunity to amend, since the defects could be cured by amendment.

[9] As stated in Kelley v. Kriess, 68 Cal. 210, 212, 9 P. 129: "If plaintiff has a good cause of action, which by accident or mistake he has failed to set out in his complaint, the court, on motion for judgment on the pleadings, should, on his application so to do, permit him to amend." The same rule applies to the defendants' pleadings; and when the facts stated indicate that the party probably has a good cause of action or defense, but that it has been pleaded imperfectly or defectively, and the defects have not been called to his attention by demurrer or by a notice of motion for judgment on the pleadings, the court should not grant the motion without first giving the party an opportunity to elect whether he will stand on his pleadings or amend them. The granting of the motion without leave to amend would in many cases be an absolute denial of justice, and is directly opposed to the policy of the law that cases should be tried and decided on the merits.

[10] The plaintiffs have cited cases, such as Neher v. Kauffman, 197 Cal. 674, 242 P. 713, to the effect that a ruling denying permission to amend will not be disturbed on appeal where there is no tender of the proposed pleadings, and they claim that there was no abuse of discretion in this case because defendants failed to specify in the superior court the nature of the proposed amendment. While no proposed pleadings were tendered, defendants re-

quested leave to amend "to conform with" the trial court's ruling that the pleadings were defective. Moreover, since there had been no demurrer and no intimation that any such attack would be made on the pleadings, it cannot be claimed that defendants were bound to appear at the time of trial armed with the proposed amendments to their pleadings. In addition, all the cases cited by plaintiffs were decided prior to the enactment, in 1939, of section 472c of the Code of Civil Procedure, which provides that the question whether the trial court abused its discretion in sustaining a demurrer without leave to amend "is open on appeal even though no request to amend such pleading was made." See Wennerholm v. Stanford University School of Medicine, 20 Cal.2d 713, 718-720, 128 P.2d 522, 525, 141 A.L.R. 1358. Since the reason for the rule is the same on a motion for judgment on the pleadings, the same result should obtain.

The judgment is reversed with directions to grant leave to defendants to amend their pleadings.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.

26 Cal.2d 829

DE HART et al. v. ALLEN.
S. F. 17155.

Supreme Court of California.
Aug. 21, 1945.
Rehearing Denied Sept. 17, 1945.

1. Judgment 🔑713(2)

Judgments for lessors, in actions during term of lease for unpaid rent, were res judicata as to issues on defenses, either expressly presented or which could have been raised therein, that lessors had terminated liability of lessee by consenting to assignment of lease and satisfying mortgage given by lessee to secure rent, and that lease was invalid because made for an illegal purpose and could not be raised in subsequent action for difference between rent called for in lease and rent received from a new tenant after lessees' assignee had abandoned premises.

2. Appeal and error 🔑1099(3)

Decision on former appeal of case rejecting certain defenses became the law of the case precluding further reliance upon such defenses.

3. Evidence 🔑351

Where writing was in form of affidavit of service reciting that affiant had served lessee with a notice by lessors that lessee's assignee had abandoned leased premises and that lessors would relet for lessee's benefit, which writing was signed by process server in presence of lessors' attorney, who placed it in his files, but which writing was never notarized, and, after process server's death, his signature was proved by witnesses, writing was admissible in rent action by lessors against lessee under the Uniform Business Records as Evidence Act. Code Civ.Proc. §§ 1953e-1953h; § 1953f.

4. Evidence 🔑351

Document prepared by process server in the usual course of his occupation or calling, and which otherwise meets the requirements of the Uniform Business Records as Evidence Act, even though not notarized, is admissible. Code Civ.Proc. §§ 1953e-1953h; § 1953f.

5. Landlord and tenant 🔑79(3)

Ordinarily, an assignment of a lease does not relieve lessee from his obligation even though lessor consents to assignment or assignee expressly assumes obligations under the lease.

6. Landlord and tenant 🔑208(1)

In a limited sense, an assignment of a lease makes lessee a surety for assignee as between assignee and lessee, but, as between lessor and lessee, lessee remains a primary obligor under his express contract to pay rent, since it is not necessary for lessor, upon abandonment of premises by assignee, to give notice of re-letting to assignee in order to hold lessee for difference between rents called for in lease and those received from new tenants.

7. Landlord and tenant 🔑195(1, 2)

Where premises have been abandoned, lessor may consider lease as still in existence and sue for unpaid installments of rent as they become due for the unexpired portion of the term, or he may retake possession for lessee's account and relet premises, holding lessee for the difference between rentals under lease and what lessor is able in good faith to procure by reletting.

8. Limitation of actions ⚷46(1)

Where lessors, after leased premises were abandoned, elected to repossess premises and relet for lessee's benefit, holding lessee for difference in rentals accruing under lease and those procured by reletting, as respects limitations, lessors' right of action for damages did not accrue until end of term of lease.

9. Landlord and tenant ⚷195(2)

Where lessors, after leased premises were abandoned, elected to repossess and relet for lessee's benefit, holding lessee for difference between rentals accruing under lease and those received from new tenants, the fact that lessors were for a time unsuccessful in reletting premises did not preclude the allowance of damages for loss of rentals during such period.

10. Appeal and error ⚷1195(3)

Where, on defendant's appeal, there was an unqualified reversal of judgment, all issues involved in case were set at large for readjudication, and, under the circumstances, fact that plaintiffs were denied recovery on one item on first trial and did not appeal did not preclude recovery on such item on second trial.

◆

In Bank.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by Rosemond T. De Hart and others against Joseph Allen for damages for breach of a lease. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Prior opinion 154 P.2d 18.

Walter F. Lynch and Ernest Spagnoli, both of San Francisco, for appellant.

Carl E. Day and Abraham Setzer, both of San Francisco, for respondents.

GIBSON, Chief Justice.

On August 1, 1931, plaintiffs leased a rooming house to defendant for a period of five years at a monthly rental of $250. In December, 1933, the lease was assigned with the consent of the lessor to one Gammons, who accepted the lease and all of its obligations. As a part of the transaction plaintiffs gave defendant a satisfaction of a chattel mortgage which had been executed as security for the rentals. Gammons paid rent for two months, abandoned the premises and disappeared.

In three separate actions in the municipal court against defendant plaintiffs recovered rentals for the period from February to May, 1934. During the period from June to September, 1934, they endeavored unsuccessfully to relet the premises but on October 1, 1934, they obtained a new tenant at a monthly rental of $125.

In January, 1940, and within four years after the lease expired, plaintiffs brought this action for damages against defendant, seeking recovery for the difference between the rentals called for in defendant's lease and those received from the new tenant. Judgment for plaintiffs was reversed on appeal. De Hart v. Allen, 49 Cal.App.2d 639, 122 P.2d 273. On the second trial, judgment was again entered for plaintiffs, and this appeal was taken by defendant.

[1, 2] Defendant contends that the satisfaction of mortgage and plaintiffs' consent to the assignment of the lease to Gammons terminated his liability. He further claims that the lease is invalid because it was made for an illegal purpose. These issues were either expressly presented or could have been raised in the municipal court actions, and the judgments therein are therefore res judicata. Sutphin v. Speik, 15 Cal.2d 195, 202, 99 P.2d 652, 101 P.2d 497; Todhunter v. Smith, 219 Cal. 690, 28 P.2d 916. Moreover, these contentions were rejected on the former appeal and that decision has become the law of the case. De Hart v. Allen, 49 Cal.App.2d 639, 122 P.2d 273.

Defendant claims that he was not given notice of reletting and that hearsay evidence thereof was erroneously admitted at the trial. Plaintiffs assert that under the terms of the lease notice was not required, but that it was nevertheless given and proved by competent evidence. We need not determine whether notice of reletting was necessary as we are satisfied that the giving thereof was properly proved at the trial.

[3, 4] The court received in evidence, over defendant's objection, a writing in the form of an affidavit of service, signed by

a process server, which recited that affiant had served on defendant a notice by plaintiffs that Gammons had abandoned the premises and that plaintiffs would relet them for defendant's benefit. On or about the day the notice was served, the document reciting such service was signed by the process server in the presence of plaintiff's attorney who placed it in his files. The signature on the document was identified as that of the process server by witnesses. The process server died before the trial and the document was never notarized.

The writing was admissible under the "Uniform Business Records as Evidence Act" (Code Civ.Proc. §§ 1953e–1953h). Subdivision f of the section provides: "A record af an act, condition or event, shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission." The act provides that the term "business" shall include every kind of business, profession, occupation or calling. Since the document was prepared by the process server in the usual course of his occupation or calling and otherwise met the requirements of the act it was properly admitted in evidence. See Loper v. Morrison, 23 Cal.2d 600, 608, 145 P.2d 1.

[5, 6] No notice of reletting was given to Gammons, and defendant contends that when the assignment was made he became a surety and that the failure of plaintiffs to notify Gammons that the premises would be relet for his benefit operated to release defendant from liability. Ordinarily an assignment of a lease does not release the lessee from his obligations even though the lessor consents to the assignment. Samuels v. Ottinger, 169 Cal. 209, 211, 146 P. 638, Ann.Cas.1916E, 830. Nor does the express assumption by the assignee of obligations under the lease affect the liability of the lessee to the lessor. Lopizich v. Salter, 45 Cal.App. 446, 449, 187 P. 1075; 32 Am.Jur. 315. It has sometimes been said that the effect of an assignment is to make the lessee a surety for the assignee. Samuels v. Ottinger, 169 Cal. 209, 212, 146 P. 638, Ann.Cas.1916E, 830; Brosnan v. Kramer, 135 Cal. 36, 39, 66 P. 979; Schehr v. Berkey, 166 Cal. 157, 160, 135 P. 41. This may be true in a limited sense as between the assignee and his assignor, the lessee, but as between the lessor and the lessee the latter remains a primary obligor under his express contract to pay rent. T.A.D. Jones Co. v. Winchester Repeating Arms Co., D.C., 55 F.2d 944; Id., 2 Cir., 61 F.2d 774, certiorari denied, 288 U.S. 609, 53 S.Ct. 401, 77 L.Ed. 983; Tiffany on Landlord and Tenant, vol. 1, p. 994; 32 Am.Jur. 310, 311, 321. It was therefore not necessary to give notice of reletting to Gammons in order to hold defendant.

[7] It is next urged that it was error for the court to award as damages rent due for the period the premises were vacant (June to September, 1934) because this was, in effect, a recovery for rent, the collection of which was barred by the statute of limitations. Where, as here, the premises have been abandoned the lessor may consider the lease as still in existence and sue for the unpaid installments of rent as they become due for the unexpired portion of the term, or he may retake possession for the lessee's account and relet the premises, holding the lessee for the difference between the rentals under the lease and what the lessor was able in good faith to procure by reletting. See Treff v. Gulko, 214 Cal. 591, 598, 7 P.2d 697; Phillips-Hollman, Inc. v. Peerless Stages, 210 Cal. 253, 258, 291 P. 178; Oliver v. Loydon, 163 Cal. 124, 124 P. 731.

[8, 9] Plaintiffs elected to pursue the latter remedy and since the lease contained no provision to the contrary, the right of action for damages did not accrue until the end of the term. Treff v. Gulko, 214 Cal. 591, 599, 7 P.2d 697; Phillips-Hollman, Inc. v. Peerless Stages, 210 Cal. 253, 258, 291 P. 178; Oliver v. Loydon, 163 Cal. 124, 124 P. 731. The fact that plaintiffs were unsuccessful in reletting the premises for the months of June to September, 1934, did not preclude the allowance of damages for the loss of rentals during this period. The suit was commenced within the statutory period after the cause of action accrued and therefore was not barred.

[10] It is contended that no award should have been made for rentals for the months of June and July, 1934, because recovery therefor was denied on the first trial and plaintiffs did not appeal. The judgment was reversed, however, on the appeal taken by defendant, and the unqualified reversal set at large for readjudication all

issues involved in the case. In re Estate of Wear, 20 Cal.2d 124, 128, 124 P.2d 12; Atchison, etc., Ry. Co. v. Superior Court, 12 Cal.2d 549, 555, 86 P.2d 85; In re Estate of Pusey, 177 Cal. 367, 371, 170 P. 846.

The judgment is affirmed.

SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., and GOODELL, Justice pro tem., concurred.

Rehearing denied; SPENCE, J., not participating.

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26 Cal.2d 817

BUSCH v. TURNER, County Auditor.

Sac. 5728.

Supreme Court of California.

Aug. 14, 1945.

1. Officers 🔑100(2)

The statute increasing salary of district attorney of Lake county and specifically stating that such compensation should be paid to incumbents afforded some indication of a general legislative intent to make salary increase under a previous statute applicable to incumbents, though it did not directly govern incumbent district attorney's right to increased compensation under previous statute for period preceding effective date of later statute. Pol. Code, § 4280, as amended by St.1943, p. 1126, and by St.1945, c. 417.

2. Officers 🔑100(1)

Before the constitutional amendment of 1944 authorizing Legislature by two-thirds vote to suspend during war and for one year after termination of hostilities constitutional provision prohibiting increase of compensation of county, township, or municipal officer after his election or during term of office, a statute increasing compensation but containing no specific indication of legislative intent with respect to incumbents was held in abeyance until next term of office, leaving former law in effect as to incumbent. Const. art. 11, § 5.

3. Constitutional law 🔑48

Statutes will be construed, if their language permits, so as to avoid unconstitutionality.

4. Constitutional law 🔑66

A statute which is expressly made contingent upon adoption of a constitutional amendment is valid even where Legislature would have had no power to so act in absence of the amendment.

5. Statutes 🔑259

The effective date of a statute may be made contingent upon a future event.

6. Officers 🔑100(2)

The 1945 statute suspending until six months after termination of hostilities constitutional provision prohibiting salary increases during term of office together with 1944 constitutional amendment authorizing such suspension by statute, advanced effective date of 1943 statute increasing salary of Lake county district attorney, which was silent with respect to its applicability to incumbents, so that such attorney, though elected for term from January 1943 to January 1947, was entitled to increased salary from effective date of 1945 statute. Pol.Code, § 4280, as amended by St.1943, p. 1126, and by St.1945, c. 417; Const. art. 11, § 5, as amended.

7. Officers 🔑100(2)

Statute suspending until six months after termination of hostilities constitutional provision prohibiting salary increases during term of office did not directly change salary of Lake county district attorney, but was merely the final event making such salary increase by previous legislation applicable to incumbent, and hence its urgency clause does not violate constitutional provision prohibiting construction of any act changing salary of any officer as an urgency measure. Pol. Code, § 4280, as amended by St.1943, p. 1126, and by St.1945, c. 417; Const. art. 4, § 1; art. 11, § 5, as amended.

8. Statutes 🔑253

The purpose of constitutional provision that legislation with certain exceptions shall not go into effect until 90 days after final adjournment of session at which it was adopted was to give the people an opportunity to express their judgment as to the merits of a statute by filing referendum petition. Const. art. 4, § 1.

9. Statutes 🔑255

The people having already passed upon merits of statute suspending until six months after termination of hostilities constitutional provision prohibiting increase of salaries during term of office by adoption of constitutional amendment authorizing such suspension by Legislature, such statute containing urgency clause became effective immediately upon approval by Governor, though it indirectly changed salary of incumbent Lake county district attorney by permitting application to incumbents of previous statute providing for salary increase for such office. Pol.Code, § 4280, as amended by St.1943, p. 1126, and by St.1945, c. 417; Const. art. 4, § 1; art. 11, § 5, as amended.

◆

In Bank.

Proceeding by Burt W. Busch against B. J. Turner, as County Auditor of Lake County, for a writ of mandamus to compel respondent to pay petitioner's salary as county attorney at the rate of $2,400 a year from and after January 25, 1945, instead of at the rate of $1,800 per year. Submitted on respondent's demurrer to the petition.

Peremptory writ granted.

Burt W. Busch, of Lakeport, in pro. per., for petitioner.

Chester E. Watson, District Atty., of Stockton, amicus curiae on behalf of petitioner.

Robert W. Kenny, Atty. Gen., and Robert E. Reed, Deputy Atty. Gen., for respondent.

GIBSON, Chief Justice.

Petitioner, the District Attorney of Lake County, asks a writ of mandate to compel respondent, the auditor of that county, to pay petitioner's salary at the rate of $2,400 a year from and after January 25, 1945, rather than at the rate of $1,800 a year, the amount which petitioner received prior to January 25. There is no dispute as to the facts, and the matter was submitted upon respondent's demurrer to the petition.

Petitioner was elected on August 25, 1942, for the term beginning in January, 1943, and ending in January, 1947. Prior to August, 1943, his salary was fixed at $1,800 a year by section 4280 of the Political Code. In 1943, St.1943, p. 1126, the Legislature amended this section to increase the salary of the District Attorney of Lake County to $2,400 a year. The statute was silent with respect to its applicability to incumbents. At this time, however, section 5 of article XI of the California Constitution provided, in part: "The compensation of any county, township or municipal officer shall not be increased after his election or during his term of office. * * *" Accordingly, petitioner did not then receive an increase.

In 1944 section 5 of article XI was amended to read, in part: "The Legislature by a two-thirds vote of the members of each House may suspend the provision hereof prohibiting the increase of compensation of any county, township or municipal officer after his election or during his term of office for any period during which the United States is engaged in war and for one year after the termination of hostilities therein as proclaimed by the President of the United States."

Pursuant to the constitutional amendment the Legislature passed chapter 5, Statutes of 1945, suspending the prohibition against salary increases in section 5 of article XI "for the period commencing upon the effective date of this act and continuing until six months after hostilities terminate in each of the wars in which the United States is now engaged." The act was declared to be an urgency measure and to go into effect immediately. It was approved by the Governor on January 24, 1945.

Thereafter petitioner demanded payment of his salary at the increased rate provided by the 1943 legislation. Respondent, however, refused to issue warrants including the increase and petitioner received his salary for the months of January and February, 1945, at the rate fixed prior to 1943. He thereupon instituted this proceeding for a writ of mandate ordering respondent to deliver a warrant for the balance assertedly due, representing the amount of the increase, for the period beginning January 25, 1945, and ending January 31, 1945, and for the month of February, 1945.

[1] Subsequent to the institution of this proceeding the Legislature, by chapter 417 of the Statutes of 1945, again amended section 4280 of the Political Code fixing the salary of the District Attorney of Lake County at $2,400 per year and specifically stating that this compensation shall be paid to incumbents. Although this amendment, not effective until September 15, 1945, does not directly govern the problems raised herein, it does afford some indication of a general legislative intent to make the salary increase applicable to incumbents. Cf. Standard Oil Co. v. John-

son, 24 Cal.2d 40, 48, 49, 147 P.2d 577; Union League Club v. Johnson, 18 Cal.2d 275, 278, 279, 115 P.2d 425.

The 1943 legislation was sufficiently broad in its terms to include incumbents and it is clear that the prohibition in section 5 of article XI constituted the sole reason precluding petitioner from receiving an increase of salary in that year. Petitioner contends that this prohibition was removed by the constitutional amendment in 1944 together with the subsequent enactment of chapter 5 of the Statutes of 1945, thus permitting section 4280 of the Political Code, as amended in 1943, to become immediately effective on January 24, 1945.

[2, 3] Although no decision considering the precise point has been found, section 5 of article XI as it read before the 1944 amendment has frequently been applied to statutes increasing compensation but containing no specific indication of the Legislature's intention with respect to incumbents. It was determined that such a statute is to be held in abeyance until the next term of office, leaving the former law in effect as to the incumbent. Smith v. Mathews, 155 Cal. 752, 103 P. 199; Regan v. County of San Mateo, 14 Cal.2d 713, 97 P.2d 231; Galeener v. Honeycutt, 173 Cal. 100, 159 P. 595; Rice v. National City, 132 Cal. 354, 64 P. 580; see Cline v. Lewis, 175 Cal. 315, 318–319, 165 P. 915; Harrison v. Colgan, 148 Cal. 69, 82 P. 674; Kilroy v. Whitmore, 115 Cal.App. 43, 48, 300 P. 851; Shay v. Roth, 64 Cal.App. 314, 323, 221 P. 967; Williams v. Garey, 19 Cal.App. 769, 771, 127 P. 824. It was reasoned that until the next term of office commenced, there was no subject upon which the statute could constitutionally operate, and that in order to harmonize the statute with the Constitution insofar as possible, it should be held that the Legislature intended to postpone the operation of the statute until the expiration of the incumbent's term of office. See Smith v. Mathews, supra, 155 Cal. at page 757, 103 P. 199; Harrison v. Colgan, supra, 148 Cal. at page 73, 82 P. 674. These decisions, therefore, represent a specific application of the general principal that statutes will be construed, if their language permits, so as to avoid unconstitutionality. The court thus held, in substance, that the Legislature intended the statutes to be operative at the earliest time the Constitution would permit, but not before. As said in the concurring opinion in the Smith case, 155 Cal. at page 762, 103 P. at page 204, such laws "are construed to be intended only for prospective operation, and hence not void, but only in abeyance *until the conditions occur to which they can apply with effect.* * * * The old law stands and controls the right to compensation *until the time arrives at which, by the Constitution, the new law is permitted to supersede it* * * *." (Italics added.) Similarly, as expressed in Shay v. Roth, 64 Cal.App. 314, 323, 221 P. 967, 971, the law "is held in abeyance until the incumbency of an officer upon whom the increase may constitutionally operate."

Although it is true that most of the decisions referred to the expiration of the incumbent's term of office as the effective date intended by the Legislature, it must be recognized that at the time those opinions were written this was the earliest date or "condition" upon which a statute increasing salaries could constitutionally operate, and, therefore, it was perfectly natural for the courts to designate it as representing the legislative intent. There was then no occasion for the courts to consider what construction should be given such a statute in the event that the constitutional prohibition as to incumbents was removed by a constitutional amendment; the question was not passed upon in any of the decisions; and, therefore, they are not authority here insofar as they may suggest that the Legislature could not have intended to give increases to incumbents in the event of such a contingency. Cf. Hobart v. Hobart Estate Co., Cal.Sup., 159 P.2d 958; Maguire v. Hibernia S. & L. Soc., 23 Cal.2d 719, 730, 146 P.2d 673, 151 A.L.R. 1062.

As asserted by petitioner, the statements in the Shay case and the concurring opinion in the Smith case more accurately express the principle applied in the decisions. A statute purporting, in general terms, to increase salaries would ordinarily be construed to include incumbents, and but for the constitutional bar it would do so. When the prohibition of the Constitution ceases to operate, there is no longer any reason to limit the statute, and its literal meaning may be carried out in full. The reason why the prohibition ceases to operate is entirely immaterial, whether it is because of expiration of the period designated in the Constitution or because of an amendment changing the Constitution. We hold, therefore, that the 1943 act increasing the salary of the District Attorney of Lake County was intended to take effect as soon as it lawfully could, including the contingency of a constitutional amendment permitting an operative date earlier than would have been permissible under the Constitution as it existed in 1943.

[4, 5] There appears to be no constitutional objection to such an interpretation. Although the taking effect of the act as to incumbents would thus depend upon the happening of a contingency, namely, passage of a constitutional amendment, it has been held in many states that a statute which is expressly made contingent upon the adoption of a constitutional amendment is valid even where, as here, the Legislature would have had no power to so act in absence of the amendment. Alabam's Freight Co. v. Hunt, 29 Ariz. 419, 242 P. 658; State v. Hecker, 109 Or. 520, 221 P. 808; State v. Rathie, 101 Or. 339, 199 P. 169, 200 P. 790; In re Opinions of the Justices, 227 Ala. 291, 149 So. 776; Fry v. Rosen, 207 Ind. 409, 189 N.E. 375; Pratt v. Allen, 1839, 13 Conn. 119; see Druggan v. Anderson, 269 U.S. 36, 46 S. Ct. 14, 70 L.Ed. 151; 16 C.J.S., Constitutional Law, § 47, pp. 97–98; cf. State v. Smith, 335 Mo. 840, 74 S.W.2d 27. Cases to the contrary have been found in only one jurisdiction. In re Opinion of the Justices, 132 Me. 519, 174 A. 845; In re Opinion of the Justices, 137 Me. 350, 19 A.2d 53. Although this problem apparently has not been decided heretofore in California, it has been held that the effective date of a statute may be made contingent upon a future event. Ex parte Beck, 162 Cal. 701, 706–708, 124 P. 543; see Ogle v. Eckel, 49 Cal.App.2d 599, 606, 122 P.2d 67; People v. San Bernardino High School District, 62 Cal.App. 67, 71, 216 P. 959. It may also be noted that the former State Liquor Control Act, passed and approved by the Governor in June, 1933, was expressly declared to take effect "If and when it shall become lawful under the Constitution and laws of the United States" to manufacture and sell intoxicating liquors for beverage purposes, whereas the 21st Amendment was not proclaimed ratified until December 5, 1933. Cal.Stats., 1933, ch. 658, p. 1697, § 39.

The case of County of Fresno v. Brix Estate Co., 194 Cal. 85, 226 P. 77, is not controlling. There a state act authorized cities and counties to eradicate animal pests. A county board of supervisors adopted a resolution relating thereto after passage of the state act but prior to its effective date. The court held that the board of supervisors had no power to pass the resolution in anticipation of the effective date of the act, since, said the court, the referendum provisions of the Constitution made it uncertain that the act would become effective. Whatever may be the law with respect to the power of a county board of supervisors to adopt resolutions to be effective upon the occurring of uncertain events, it is clear from the foregoing authorities that the Legislature does have such power.

The case of Banaz v. Smith, 133 Cal. 102, 104, 65 P. 309, cited by respondent, is not contrary to petitioner's position. It was there stated that if a statute is void from the beginning, a subsequent amendment to the Constitution does not give life to the statute unless the amendment expressly so provides. Such a situation is not presented here. The 1943 legislation was at no time in violation of the Constitution if interpreted as not intended to apply to incumbents until removal of the constitutional prohibition—such an interpretation is in recognition of, not in contravention of, the Constitution.

[6] It follows, therefore, that chapter 5 of the 1945 statutes, together with the constitutional amendment adopted in 1944, operated to advance the effective date of the 1943 act, thereby granting petitioner an increase of salary as of the effective date of the 1945 act.

[7] Respondent contends, next, that the urgency clause of the 1945 statute is invalid as to petitioner under section 1 of article IV of the California Constitution which provides, in part, that "no measure creating or abolishing any office or changing the salary, term or duties of any officer * * * shall be construed to be an urgency measure." Respondent argues that if the 1945 act is given the effect for which petitioner contends, it would constitute a measure changing his salary. The statute, however, does not by its terms change salaries—it purports merely to exercise the authority granted the Legislature by the 1944 amendment to suspend temporarily the prohibition contained in section 5 of article XI. The increase in salary of the District Attorney of Lake County was made by the legislation of 1943, and although passage of the 1945 act constituted the final event making the increase applicable to petitioner, this only resulted indi-

rectly from removal of the constitutional prohibition.

[8] Since the act does not directly purport to change salaries, we may properly consider it in light of the purposes underlying the rules governing urgency measures as set forth in section 1 of article IV of the Constitution. These are included as a part of the referendum provisions adopted by the people in 1911. It is there stated that referendum petitions may be presented to the Secretary of State within ninety days after the final adjournment of the Legislature, and that no act passed shall go into effect until ninety days after the final adjournment of the session at which it was passed, with exceptions being made to certain types of legislation including urgency measures. Prior to the adoption of the referendum system, the Constitution contained no provision precluding immediate operation of statutes, and the effective dates of the statutes were determined by the Legislature. 23 Cal.Jur. 621; see Pol.Code, § 323, as it read before its amendment in 1929. The obvious purpose of placing the ninety-day limitation in the Constitution was to give the people "an opportunity * * * to express their judgment as to the merits" of a statute by filing a referendum petition. McClure v. Nye, 22 Cal.App. 248, 251, 133 P. 1145, 1147; see 59 C.J. 1149; cf. Solomon v. Alexander, 161 Cal. 23, 27, 118 P. 217 (referendum provision in a city charter). Thus, in declaring that measures changing salaries are not to be construed as urgency measures, the people in substance reserved the right to an opportunity to pass upon such laws before the taking effect thereof.

[9] In the present case, however, this purpose has been completely fulfilled, and there remains no reason to delay the effective date of the 1945 act. The people have already passed upon it, since they specifically authorized it by adopting the 1944 amendment to section 5 of article XI of the Constitution. The 1945 act, with one unimportant exception relating to the date of termination of the period of suspension, strictly follows the authority granted by the 1944 amendment. It is clear that this amendment was adopted in view of the present war and contemplated action by the Legislature with respect thereto. It would be unreasonable to hold that the people, having directly authorized the statute, would wish to pass upon it again under the referendum provisions.

We conclude, therefore, that the 1945 act took effect immediately upon its approval by the Governor.

The peremptory writ is granted.

SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.

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70 Cal.App.2d 639

SACRAMENTO COUNTY v. LAUSZUS et al.

Civ. 7134; Sac. 5698.

District Court of Appeal, Third District, California.

Aug. 30, 1945.

1. Dedication 🔑31

Generally, a mere offer to dedicate land to public purposes does not become effective until the offer has been accepted.

2. Dedication 🔑42

A complete dedication is distinguished from a mere offer to dedicate, in that in the case of a complete dedication no acceptance is required, it being presumed from the benefits arising from the dedication.

3. Dedication 🔑31

An acceptance of an offer to dedicate land for street purposes need not be express, but may be implied.

4. Dedication 🔑44

Evidence authorized finding that the city of Sacramento had either expressly or impliedly accepted offer of dedication contained in deed purporting to make a completed conveyance of land in controversy to city without reservation, even if deed constituted a mere offer rather than a complete dedication.

5. Dedication 🔑35(2)

Where Sutter deed purported to dedicate land in controversy for street purposes, subsequent adoption by city of Sacramento of a city map showing the streets as they appeared on earlier map and including land in controversy as a street was an acceptance of the dedication of street made by such deed. St.1850, p. 70.

6. Dedication ⚷65

Where, under terms of Sutter deed dedicating land in controversy for street purposes, land was conveyed to city of Sacramento in fee and city, in accepting dedication, took it as a trustee for the "present and future owners" of lots and property in city, act of Legislature excluding street in controversy from city and placing it in county did not cause trust to fail for lack of a trustee, but merely changed trustee by substitution of county for city, and there was no reversion of street to abutting owners. St.1850, p. 70; St.1873–74, p. 191.

7. Dedication ⚷55

Sutter deed conveying certain lands to the city of Sacramento for street purposes under certain conditions was construed to mean that, until city should be incorporated and city authorities established specified street, land conveyed should be subject to exclusive use of owners of lots fronting on proposed streets and not to mean that streets and alleys conveyed were to be kept for public use only until city should be incorporated and city authorities established.

8. Dedication ⚷37

Where there has been a dedication of a street by deed, it is not necessary that there also be a dedication by use.

9. Dedication ⚷37

Where there has been a dedication of a street by deed, delay in use does not affect the dedication.

10. Dedication ⚷44

Evidence sustained finding of public use of street dedicated by deed.

11. Adverse possession ⚷8(2)

Land dedicated by deed for street purposes was not subject to the operation of the statute of limitations, so as to permit adjoining landowner to acquire such land by adverse possession. Code Civ.Proc. § 315, subds. 1, 2; §§ 318, 319, 343.

12. Adverse possession ⚷8(2)

The rule that the people are bound by the same rules as an individual in the application of statutes of limitations is subject to an exception in the case of land dedicated for street purposes. Code Civ. Proc. § 315, subds. 1, 2; §§ 318, 319, 343.

13. Municipal corporations ⚷652

Generally, laches of municipal officers cannot defeat the rights of the public in a street.

14. Dedication ⚷39

Where land in controversy was dedicated for street purposes by deed recorded in 1850 purporting to convey property to city of Sacramento, which accepted the dedication, and thereafter land was excluded from city limits in 1874 by statute redetermining city limits, and placing property in county, and a portion of street was thereafter continuously used by public, delay of county for over 60 years in asserting right to unused portion of property included within dedication did not estop county from seeking to obtain possession of property. St.1873–74, p. 191.

15. Estoppel ⚷54

An estoppel cannot exist where the knowledge of both parties is equal and nothing is done by one to mislead the other.

◆

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by the County of Sacramento against Herman Lauszus and others to recover possession of certain property allegedly belonging to plaintiff for highway purposes, and for a decree quieting title and enjoining defendants from asserting any adverse claim to the property, wherein defendants Herman Lauszus and Marie Lauszus, his wife, Elbert L. Kempley and Myrtle Kempley, his wife, W. T. Crow and Yvonne Crow, his wife, asserted demands for affirmative relief. Judgment for plaintiff, and named defendants appeal.

Affirmed.

Fontaine Johnson, of Sacramento, for appellants.

John Quincy Brown, Dist. Atty., William A. Green, Asst. Dist. Atty., and Albert L. Wagner, all of Sacramento, for respondent.

ADAMS, Presiding Justice.

Plaintiff's complaint in this action, in the first count thereof, alleges that plaintiff is the owner and entitled to the exclusive possession and use for a public highway of certain property described as a portion of 12th Street on a map filed for record in the office of the county recorder on April

24, 1850; that defendants without the consent of plaintiff have entered into possession of said land and wrongfully withheld possession from plaintiff. The second count incorporates the foregoing allegations and recites that defendants claim some interest in the property adverse to plaintiff, which claims are without right and constitute a cloud on plaintiff's title. A third count alleges that defendants maintain structures upon the property thereby ousting and obstructing plaintiff and the public from use of it as a public highway. The prayer is for the recovery of possession, for a decree quieting title and enjoining defendants from asserting any adverse claims to the property.

Defendants Herman Lauszus et al. filed an answer asserting ownership of the east half of the street described in the complaint, invoking subdivisions 1 and 2 of section 315, and sections 318, 319 and 343, of the Code of Civil Procedure, as a bar to the action, alleging that plaintiff is estopped by a judgment in a prior action adverse to its contentions. They also asserted rights by adverse possession and estoppel of plaintiff by reason of laches.

After trial by the court sitting without a jury, findings of fact and conclusions of law were filed. The court found that plaintiff was the owner and entitled to the possession of the land in controversy for a public highway, that defendants' claims were without right, that plaintiff was not estopped by laches or otherwise, and that its cause of action was not barred by the statutes of limitations or any of them. In so far as the appealing defendants are concerned, judgment was for the plaintiff, quieting its title and enjoining said defendants from maintaining any obstructions to the use of the property as a public highway.

This appeal has been taken by defendants Lauszus, Kempley and Crow and their respective wives, by whom it is contended that the findings of the court are without support in the evidence, and that the court erred in its application of the law in the respects hereinafter stated.

Plaintiff claims title to the property in controversy by virtue of a deed executed by John A. Sutter, Jr., on January 2, 1849. The pertinent portions of that instrument are as follows:

"I John A. Sutter Jr. * * * have this day conveyed and quite claimed and by these presents do convey and quite clame unto the present & futerer owners of Town lots and town property in Sacramento City * * * all my right title & Intrest in an to cirtain portions of said City discribed as follow and under the conditions follwing, That is to say all the streets & alleys in said City except so much of L and Twenty seventh Streets and of all alleys runs into or threw any part of Sutters Fort, said portions of said streets & alleys being reserved to myself said streets and alleys herby conveyed, to be kept for Public use under such conditions & regulations as the future authoritys of said Citty may deturmine & initel said City shall be incorperated & City authorityes established Frount Sreet shall be subject to the exclusive use of the owners of lots frunting on said frunt Street in such maner that the owners of each lot or part of a lot fronting on said street shall have the exclusive use of all the grunds lyinge immediatele opposite his lot or a part of a lot, and betwene such lot or part of lot & the river but all the cross streets such for instence as L, M, and others shall remain at all times open for public use and also the entire following squares in said City to wit. * * * The said several squares are herby conveyed unto the present & future propriators of town property in said City for the public use of the inhabitance of said City to be applyed to such public purposes as the future incorporated authoritys of said City from time to time declare and deturmin To have & to hold the aforesaid primesis umto the present and future owners of town property in said City their heirs an assigns forever upon this exspress condition that I reserve to myself my heirs & assigns all ferry priveledges that I now have or may herafter acquire on & upon aney or all of the aforesaid primises. * * *"

This deed, it is to be noted, makes no reference to any map. However, plaintiff introduced in evidence several very old maps all of which show the street in controversy to be a public street; one of those maps was adopted by the Common Council of the City of Sacramento at a meeting held on December 5, 1854, the minutes of that meeting reading:

"The special committee on the report of the City Surveyor with the official map of the City reported that a copy of the same be placed on file in the City Surveyor's Office, and that the Council order for the use of the City Offices ten copies providing that the cost of each shall not exceed the sum of $15.00, the payment of which to be made when completely finished, accepted and account audited for same. Report adopted."

On said map appears the following legend:

"Official Map of the City of Sacramento California compiled from actual surveys, by W. S. Watson Civil Engineer approved and declared to be the official map of the City by a resolution passed Dec. 4 by the Common Council 1854.

"[Signed] R. P. Johnson, Mayor Wm. H. Watson Percival Gofs. Samuel S. Cardish I. R. Vureyard Special Committee"

On the map is a scale, "400′ to one inch," and "All streets are 80 feet in width except M and Front Sts which are 100 feet Alleys, 20 feet in width."

Another of said maps was filed for record in 1850 in Book 1 of Maps, at page 8. From another, filed for record in 1896, it appears that the original survey was made in December, 1848, by Captain W. H. Warner, U. S. A., and a resurvey by Clement W. Coote, Civil Engineer, in December, 1849. On it appears: "Map of Sacramento City 1849." The maps are identical with respect to the area embraced, and the street in controversy appears in identical fashion on all of them.

Appellants contend that the Sutter deed did not effect a dedication of the property therein described; that it was, at most, merely an offer to dedicate which offer was never accepted; and that even if there was a dedication and an acceptance there was a subsequent abandonment when the Legislature of the State in 1874 (Stats. 1873–74, p. 191) fixed the boundaries of the city of Sacramento so as to exclude the property in controversy therefrom and providing that the area of which it is a part should thereafter constitute and be a portion of American Township in Sacramento County.

[1, 2] It may be conceded, as contended by appellants, that as a general principle of law a mere offer to dedicate land to public purposes does not become effective until same has been accepted. 9 Cal.Jur. 52, sec. 41; Demartini v. City & County of San Francisco, 107 Cal. 402, 409, 40 P. 496; County of Inyo v. Given, 183 Cal. 415, 419, 191 P. 688; Diamond Match Co. v. Savercool, 218 Cal. 665, 24 P.2d 783; People v. Rio Nido Co., Inc., 29 Cal.App.2d 486, 85 P.2d 461; City of Santa Clara v. Ivancovich, 47 Cal.App.2d 502, 118 P.2d 303. However, it is said in 9 Cal.Jur., p. 53, sec. 41, that "An important distinction is to be observed between a complete dedication and a mere offer to dedicate. In the case of a complete dedication no acceptance is required, it being presumed from the benefits arising from the dedication." Citing Archer v. Salinas City, 93 Cal. 43, 28 P. 839, 841, 16 L.R.A. 145. Also see, 26 C.J.S., Dedication, § 45; 18 C.J. § 106, p. 95, and cases there cited; 1 Elliott on Roads and Streets, 4th Ed., secs. 134, 135, pp. 160, 161. In the Archer case it was said that dedication "'results from the acts of the owner of the land, coupled with the intent with which he does those acts. It may be express and completed by a single act, as when the land is dedicated by deed; or it may be implied from a series of acts, as when the owner subdivides a tract of land into blocks and streets, and causes a map of such subdivision to be recorded, and sells the several subdivisions which front upon those streets."

The Sutter deed purports to make a completed conveyance of the streets and alleys, without reservations at least as to the street here in controversy, "to be kept for Public use under such conditions & regulations *as the future athoritys of said Citty may deturmine.*" (Italics ours.)

[3, 4] But even if the deed constituted a mere offer, and acceptance of the dedication was required, an acceptance of an offer to dedicate need not be express, but may be implied; and if we were to assume that the Sutter deed was a mere offer to dedicate, there is no evidence that the offer was ever withdrawn; and the evidence before the trial court is sufficient to sustain its implied finding that as a fact the dedication was accepted by the city, if not actually then impliedly. "A technical formal offer and acceptance is not requisite to dedication of a public street." Hall v. Fairchild-Gilmore-Wilton Co., 66 Cal.App. 615, 626, 227 P. 649, 653. Such acceptance may be implied. 1 Elliott on Roads and Streets, 4th Ed. secs. 166, 167, pp. 192–194.

The Statutes of 1850, Ch. 20, p. 70 (enacted Feb. 27, 1850), fixed the original boundaries of the city as—

"All that tract of land lying within the limits and boundaries hereinafter mentioned, that is to say: Beginning at the junction of the American Fork with the Sacramento River; thence down said Sacramento River to Y Street, as designated on the map or plan of Sacramento City on file in the Recorder's office in said City; thence along said Y Street east to the point where said Y Street intersects Thirty-first Street, as designated on said map; thence along the said Thirty-first Street until the same intersects the American Fork; thence along the American Fork to the place of beginning, the said boundaries extending to the middle of said Sacramento River and American Fork, shall henceforth be known by the name of Sacramento City."

It is apparent from the foregoing that there was on file when this act was passed, a map of the city which the legislature recognized as such, that it included the area in controversy, and that the streets were named by letters up to Y and by numbers up to 31, which included the portion of 12th Street in controversy.

In the early case of Mayo v. Wood, 50 Cal. 171, 175, it was said:

"The instrument executed by John A. Sutter, Jr., on the 2d day of January, 1849, dedicated the land in controversy to public use, to be applied 'to such public purposes as the future incorporated authorities of said city (may) from time to time declare and determine.' It purported in terms to convey whatever title he had, to the present and future owners of town lots and town property in Sacramento city.' It recognized the fact that there were such 'present' owners, and that Sacramento was then known as a city, though not at that time formally incorporated as such. Aside from the question of dedication, the instrument was operative as a conveyance to vest the title in the then 'present' owners of the town lots and property. This was a sufficient designation of the grantees to uphold it as a conveyance, and thereafter Sutter, Jr., had no title to this property which could pass by his deed to Mesick."

In Gramer v. City of Sacramento, 2 Cal. 2d 432, at pages 435, 436, 41 P.2d 543, at page 544 it is said: "At the time the [Sutter] deed was executed the city of Sacramento was not incorporated, that legal formality not occurring until February 27, 1850. After its incorporation, however, the deed was accepted and the streets therein designated have been used as public thoroughfares down to the present time, except those which the evidence discloses have been abandoned." It was also held in that case that the deed intended no condition subsequent for the reason that Sutter, Jr., was engaged in a real estate undertaking—that of subdividing and selling the lots upon which he hoped that the future city would thrive and expand; that the deed contained no words of forfeiture or reverter, and that it would have been a simple thing to include language making provision therefor had it been intended. It also said, 2 Cal.2d at page 440, 41 P.2d at page 546:

"In the fifth place, the construction placed upon the instrument by the city authorities and by the property owners of Sacramento, and acquiesced in by the Sutters and their heirs from 1862 down to the time of the filing of the present action, is conclusive, at least when considered with the factors already mentioned, of the question of what interpretation must be placed upon the deed. For a period of sixty years all parties concerned had proceeded upon the theory that the grantor had completely divested himself of title. It is a familiar rule, unbroken in this state, that if the meaning of the language of an instrument is doubtful the court will look to the practical construction placed upon it by the parties. Mulford v. Le Franc, 26 Cal. 88–110; Kales v. Houghton, 190 Cal. 294–300, 212 P. 21, and cases cited."

[5] Also, as hereinbefore stated, the city council in December, 1854, adopted a city map which shows the streets as they appear on the earlier ones, and this may properly be construed as an acceptance of the dedication of streets made by the Sutter deed. Gross v. City of San Diego, 125 Cal.App. 238, 246, 247, 13 P.2d 820. No other conveyance by which the city could have acquired title to the land designated on said map as streets has been shown or indicated. Also it is obvious that when Sutter made his deed he was aware of the existence of a map and of the designation of streets by letters and numbers since said deed makes reference to many of them; and prior to his deed his father had executed deeds referring to streets and blocks. One, found in the record before us, was executed by Sutter to one Gillespie on November 3, 1849, which conveyed "everything between east side of 10th Street and West side of 25th Street, extending from North side of A street and the American Fork River."

We think there is ample in the record to sustain the decision of the trial court that the Sutter deed effected a dedication of the streets including the one in controversy, and that the dedication was accepted by the city.

As for appellants' contention that there was an abandonment of the dedication in so far as the property in controversy is concerned, this is premised primarily upon the act of the legislature of 1874, above mentioned, which eliminated from the corporate limits of the city of Sacramento the area in controversy and provided:

"All that territory lying between the east line of Thirty-first street, on the east, and the east line of Twenty-second street, on the west, and the American River on the north, and the north line of said 'A' street, on the south; and also all of that territory bounded on the north and west by the American River (as it existed on the twenty-sixth day of May, A. D. eighteen hundred and fifty-one), and on the south by the north line of 'B' street north, and on the east by the east line of Twenty-second street, heretofore embraced within the corporate limits of the City of Sacramento, shall hereafter constitute and be a portion of American Township, in Sacramento County."

Appellants state in their brief that when this act was passed no attempt was made by the city to reserve any right to public roads or other easements, nor was any attempt made to accept any dedication theretofore made by Sutter and incorporated in that portion of the city which was abandoned, and, therefore, any streets which may have been indicated on any early maps and were not in use reverted to the abutting owner, citing Elliott v. McIntosh, 41 Cal.App. 763, 183 P. 692.

[6] But in making the foregoing statement we think that appellants lost sight of the fact that what Sutter purported to convey and dedicate was not a mere right to use the land laid out as streets and alleys, to wit, an easement, but that he conveyed the title in fee; and that the city in accepting the dedication took it, not in its proprietary capacity as a private owner, but as a trustee for the "present and future owners of town lots and town property in Sacramento City" to whom and for whose benefit the conveyance was made; and that these property owners included not only those whose property continued to be within the limits of the city, but those whose property was excluded; that the dedication had already been accepted by the city, not piecemeal, but as a whole, and that there was no occasion for the county to accept dedication; and that when the street under consideration ceased to be in the city and became a part of the county, the trust did not fail for lack of a trustee, but there was merely a change of trustee for the public and not a surrender of the rights of the public.

See Board of Education of City and County of San Francisco v. Martin, 92 Cal. 209, 216, 28 P. 799. In 1 Elliott on Roads and Streets, 4th Ed., sec. 127, p. 147, the author says:

"A dedication, either statutory or common law, to a public corporation is not lost by changes in the form of the corporate government, nor by changes in its territorial boundaries. A dedication for the purposes of a public township road will not be lost to the public if a town or city is built up, and the road falls within its limit, nor will it be lost in cases where there is an extension of corporate limits so as to embrace county roads, nor where a village grows into a town or a town into a city. Towns, townships and cities are but trustees of the public, and, as in cases of ordinary trusts, the public trust is not defeated by a change of trustees."

See, also, San Francisco-Oakland Terminal Railways v. County of Alameda, 66 Cal.App. 77, 225 P. 304.

But even if title to the area covered by the streets had reverted to Sutter, there is no evidence that conveyances of lots or blocks were ever made by him conveying title to any portion of the streets, either in or out of the city, and there is uncontradicted testimony in the record that prior to 1921 the entire chain of title to the property subsequently acquired by appellants shows transfers made solely by lot and block, or by block, by block number, or by block with reference to the streets that bounded it. This indicates rather clearly that at least up until 1921 no one, during the forty-seven years between 1874 and 1921, ever claimed to have any title to the lands comprising the streets and alleys. Certainly there is no evidence that Sutter ever resumed, or claimed the right to resume, title to the streets, or attempted in subsequent conveyances to convey title to the middle of a street; and it was not until 1921 that any conveyance purported to give such title.

[7] At this point notice may be taken of the contention of appellants that by the language of the Sutter deed "the dedication was dependent upon the acts of the city authorities and neither the city authorities, nor the county authorities, ever did anything at all about the strip of land under litigation." In support of this argument appellants construe the language of the deed reading "said streets and alleys herby conveyed, to be kept for Public use under such conditions & regulations as the future authoritys of said Citty may deturmine & initel [until] said City shall be incorporated & City authorityes established Frount Sreet shall be subject to the exclusive use of the owners of lots frunting on said frunt Street," etc., as though a period had been placed after the word "established." But the deed is not so punctuated, and the language is equally subject to be construed as though a period were inserted after the word "deturmine." And we construe it to mean that until the city should be incorporated and city authorities established Front Street should be subject to the exclusive use of the owners of lots fronting on that street, and not to mean that the streets and alleys conveyed were to be kept for public use only until said city should be incorporated and city authorities established. Any other construction would be inconsistent with the prior language of the conveyance; and under the rule that the language of a grant is to be construed most strongly against the grantor who made and executed the instrument, it is not to be presumed that Sutter intended the dedication and conveyance to be so limited as to time. As was said in Wattson v. Eldridge, 207 Cal. 314, 320, 278 P. 236, 238, "a dedication must be understood and construed with reference to its primary object and purpose"; and since Sutter was engaged in a real estate enterprise it is not reasonable to assume that he intended that the streets and alleys conveyed should be kept for public use only until the city should be incorporated and city authorities established.

[8, 9] Appellants devote a portion of their brief to an argument that there has been no *dedication* of the street in controversy by *use;* but if we are correct in our conclusion that there was a dedication by deed, then it is immaterial whether or not the street in controversy was or was not used as such, so as to effect a dedication by user. And if appellants mean by their argument that failure to use the street as such is evidence of an abandonment, then the principle that delay in the use does not affect the dedication, must be applied. Archer v. Salinas City, supra, 93 P. at page 51, 28 P. 839, 16 L.R.A. 145; Davidow v. Griswold, 23 Cal.App. 188, 193, 137 P. 619.

[10] However, the trial court has found that there was use of the street as such, and we cannot say that there is an entire lack of evidence to sustain such a finding. Its finding is that "the west one-half of the street was used by the public as a public highway almost continuously for more than sixty years last past." Miss Amy Greenlaw, the common grantor, a witness for plaintiff, testified that she was born on the Greenlaw ranch the west boundary of which was 12th Street; that her memory went back sixty or sixty-five years and that she and her parents traveled over 12th Street and her father took her to school over it; that it was also used by others whom she named, who owned property in that vicinity; that she had used the road off and on all her life; that she owned the Greenlaw property until about two years ago. Silas Orr, who had lived thirty-five years in the vicinity of 12th Street, stated that he used said street for many years—twenty years at least—and that it had always been open while he lived there; that it was used by different families, and was in fact the only outlet they had at certain times of the year—during the stormy season; that it is the same now as it always was, and a fence that runs through there is supposed to be the center of 12th Street. Gilroy E. Cottle also testified to use of the street beginning about 1919 or 1920, by himself and others.

Appellants argue that though there may have been some use of a portion of 12th Street, there is no testimony that the half of it occupied by appellants' structures was so used, and they rely upon Tate v. City of Sacramento, 50 Cal. 242, wherein it was held that if a party is and has been for many years in the occupancy of a piece of land, and the authorities claim that it has been dedicated as a public street and that his buildings thereon are a public nuisance, it devolves upon them to show affirmatively that it has been thus dedicated. But there the Supreme Court merely affirmed the decision of the trial court on the ground of insufficiency of the evidence to show that the street claimed by Tate had ever been dedicated as a public street. And reference to the record in the case shows that the area there in controversy was not embraced within the original boundaries of the city and was not included in the map made by Warner in 1848–1849; that it was covered with water and known as Sutter Lake, and was granted to the city as swamp and overflowed land in 1857 and was not embraced within the Sutter grant. The case is, therefore, not pertinent here.

[11] Regarding the application of the various statutes of limitation relied upon by appellants, and their defense of laches, as early as 1875 the Supreme Court held, in Hoadley v. City and County of San Francisco, 50 Cal. 265, 276, where certain land had been dedicated to the public, that "Land held for that purpose, whether held by the State or a municipality, in our opinion, is not subject to the operation of the Statute of Limitations." In People ex rel. Alvord v. Pope, 53 Cal. 437, 451, decided in 1879, the court said:

> "Assuming that the evidence proved such actual adverse occupation for ten years or more, it must be considered as the settled doctrine of this Court, since the decision in Hoadley v. San Francisco, 50 Cal. 265, that no one can acquire by adverse occupation, as against the public, the right to obstruct a street dedicated to public use, and thus prevent the use of it as a public highway."

The holding in Board of Education v. Martin, supra, is to the same effect; the court there stating, 92 Cal. at page 218, 28 P. at page 802:

> "There can be no adverse holding of such land which will deprive the public of the right thereto, or give title to the adverse claimant, or create a title by virtue of the statute of limitations. This rule is universal in its application to all property set apart or reserved for public use, and the public use for which it is appropriated is immaterial. * * * The public is not to lose its rights through the negligence of its agents, nor because it has not chosen to resist an encroachment by one of its own number, whose duty it was, as much as that of every other citizen, to protect the state in its rights. This question has been determined, and these principles have already been established in this state in the case of County of Yolo v. Barney, 79 Cal. 375, 21 P. 833 [12 Am.St.Rep. 152]."

In City and County of San Francisco v. Bradbury, 92 Cal. 414, 418, 28 P. 803, also decided in 1891, the court repeated the language used in Board of Education v. Martin, quoted above.

In People ex rel. State Board of Harbor Com'rs v. Kerber, 1908, 152 Cal. 731, 733, 734, 93 P. 878, 879, 125 Am.St.Rep. 93, it was said: "Property thus held by the state in trust for public use cannot be gained by adverse possession, and the statute of limitations does not apply to an action by the state or its agents to recover such property from one using it for private purposes and not consistent with the public use." Numerous cases are there cited.

In a more recent case, Patton v. City of Los Angeles, 1915, 169 Cal. 521, 147 P. 141, at page 143, at page 527, it was said that "adverse possession of land devoted to public use does not divest the right of the state, or other public body corporate in which the title is vested, to maintain such public use, nor in any manner affect the public right or the public use." The foregoing cases and numerous others were cited in support of the conclusion of the court.

In Humboldt County v. Van Duzer, 1920, 48 Cal.App. 640, 644, 645, 192 P. 192, 194, the court said that mere nonuser of an easement acquired by grant does not amount to an abandonment; and it added:

> "If mere nonuser shall be held to be an abandonment of a public highway or street, every encroachment or nuisance on the public highway would effect an abandonment to the extent of the encroachment. The negligence of the public authorities in not removing the encroachment or obstruction would then be a legal substitute for the formal action or proceeding of abandonment provided by law. In that case the possessor, by thus separating the public use from the fee, could, by a system of 'divide and destroy,' acquire title by adverse possession in face of the long line of well-established authority to the contrary."

Also see City of Visalia v. Jacob, 1884, 65 Cal. 434, 435, 436, 4 P. 433, 52 Am.Rep. 303; County of Yolo v. Barney, 1889, 79 Cal. 375, 378, 21 P. 833, 12 Am.St.Rep. 152; Daly City v. Holbrook, 1918, 39 Cal.App. 326, 329, 178 P. 725; Richert v. City of San Diego, 1930, 109 Cal.App. 548, 554, 293 P. 673; Henry Cowell Lime & Cement Co. v. State, 1941, 18 Cal.2d 169, 172, 114 P.2d 331.

[12] Appellant relies upon People v. Osgood, 104 Cal.App. 133, 285 P. 753, and

County of Tehama v. Pacific Gas & Electric Co., 33 Cal.App.2d 465, 91 P.2d 936, as holding that the people are bound by the same rules as an individual in the application of statutes of limitation. But neither case is applicable here, since the rule of the cases hereinbefore cited must he held to be exceptions to that applied therein.

[13, 14] In support of its contention that respondent is barred by laches, appellants cite City of Los Angeles v. Cohn, 101 Cal. 373, 35 P. 1002; McGee v. City of Los Angeles, 6 Cal.2d 390, 57 P.2d 925; and Times-Mirror Co. v. Superior Court, 3 Cal.2d 309, 44 P.2d 547. While in the first of said cases the Supreme Court did affirm a judgment based upon an estoppel in pais, it is to be noted that in so doing it recognized the general rule that the laches of municipal officers cannot defeat the rights of the public in streets, and strictly limited its decision to the facts there appearing, which included evidence that the city, before the erection of structures upon the strip of land in controversy, had expressly agreed that it did not own the land, and that upon the faith of that agreement the buildings had been erected some twenty years prior to the commencement of the action. Similar exceptional circumstances appear in the other two cases relied upon. In none of them was mere delay or inactivity held to estop the governmental agency; and that is the sole ground for appellants' invocation of estoppel in this case. In fact, in one of the cases cited and relied upon by appellants, City of Sacramento v. Clunie, 120 Cal. 29, 52 P. 44, the court said that a delay of forty years in bringing an action of ejectment to recover lands claimed to have been dedicated as public streets, during which delay large sums of money were expended in permanent improvements by defendant and his grantors, did not estop the city from maintaining an action in ejectment, if the streets were, in fact, dedicated to public use; and Los Angeles v. Cohn, supra, was said not to be comparable in its facts.

[15] It is said in 2 Elliott on Roads and Streets, 4th Ed., p. 1697, sec. 1189, that "an estoppel cannot exist where the knowledge of both parties is equal and nothing is done by the one to mislead the other."

Also see Gross v. City of San Diego, supra, 125 Cal. at page 246, 13 P.2d 820, citing and quoting from Davidow v. Griswold, supra; Archer v. Salinas City, supra, 93 Cal. at page 51, 28 P. 839, 16 L.R.A. 145.

We find no error in the record, therefore the judgment is affirmed.

PEEK and THOMPSON, JJ., concur.

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70 Cal.App.2d 592

KING et al. v. LOS ANGELES COUNTY FAIR ASS'N et al.

Civ. 14731.

District Court of Appeal, Second District, Division 3, California.

Aug. 28, 1945.

1. **Evidence** 🔑29

Court could take judicial notice that substantial sums of public moneys had been appropriated for the development of Los Angeles county fair. Code Civ.Proc. § 1875, subd. 3; St.1935, p. 1587, § 13.

2. **Agriculture** 🔑5

Right to vacate the dissolution of a county fair corporation and any rights dependent upon revivor of such corporation were barred by six-month statute of limitations, where more than a year had elapsed since association was dissolved before action to vacate dissolution was filed. Code Civ.Proc. § 341, subd. 3.

3. **Agriculture** 🔑5

Relief sought by minority stockholders of dissolved county fair corporation in action to set aside transfer of assets of such corporation to successor corporation and for an accounting was purely equitable and subject to defense of laches.

4. **Pleading** 🔑193(4)

The defense of laches may be raised by demurrer.

5. **Equity** 🔑84

The lapse of time or circumstances which will justify application of doctrine of laches is not fixed by any artificial rule, and each case must be determined by its own circumstances.

6. Corporations ⚷312(7)

Shareholders, unless they act promptly, will be barred by laches from questioning the validity of transfer of corporate assets.

7. Pleading ⚷37

Where circumstances that might excuse unreasonable delay in commencing action are not alleged, it will be presumed that they do not exist.

8. Contracts ⚷270(2)

Notice of desire to rescind a contract because of misrepresentation and fraud must be given promptly.

9. Agriculture ⚷5

Action by minority stockholders of dissolved county fair corporation to set aside transfer of assets to successor corporation was barred by laches, where action was commenced more than two years after the transfer without offering any excuse for delay and more than one year after dissolution of corporation so that it could not be revived and assets reconveyed to it, and where public had an interest in continued, unimpaired operation of either corporation. St.1935, p. 1587, § 13; Code Civ.Proc. § 341, subd. 3.

10. Pleading ⚷225(1)

Where complaint showed plaintiffs were not entitled to relief in any event, further opportunity to amend complaint was properly denied.

◆

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Tom C. King and others against Los Angeles County Fair Association, a corporation, and others, to vacate the dissolution of named defendant's predecessor corporation, to set aside as fraudulent the acts of individual defendants as officers of named defendant and predecessor corporation, and to require defendants to reconvey to predecessor corporation, or persons therein interested, all the assets of such corporation conveyed to named defendant. From a judgment dismissing the action following an order sustaining without leave to amend defendants' demurrer to the first-amended complaint, plaintiffs appeal.

Judgment affirmed.

Oliver O. Clark and Robert A. Smith, both of Los Angeles, for appellants.

Allard, Whyte & Brownsberger and Joseph A. Allard, Jr., all of Pomona, and Pacht, Pelton, Warne, Ross & Bernhard, Isaac Pacht, and Clore Warne, all of Los Angeles, for respondents.

FOX, Justice pro tem.

This is an appeal by the plaintiffs from a judgment dismissing the action following an order sustaining, without leave to amend, defendants' demurrer to the first amended complaint.

It is alleged in the amended complaint that the Los Angeles County Fair (hereinafter referred to as the "predecessor corporation") and the defendant, Los Angeles County Fair Association (hereinafter referred to as the "successor corporation"), were domestic corporations; that the individual defendants were directors of both corporations and dominated and controlled the same; that each of the plaintiffs is the owner of shares of the predecessor corporation; that at the time plaintiffs acquired their shares in 1922, it was represented to them that the predecessor corporation was profit sharing and that plaintiffs bought their stock in reliance upon said representation; that in September, 1940, the individual defendants conceived a plan and subsequently consummated same, whereby the successor non-profit corporation was organized, the assets of the predecessor corporation transferred to it without consideration, the predecessor corporation dissolved, with the stockholders of the latter who consented to such plan receiving $10 per share out of the assets of the predecessor corporation; that the assets of the predecessor corporation prior to the transfer had a net value in excess of $500,000; that plaintiffs are now the sole owners of the shares of the predecessor corporation, and that such shares would be of a value substantially in excess of $100,000, if the transfer should be set aside, and otherwise would be without value.

A copy of the Articles of the predecessor corporation is attached to and made a part of the amended complaint. It is there stated that the purposes for which the Los Angeles County Fair "is formed are to advance the agricultural and mechanical and all other interest of every kind and nature of the County of Los Angeles, and vicinity, and for the competitive exhibition of farm products, live stock and trials of speed, mechanical products, and all other products of every kind and nature, and to promote the general interests of the community and for all other purposes for which such organizations are intended * * *" and "to carry on, promote, and conduct *all* business of said corporation *without profit to the stockholders thereof.*" (Italics added.)

Plaintiffs ask the following relief: That the acts of the individual defendants be declared fraudulent and set aside; that the dissolution of the predecessor corporation be vacated; and that the defendants be required to convey to the predecessor corporation, or to the persons interested therein, all the assets it conveyed to the successor corporation.

It is not alleged in the amended complaint that the plan to have the assets of the predecessor corporation conveyed to the successor corporation was to bring about a profit to the individual defendants or to freeze out the plaintiffs. The price of $10 per share which the individual defendants and all other consenting stockholders of the predecessor corporation received for their stock was the par value thereof as fixed by the Articles of Incorporation. It is not alleged that these three plaintiffs did not have the same opportunity as the individual defendants and other stockholders to cash in their stock at the same price. Also, it is not alleged that the plaintiff did not have proper notice and full knowledge of all the steps in the transfer of the assets in question from one corporation to the other or that any of them made any protest or objection thereto.

It is not alleged that the successor corporation is not carrying out the non-profit public purposes for which it and the predecessor corporation, Los Angeles County Fair, were organized.

The number of shares in the predecessor corporation owned by the three plaintiffs is not stated in the amended complaint, but it is clear from their brief that theirs is a minority interest. (On oral argument it was stated the plaintiffs owned 20¾ shares out of a total of 1712 issued and outstanding.)

[1] Although it is not alleged in the amended complaint, it is a fact of which the trial court, as well as this court, can take judicial notice that substantial sums of public moneys have been appropriated for the development of the Los Angeles County Fair. Sec. 1875, subd. 3, Code Civ.Proc.; Loranger v. Nadeau, 1932, 215 Cal. 362, 365, 10 P.2d 63, 84 A.L.R. 1264; Livermore v. Beal, 1937, 18 Cal.App.2d 535, 539–542, 64 P.2d 987; Sec. 13 of the Horse Racing Act, St.1933, p. 2052, as amended in 1935, St. 1935, p. 1587.

Reduced to its simplest terms, the situation, as disclosed by the amended complaint, is that these three plaintiffs are seeking to set aside a transfer of assets from one non-profit, public use corporation, to another non-profit, public use corporation, where no profit has been realized by anyone and where no concealment or misrepresentation has been practiced by those responsible for the transfer and no unequal advantage taken of the plaintiffs who, however, seek a profit for themselves.

The assets of the predecessor corporation were transferred to the successor corporation on February 21, 1941. The former corporation was dissolved on January 15, 1942. The plaintiffs filed this action on March 22, 1943—more than two years after the transfer of the assets and more than one year after the dissolution of the predecessor corporation.

[2] By their demurrer the defendants, among other things, raise the statute of limitations and laches. They particularly rely on section 341, subdivision 3, Code of Civil Procedure, which provides that an action must be brought within six months "To set aside or invalidate any action taken or performed by a majority of the trustees of any corporation heretofore or hereafter dissolved by operation of law, *including the revivor of any such corporation.*" (Italics added.) Since more than a year elapsed between the dissolution of the predecessor corporation and the filing of this action, it is clear that the right to vacate the dissolution of said corporation, which is part of the relief plaintiffs request, is barred by the italicized portion of the above code section. This, of course, includes any rights and relief dependent upon the revivor of said corporation.

[3-5] The plaintiffs also seek to have the transfer of assets to the successor corporation declared void and the same vacated and set aside. In addition they seek an accounting. Such relief is purely equitable and consequently subject to the defense of laches which can be raised by demurrer. Livermore v. Beal, supra, 18 Cal.App. at page 548, 64 P.2d 987; Kleinclaus v. Dutard, 1904, 147 Cal. 245, 250, 81 P. 516; Superior California Fruit Land Co. v. Grossman, 1916, 32 Cal.App. 357, 361,

162 P. 1046; Arnold v. Universal Oil Land Co., 1941, 45 Cal.App.2d 522, 530, 114 P.2d 408; Clanton v. Clanton, 1942, 52 Cal.App. 2d 550, 555, 126 P.2d 639. "There is no artificial rule as to the lapse of time or the circumstances which will justify the application of the doctrine of laches, and each case as it arises must necessarily be determined by its own circumstances." Marsh v. Lott, 1909, 156 Cal. 643, 647, 105 P. 968, 969.

[6] In Ballentine on California Corporation Laws (1938 Ed.), 186, sec. 201, it is said that: "Shareholders must act promptly or they will be barred by laches from questioning the validity of a sale and transfer of assets."

[7] These plaintiffs, however, did not file their complaint until two years and one month after the transfer of the assets to the successor corporation and not until one year and two months after the dissolution of the predecessor corporation. Also, nearly a year elapsed between the transfer of the assets and the dissolution. No facts or circumstances are alleged to excuse this delay and "if circumstances that might excuse the delay are not alleged, it will be presumed that they do not exist." Kleinclaus v. Dutard, supra, 147 Cal. at page 250, 81 P. at page 518.

[8, 9] The obligation on the part of these plaintiffs to act promptly if they desired equitable relief against the transfer of the assets is analogous to the duty of one who desires to rescind a contract because of misrepresentation and fraud to give notice thereof promptly. There are many cases in which delays for a shorter period than a year have been held fatal to the right to rescind. See: Maginess v. Western Securities Corporation, 1918, 38 Cal.App. 56, 175 P. 277—6 months; Bailey v. Fox, 1889, 78 Cal. 389, 20 P. 868—4 months; Gamble v. Tripp, 1893, 99 Cal. 223, 33 P. 851—4½ months; Marten v. Paul O. Burns Wine Co., 1893, 99 Cal. 355, 33 P. 1107—3 months; J. I. Case Threshing Machine Co. v. Copren Bros., 1919, 45 Cal. App. 159, 187 P. 772—4 months; Stowe v. Kaetzel, 1940, 38 Cal.App.2d 356, 101 P.2d 719—11 months; Sanders v. Magill, 1937, 9 Cal.2d 145, 70 P.2d 159—4 months; Campbell v. Title Guarantee, etc., Co., 1932, 121 Cal.App. 374, 9 P.2d 264—9 months. Under the circumstances of this case it clearly appears that the plaintiffs waited an unreasonable length of time before seeking equitable relief.

It cannot be said that this unreasonable delay has not operated to the disadvantage of interested parties. In this connection it must be borne in mind that there were stockholders in the predecessor corporation other than the three plaintiffs and the individual defendants. Also, the general public has an interest in the continued and unimpaired operation of either the successor or predecessor corporations. They have an investment in the Los Angeles County Fair. It has become an institution of great educational value to those interested in agriculture, horticulture, citrus and stock raising, as well as to those interested in the mechanical arts and sciences. Because of the lapse of more than six months after the dissolution of the predecessor corporation before the bringing of this action the court could not properly give judgment for the revival of that corporation. Hence, if the plaintiffs should succeed in setting aside the transfer of assets to the successor corporation they cannot be returned to its predecessor because it is legally dissolved. Thus the public purposes of both the successor and predecessor corporations would be thwarted and the public would be injured. The plaintiffs, however, have an alternative to that portion of their prayer which requests reconveyance of the assets to the predecessor corporation. That alternative is that the reconveyance be "to the persons interested therein," i. e. in the predecessor corporation. They, however, claim to be the only remaining stockholders of that corporation. That means, then, that if the predecessor corporation cannot be revived the assets conveyed to the successor corporation should be transferred to these three plaintiffs, who would apparently claim them as their own. The unfair advantage which they would thus obtain over all the other stockholders is obvious. In this connection it is to be noted that this is not a representative suit brought on behalf of the plaintiffs and all other stockholders. For the foregoing reasons the demurrer was properly sustained.

The views herein make it unnecessary to consider other grounds urged by the respondents for affirmance of the judgment.

[10] No abuse of discretion is shown in denying the plaintiffs further opportunity to amend their complaint.

The judgment is affirmed.

DESMOND, P. J., and SHINN, J., concur.

70 Cal.App.2d 586

LUSHER v. SILVER et ux.

Civ. 14703.

District Court of Appeal, Second District, Division 1, California.

Aug. 27, 1945.

Rehearing Denied Sept. 19, 1945.

Hearing Denied Oct. 25, 1945.

1. Partnership ⚷17, 47

The fact of partnership depends upon the intention of the parties and, to determine that intent, not only the words of the agreement itself, but the actions and conduct of the parties, may be considered.

2. Partnership ⚷53

Evidence establishing that plaintiff was to share in profits of real estate transactions conducted by plaintiff with defendant's money was prima facie evidence that plaintiff was a partner. Civ. Code, § 2401, subd. 4.

3. Partnership ⚷53

Evidence supported finding that partnership existed between plaintiff broker and defendant whereby plaintiff was to receive half the profits of real estate transactions conducted by plaintiff with defendant's money and that it was not contemplated that plaintiff should split commissions so as to invalidate agreement.

4. Appeal and error ⚷1011(1)

District Court of Appeal is bound by finding of trial court on conflicting evidence.

5. New trial ⚷82

Whether new trial should be granted on grounds of accident and surprise is a matter within sound discretion of trial court.

6. New trial ⚷82

In suit to establish existence of partnership and for an accounting of profits, trial court did not abuse its discretion in denying defendant's motion for a new trial on ground of accident and surprise.

7. Partnership ⚷336(3)

Evidence supported finding of profit in the purchase and sale of properties, so as to entitle plaintiff partner to an accounting thereof.

◆

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by Herman J. Lusher against Jack T. Silver and wife to establish existence of a partnership and for an accounting. From a judgment for plaintiff, defendants appeal.

Affirmed.

Phillip W. Silver, of Los Angeles, for appellants.

Henry S. Cohen, of Los Angeles, for respondent.

DRAPEAU, Justice pro tem.

Plaintiff and defendant Jack T. Silver became acquainted in 1942 (defendant Lube Silver is the wife of defendant, Jack T. Silver, and appears in the case because title to certain properties and assets of the partnership hereafter discussed were carried in her name. Reference to defendant hereafter will be to defendant Jack T. Silver.) Plaintiff was a real estate broker, defendant was not, but the defendant had money which he desired to invest in real estate. Plaintiff testified that in 1943 defendant suggested that plaintiff and defendant buy real estate, plaintiff to furnish his knowledge of realty values, and defendant to furnish the money; that defendant said he had $50,000 and could lay his hands on another $100,000; that defendant proposed they should go together and split the profits fifty-fifty; that plaintiff agreed, and suggested a written memorandum should be drawn up, but defendant replied that it was not necessary, his word was as good as his bond.

Then plaintiff testified to the purchase of certain properties, to the manner of inspection of them by plaintiff and defendant; that advertisements for the sale of this real estate were placed in newspapers, and that the expense of advertising was paid equally by the parties.

In behalf of plaintiff, another witness testified to hearing conversations between the plaintiff and defendant relative to purchase and sale of property; another witness testified that defendant told her he was in the real estate business with plaintiff; another testified that the defendant introduced the plaintiff as his partner; another that the defendant told him that the plaintiff was his partner; others that the parties were together inspecting properties with a view to purchasing the same.

The trial court found that there was an oral agreement constituting a partnership between the parties for the purchase and sale of real estate, profits to be divided equally, took an accounting and found a balance due from defendant to plaintiff.

On appeal defendant contends that the language testified to by plaintiff "why not go together and buy ourselves properties and split the profits on them" is insufficient to establish a partnership as to the properties which the court found they bought and sold as partners.

[1] In the last analysis the *fact* of partnership depends upon the intention of the parties. To determine this intent not only the words of the agreement itself, but the actions and conduct of the parties may be considered. All the evidence should be taken into account to support the finding. Associated Piping & Engineering Co. v. Jones, 17 Cal.App.2d 107, 61 P.2d 536.

Section 2401 of our Civil Code sets forth tests to determine the existence of a partnership. One important test is to be found in Subdivision 4 of the section, which provides that the receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner. Also see Swanson v. Siem, 124 Cal.App. 519, 12 P.2d 1053; Krenz, etc., Co. v. England, 109 Cal.App. 747, 293 P. 689; Coward v. Clanton, 122 Cal. 451, 55 P. 147; Black v. Brundige, 125 Cal.App. 641, 13 P.2d 999; Spier v. Lang, 4 Cal. 2d 711, 53 P.2d 138; 1 Cal.L.Rev. 482.

[2, 3] In this case plaintiff received no part of the profit but he testified that it was agreed that he should. The defendant testified to the contrary. For the purposes of this appeal we must deem plaintiff's testimony in this respect, together with the other testimony referred to, sufficient to support the finding of the trial court that there was a partnership. Kling v. Crown Finance Corporation, 63 Cal.App. 2d 33, 146 P.2d 54.

[4] Next defendant contends that the partnership agreement, if any, contemplated splitting commissions of plaintiff as a realty broker, which would be illegal and void. Defendant testified that this was the agreement; plaintiff testified it was not. Again, in conformity with the familiar rule binding on courts of appeal in such a situation, this court is bound by the finding of the trial court.

[5, 6] Also the defendant contends that his motion for a new trial should have been granted on the grounds of accident and surprise. This is a matter committed to the sound discretion of the trial court, and a review of the record discloses no abuse thereof.

[7] Finally defendant contends that the trial court's finding of profit in the purchase and sale of one of the properties purchased is not supported by the evidence. However, again this matter was testified to by the plaintiff, and his testimony is sufficient to support the finding.

The judgment is affirmed.

YORK, P. J., and DORAN, J., concur.

Hearing denied; SCHAUER, J., dissenting.

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70 Cal.App.2d 654

CAFE APOLLO CO. v. ANSELM.

Civ. 14872.

District Court of Appeal, Second District, Division 1, California.

Aug. 31, 1945.

Hearing Denied Oct. 29, 1945.

1. Appeal and error ⇨1097(1)

Once a question of law has been determined and is sought to be relitigated upon a second appeal to same appellate court, the first and original determination thereof is the "law of the case" and no re-examination is authorized.

See Words and Phrases, Permanent Edition, for all other definitions of "Law of the Case".

2. Appeal and error ⇨1097(1)

Where sublease had been interpreted on prior appeal, in unlawful detainer action, and evidence adduced at the respective trials was not substantially different and issues remained the same, consideration of questions raised on subsequent appeal was concluded by decision on former appeal under doctrine of the "law of the case".

3. Landlord and tenant ⇨291(13)

Evidence justified finding for defendant in unlawful detainer action on ground that defendant upon expiration of her sublease, which terminated contemporaneously with plaintiff's main lease, was given right to renewal of sublease for a term concurrent with that of new lease to be obtained by plaintiff and that defendant exercised her right properly and that main lease, which had been renewed, had not expired and that it was not shown that sublease was at any time a month to month tenancy.

◆

Appeal from Superior Court, Los Angeles County; Harold B. Jeffery, Judge.

Action by Cafe Apollo Company, a corporation, against Agnes Marie Anselm for unlawful detainer. From a judgment for defendant, plaintiff appeals.

Affirmed.

Earl Malmrose and O. H. Myrick, both of Los Angeles, for appellant.

Guy B. Graham, of Los Angeles, for respondent.

WHITE, Justice.

This cause is before us for the second time. On a prior appeal, Cafe Apollo Co. v. Anselm, 47 Cal.App.2d 151, 117 P.2d 691, 693, this court reversed a judgment in favor of plaintiff. Reference is made to the case just cited for a statement of the factual background which gave rise to this litigation. The second trial resulted in judgment for the defendant, from which plaintiff now prosecutes this appeal. Both trials were had upon the same pleadings and the facts and circumstances shown in evidence in connection with the relationship of the parties and their written as well as oral agreements with each other are substantially the same, save and except that a portion of the evidence was received at the first trial by stipulation as to what testimony would be given by the defendant were she present in court, whereas at the second trial the witness was personally present and testified substantially to the same facts covered by the aforesaid stipulation at the former trial.

The sole issue involved in this case we think may be fairly stated as whether, upon the expiration of the sublease held by defendant and which terminated contemporaneously with the main lease held by plaintiff, the defendant was given the right to a renewal of her sublease for a term concurrent with that of a "new" lease being negotiated and which was finally obtained by plaintiff, provided the option for such renewal was accepted by plaintiff when the original sublease by its terms expired.

On the first trial, the court sustained plaintiff's objections to the admission of any evidence of the conversations referred to in the stipulation, and which are substantially the same as the conversations testified to by defendant at the second trial as having taken place between herself and Joseph Tadini, secretary of plaintiff corporation, with respect to their mutual understanding of certain provisions of the sublease, and rendered judgment for plaintiff. On the first appeal, this court decided that certain provisions therein quoted from the sublease were ambiguous and that it was therefore "proper to resort to extrinsic evidence for the purpose of explaining what was actually intended by the parties at the time when the sublease was executed." Pursuant to the holding of this court on the former appeal, the trial court upon the second trial admitted such conversations into evidence and we have no hesitancy in saying that, if the defendant's testimony as to what transpired at said conversations was believed by the court, as evidently it was, then the court was justified in finding, as it did, "that it is true that the defendant did not occupy the premises on a month to month tenancy at any time * * *"; and "that it is true that defendant took possession of said premises under a written lease executed by plaintiff and defendant and remained in possession of said premises under and by virtue of the terms of said lease until defendant was unlawfully ejected by the plaintiff."

[1-3] All of the issues raised upon this appeal were presented on the former appeal and consequently determination by the appellate tribunal thereon became the law of the case on the second trial and remains the law of the case upon the second appeal. Steelduct Co. v. Henger-Seltzer Co., 26 Cal.2d 634, 160 P.2d 804. It is thoroughly established as the law of this state that once a question of law has been determined and is sought to be relitigated upon a second appeal to the same appellate court, the first and original determination thereof is the law of the case and no re-examination is authorized. The contract in the instant case having been once interpreted by decision on appeal, that interpretation is the law of the case, and, since the evidence adduced at the respective trials was not substantially different and the issues remained the same, consideration of the questions raised was concluded by our decision on the former appeal. Gore v. Bingaman, 20 Cal.

2d 118, 121, 124 P.2d 17; McCarty v. Wilson, 57 Cal.App. 703, 704, 207 P. 924; Carpenter v. Pacific States Savings & Loan Co., 19 Cal.App.2d 263, 64 P.2d 1102, 66 P. 2d 656.

We have carefully examined the record in this case and the issues presented in the light of the decision on the former appeal and are convinced that not only because of the law of the case but because of the sufficiency of the evidence to support the findings, and the findings to support the judgment, the latter cannot be disturbed.

For the foregoing reasons, the judgment is affirmed.

YORK, P. J., and DORAN, J., concur.

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70 Cal.App.2d 628

PEOPLE v. SHIELDS.

Cr. 3886.

District Court of Appeal, Second District, Division 3, California.

Aug. 30, 1945.

Hearing Denied Sept. 27, 1945.

1. **Kidnapping** 🔑5

Evidence that child whom defendant was charged with kidnapping was only a few days over three years old, and that child called for mother as she was being carried away by defendant, sufficiently established element of force, so as to authorize conviction of kidnapping.

2. **Criminal law** 🔑878(4)

A charge of burglary based on ground that defendant entered building with intent to commit rape and to commit offense of lewd conduct with child would not fail because jury found defendant not guilty of rape. Pen.Code, §§ 288, 460.

3. **Infants** 🔑20

Proof that defendant's acts were with intent to arouse his own passion would be sufficient to support conviction of offense of lewd conduct with child without showing that lust, passions, or sexual desires of alleged victim were affected. Pen.Code, § 288.

4. **Burglary** 🔑41(1)

Evidence supported conviction of burglary based on defendant's entering apartment building with intent to commit offense of lewd conduct with child, notwithstanding that it was shown that the offense with child was committed on roof of the building, where jury could have found that defendant had intent to commit the offense when he entered the building. Pen.Code, §§ 288, 460.

5. **Infants** 🔑20

Evidence supported conviction of lewd conduct with three-year-old child. Pen. Code, § 288.

6. **Criminal law** 🔑346

In prosecution for kidnapping, burglary, and lewd conduct with three-year-old child, testimony of mother of alleged victim and chemist which tended to show that child had been on roof of apartment building where attack allegedly occurred had probative value and was properly admitted. Pen.Code, §§ 288, 460.

7. **Criminal law** 🔑1170½(5½)

Refusal to strike trial court's own question as to whether defendant had received an honorable discharge from navy and answer given did not constitute prejudicial error, where defendant brought question upon himself by volunteering statement on cross-examination that he had been shell shocked and discharged out of the navy.

8. **Criminal law** 🔑339, 741(2)

Testimony concerning defendant's visit to hospital in which alleged victim was confined and occurrences when defendant was brought in her room was admissible for purpose of identification, and weight of such testimony was for jury.

Appeal from Superior Court of Los Angeles County; Edward R. Brand, Judge.

Kenneth J. Shields was convicted of kidnapping, burglary, and violation of section 288 of the Penal Code, and he appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Everett W. Mattoon, Deputy Atty. Gen., for respondent.

DESMOND, Presiding Justice.

The defendant was charged with the commission of four felonies: Kidnapping, burglary, violation of section 288 of the Penal Code, and rape. A jury found him not guilty of rape but guilty of the three other felonies. He appeals from all the judgments of conviction on the ground that they are contrary to the evidence and also upon claimed errors of law.

The People presented evidence tending to prove that on February 25, 1944, between the hours of twelve noon and one p. m., the defendant called at the Bellevue Apartments in Los Angeles, picked up and carried a child named Susan, a few days over three years of age, to the roof of the building and committed upon her the lewd act denounced by section 288. Several women residing in the Bellevue testified that they saw the defendant there at the time mentioned. According to a Mrs. Johnson, living on the first floor, she saw him between 12 and 12:30 p. m. as he came up Boylston Street, entered the house by himself and went upstairs. As he passed the corner of a nearby store where Susan was playing in the dirt she had seen him pat the little girl on the head. He came downstairs about eight or ten minutes later and she saw him leave the house. About ten or fifteen minutes after that she noticed defendant again as he came around the corner of the house, and this time he had Susie with him. She stated that she saw him going upstairs carrying the little girl on his hip with her legs around his waist and her left arm around his neck; that at the time Susan was calling "Mama" in a whining or whimpering way; that defendant was saying something to the child about a tricycle or "trike"; that she heard his footsteps go up the stairs to the second floor; that about fifteen minutes later he came running down the stairs, "ran out on the porch, stopped for a moment, brushed his clothes off, ran his hand through his hair, jumped off the bottom stairs and ran north on Boylston." Mrs. Johnson further testified that about two minutes after she saw defendant running down the stairs, following his trip upward with Susie, she heard the little girl screaming, and, going out, found her on the second floor holding up her panties. A Mrs. Bass, landlady of the Bellevue, was in the room with her daughter, Mrs. Johnson, and testified that she saw the defendant "galloping" north on Boylston and noticed too that he was running his hands through his hair; that a few minutes later she saw Susie crying and holding her clothes up and that they were all soiled.

A Mrs. Mattingly testified that the defendant had occupied the apartment next to her's in the Bellevue; that she knew him by sight, and that as she was leaving the apartment house at about 12:15 p. m. on February 25th she met him coming toward her with Susan in his arms and spoke to him, saying, "How do you do," in answer to his greeting in the same words. Her testimony was corroborated by her seven-year-old daughter, who stated that she saw the defendant going upstairs with Susie lying in his arms. A Mrs. Baker, living on the second floor of the Bellevue, testified that between twelve and one o'clock of February 25th she saw defendant as he came down the third-floor stairs around the landing, and noticed that he patted her little boy on the head. She then entered her apartment and listened to a radio program. She heard no screams.

Susan's mother testified that on February 25th the little girl and her six-year-old brother had their lunch at about twelve o'clock and then went out to play; that she next saw Susan when she came into the house crying at about 12:45 p. m.; that she picked her up and noticed she had blood in her panties; that she washed the child and examined her private parts and saw that she had been torn in the lower part of her vagina, and that the wound was still bleeding; that police officers were called and she and Susan went with them at about 2 p. m. to the Georgia Street receiving hospital and then immediately afterward to the College Hospital at Glendale. A doctor at each institution examined the child and found the hymen freshly ruptured and also a fresh laceration about one and one-half inches long in the posterior part of the vagina.

Ray Pinker, a chemist attached to the Los Angeles police department, testified that on the afternoon of February 25th he went to the roof of the Bellevue Apartments and determined that defendant had walked there recently, by comparing with defendant's shoes rubber-heel imprints which he found on the tar-like surface. He examined the clothing of Susan but found no seminal stains, nor did he find any upon the clothing which defendant said he wore on February 25th and which police officers took from him when they arrested him in mid-afternoon of that day. On that same day Mr. Pinker failed to find any blood upon the private parts of defendant or upon his clothing except a spot on the belt band of his shorts at the back. However, he did find scratch wounds on his neck which were still bleeding, and found blood in scrapings which he took from underneath his fingernails; also a spot of blood upon his left thumbnail and right ring finger. A smear had been taken at the receiving hospital from the area where Susan was injured and placed upon a glass slide, which when examined by Mr. Pinker showed no spermatozoa. Defendant told the police chemist that he had had a fight earlier in the day at the place of his employment, claiming the scratches on his neck resulted from it.

Defendant testified that in the fall of 1943 he had lived for a month and a half in an apartment at the Bellevue; that several times in February of 1944 he had called there, the last occasion on February 25th; that two or three days before that he inquired of Mrs. Bass for an apartment, having in mind a penthouse on the roof; that on that day he went on the roof, "looked in the penthouse window; I had heard the people in the penthouse apartment had moved out, and I knew the people, they were friends of mine; and I started to look in the window—I thought I had better not, I didn't have any business looking in anybody's apartment; and so I walked away from the penthouse, and I stood there for several minutes thinking whether it would be advisable for me to knock on the door and get Mrs. Mack to the door. Then I thought I had better not do that, she was married and her husband was gone, and it might cause talk; and so I walked around like the heelprints indicate. * * *" According to defendant, he finished his work at a restaurant where he was employed at about 6:30 a. m. of February 25th and spent the rest of the morning until 11:45 drinking with several people there; that he had a fight with a dishwasher shortly after he stopped working. "He tried to choke me. He got me down on the floor of the barroom where he was standing; he was standing at the bar as I came through the cafe. He got me down on the floor and choked me, and as I tried to get his hands off my neck I scratched my own neck doing it."

Defendant further testified that at Mr. Pinker's office, "I showed him the handkerchief with the blood on it and asked him if he wanted that for evidence. He turned it down. The blood was mixed with mucous. He could see I had a bloody nose that morning from a fight." He stated that he left the restaurant where he had helped his companions consume three pints of whiskey about 11:40 a. m., taking with him a bottle containing what was left of the liquor, and went first to his home, six blocks from the Bellevue Apartments, and then to the Bellevue, where he knocked on the door of an acquaintance living on the third floor and receiving no answer left and did not go back at any time. He testified that he did not take the child in his arms going into the apartment nor did he pick up Susie at that time; that the last time he was in the Bellevue was when he passed Mrs. Baker in the hall. He then described his arrest at his home by two police officers at about 3:30 p. m. of February 25th, saying that he had been asleep and was in bed wearing a T shirt; that he had not taken a bath when he returned that morning or noon and that his landlady, a Mrs. Packard, told the officers so. In this he contradicted the officer who had testified on cross-examination that defendant's landlady had said "he came home and took a bath." Defendant specifically denied having taken Susie on the roof February 25th or that he touched her with any instrument or portion of his body, or that he carried her from one portion of the County of Los Angeles to another portion against her will. Under cross-examination he stated that the dishwasher with whom he had a fight was named "Tex," and that present at the time were the bartender, Mr. Starr, "a fellow called Broadway" and a barmaid. He denied having seen Mrs. Mattingly or her daughter on February 25th. He denied that he told Officer Tetrick at the time of his arrest that he had been in bed all the morning of the 25th. The testimony of the officer on that subject had been given as follows:

"A. He had no clothes on but the bedclothes over him; he was naked.

"Q. What did you do after you saw the defendant in bed naked? A. We made him get up and asked him where he had been that day.

"Q. What did he tell you? A. He said he had been out to get work in the morning and came home and went to bed and was in bed all day.

"Q. He said he had been in bed all morning? A. Yes, the first he told us.

"Q. Then after he told you he had been in bed all morning what did he do? A. We asked if he had not used to live on Boylston and he said that he had. We asked him if he had not been up there that morning and he said yes, he had."

This same officer testified that he and another policeman went with Susan's mother and the defendant to the College Hospital; that the mother entered the room where the child was in bed and shortly thereafter the defendant went into that room, being assisted in doing so by the officers; that the little girl looked at the defendant and started crying and seemed very upset; that defendant had told him that he had not harmed the child in any way and that he was not guilty of any offense toward her. Susan's mother testified that the trip to the hospital was made probably on February 27th; that when she entered Susie's room the child was happy to see her and was singing, but that when defendant entered the room with the officer "she seemed to cower down. She was very much afraid. She looked at him and then she hid her head and started to cry"; that the defendant said nothing and did not answer when the officer asked him if he knew the little girl.

Defendant's version of what transpired at the hospital was as follows: "The doctor went in and pretty soon the other officer came out and said, 'You can bring the prisoner in now.' And so they brought me to the edge of the door, and I heard, while he was taking the handcuffs off—Mr. Tetrick was taking the handcuffs off of me—I heard Mrs. Miller inside say, 'They are going to bring in the man who hurt you and we want you to tell us if it is him'; and so he asked me right then and there, just about that time, Mr. Tetrick asked me, 'You are sure you have got nerve enough to go through with this, you dirty rat, son-of-a-bitch?' I said, 'Let's go.' He made me mad, and I said, 'Let's go'; and I started walking to the room. He let me walk in the room—he did not shove me into the room, I walked into it; and as I started to face the girl, in the middle of the room, he shoved me up against the wall. He said, 'Is this the man that hurt you?' and the little girl looked at me just blank, she didn't know what to think.

"Q. Don't tell what she thought. Then what happened? A. And, so, he let me stand there for about a half a minute. The child was looking at me all the time and she didn't know me; and, then, he grabbed me, and he says, 'All right, come on; get out of here.' As I was walking out I heard the mother say, 'Susie'—I looked around at that time; and she said, 'Susie, Susie, is not this the man who hurt you?' She was hysterical, and the child started to cry then; after I was already out of the room I heard her start to cry.

"Q. Now at that time did anybody say anything to you at all in the room? A. I don't know; I don't remember. To me?

"Q. Yes. A. No."

While defendant was being cross-examined by the District Attorney the following testimony was given:

"Q. Mr. Shields, directing your attention again to the time when you talked to Dr. Crahan on the 31st of July, 1944, in the county jail, you and he being present, did you not make a statement to the effect that you tried to think of whether the alleged act could have been done by you in such a state of intoxication that you did not remember doing it, but you did not believe it could have been? A. No, I did not say exactly that. He asked me here, how was it? He asked me if I had ever thought it could be me.

"Q. What was that? A. He asked me if I ever thought it could be me. I told him no. However, it had been suggested to me that being shell-shocked and discharged out of the Navy—that it had been suggested by Mr. Pinker, over in the Crime Laboratory, that I could have had a lapse of memory.

"Q. You told him it might have been done by you while you had a lapse of memory? A. No, I did not. * * *

"The Court: You were not discharged from the Navy because of shellshock, were you? A. Well, that was the main reason in back of it.

"Q. But that was not the reason you were discharged? A. No, not exactly.

"Q. Did you receive an honorable discharge from the Navy? A. No, I did not."

The county jail physician, Dr. Crahan, testified in rebuttal that on July 31, 1944, he had had a conversation with the accused substantially as quoted in the District Attorney's question. Susan's mother, also in rebuttal, denied that she had told her little girl at the College Hospital that "they are going to bring in the man that hurt you," and stated that she did not hear either one of the officers say to Susan, while indicating the defendant, "This is the man that hurt you." She further stated that Susie began to cry before the defendant left the room. Other witnesses, produced in rebuttal, contradicted various items of testimony given by defendant; e. g., whereas he testified that he went upon the roof two or three days before February 25th, Mr. Pinker stated that when he examined him on this subject on Saturday, February 26th, the day after Susan was hurt, defendant told him that prior to the 25th he was last on the roof on the prior week-end; "He thought it had been either the previous Friday or Saturday."

[1] The foregoing recital has been deemed necessary for a determination of appellant's contention that the verdict or verdicts of guilty rendered by the jury were contrary to the evidence. He argues that the record fails to indicate that he was guilty of kidnapping, since it was not shown that the element of force commented upon by the court in People v. Guerrero, 1943, 22 Cal.2d 183, 137 P.2d 21, was present in the taking of the little girl upstairs in the Bellevue Apartments. He cites Mrs. Mattingly's testimony that when she saw Susie in his arms the little girl was not crying. But Mrs. Mattingly saw them together as defendant was about to enter the building and a few seconds later Mrs. Johnson saw him ascending the stairs carrying Susie with him, at which time she was crying "Mama" in a whining or whimpering way. The jury was justified, considering the fact that the child was only a few days over three years old, in concluding that she was being taken by force and against her will. She could not by physical means resist effectively the defendant's taking her; her only recourse was to call to her mother, her natural protector.

[2, 3] Appellant's contention that the jury went contrary to the evidence when they found him guilty of first degree burglary rests upon various grounds. In considering them we must refer to the Penal Code. Section 459 provides that: "Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, railroad car, mine, or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary." Count II of the information, in charging this defendant, alleged that he entered the building occupied by Mrs. Bass with the intent then and there and therein unlawfully and feloniously to commit rape and violate section 288 of the Penal Code, felonies. Apparently the argument in appellant's behalf is that since the statute characterizes as criminal an intent, on the part of the person entering, to commit in the place entered "any felony," the charge of burglary against him must fail for the reason, first, that it was alleged in the information that he intended to commit not a single felony but two, and, second, the jury found him not guilty of rape. We do not know of any process of reasoning that gives validity to such an argument. The same is true of the idea advanced that the facts of the case did not support the finding of the jury because there was no "evidence to show the requisite intent in appellant * * *; the alleged victim not having testified there is no showing that her lusts, passions or sexual desires were affected one way or another." The intent requisite to sustain a conviction under section 288 is the performance of the proscribed act "with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such child." The only comment we have to make on this argument is that "such child" in this case could have been and was identified by the jury on the evidence before them as Susie (and she was barely three years old), and "such person" as appellant. It was sufficient if he had the intent to arouse his own passions. People v. McCurdy, 1923, 60 Cal.App. 499, 213 P. 59, is not in point.

[4] Section 460 of the Penal Code provides that: "* * * every burglary, whether in the daytime or nighttime, committed by a person * * * who while in the commission of such burglary assaults any person, is burglary of the first degree." Counsel argues that: "The assault, if any was committed, occurred on the roof of the apartment house. * * * The house or building within the meaning of the burglary statute must be a structure with walls on all sides and covered by a roof. People v. Stickman, 1867, 34 Cal. 242. Therefore, an assault committed upon a roof would not be an assault while in the commission of a burglary, a roof not being covered by

a roof and bounded by four walls." A sufficient answer to this argument lies in the statute itself. The Bellevue Apartments is a building. Moreover, it has walls on all sides and is covered by a roof. Appellant entered it. Did he at that time have the intent to commit a felony? From the fact that the jury found him guilty of violating section 288 of the Penal Code it is apparent that they also found that he had the intent to commit that crime when he entered the building. They had before them the testimony of Mrs. Johnson that when she first saw appellant on February 25th he was patting Susie's head at a nearby corner; that he then entered the Bellevue, went upstairs and after several minutes descended and left the building, only to return very shortly thereafter with Susie in his arms. Considering this and all the other testimony in the case, we cannot say that there was not sufficient basis for the jury's verdict on the burglary charge.

[5, 6] Our summary of the evidence in this case furnishes an adequate negative answer to appellant's complaint that his conviction of violating section 288 of the Penal Code is contrary to the evidence. The jury may have concluded from it that the child was taken by the defendant to the roof and there attacked, for there was testimony from appellant that when he went on the roof he saw nothing to indicate that there was anybody in the penthouse at that time. In view of Mrs. Johnson's testimony that defendant made two trips upstairs within a few minutes of each other the jury may have concluded that the first was in the nature of a survey to determine the feasibility of taking the child to the roof as a secluded spot for perpetration of the crime against her. Objection was made to certain testimony of the mother and the chemist which tended to show that the child had been on the roof. The circumstances testified to had some probative value and the court did not err in receiving the evidence.

Appellant claims that the court erred (1) in refusing to strike the court's own question as to "whether appellant was honorably discharged from the service" and the answer given; (2) in overruling the objections made to testimony concerning the visit to the College Hospital and the occurrences there, and (3) in not permitting cross-examination as to whether force was used in taking Susie.

[7] In regard to the claim that the trial judge should have granted the request to strike out his own question as to whether appellant was dishonorably discharged from the service, it may be said that appellant brought this upon himself by the answer which he made when being cross-examined by the District Attorney and which we have quoted. The judge did not ask the defendant if he had or had not been dishonorably discharged from the service. The question was: "Did you receive an honorable discharge from the Navy?" and it was a perfectly natural question, for shellshock would be a likely cause for an honorable discharge and appellant had previously volunteered the statement that "it had been suggested to me that being shell-shocked and discharged out of the Navy * * * that I could have had a lapse of memory." We do not feel that an error can justly be charged to the court in connection with this incident; rather, it was an error on the part of the appellant to use language which so easily might have misled the jury.

[8] The next assignment of error is not well founded. Appellant argues that the conclusions which the prosecution expected to derive from the testimony of what occurred at the hospital "was apparently that the alleged victim was registering a complaint by her actions in the hospital room, although nothing was said at that time." In answer respondent asserts: "The purpose is clearly misconceived. The only purpose at all could have been one of identification. The weight or the credibility of that, if any, were for the jury to determine." We think the latter view is the correct one, since there was no evidence that the child said a word at the meeting that could be construed as a complaint against the defendant; but, according to appellant's own testimony, Officer Tetrick asked the child, "Is this the man that hurt you?" and as appellant was walking from the room he heard her mother say, "Susie, is not this the man who hurt you?"

We have been unable to find anything in the record to substantiate appellant's final claim of error that the trial court erred "in not admitting in evidence upon cross-examination testimony as to whether there was force in the alleged kidnapping."

Since in our opinion the evidence sustains the verdict of guilty in all three counts upon which appellant was convicted, and since no prejudicial error appears, the judgments are each and all affirmed; so also is the order denying his motion for a new trial.

SHINN and PARKER WOOD, JJ., concur.

HUEBOTTER v. FOLLETT. *

Civ. 14671.

District Court of Appeal, Second District, Division 3, California.

Aug. 30, 1945.

Hearing Granted Oct. 25, 1945.

1. Automobiles 🔑181(2)

Other benefits or considerations to driver of automobile from one riding therein than cash or its equivalent may be "compensation" for ride, so as to render such rider a "passenger" rather than "guest" within automobile guest statute. Vehicle Code, § 403, St.1935, p. 154.

See Words and Phrases, Permanent Edition, for all other definitions of "Compensation", "Guest" and "Passenger".

2. Automobiles 🔑181(2)

Mere exchange of social amenities and reciprocal hospitalities between driver of and one riding in automobile does not constitute "compensation" rendering rider a "passenger" rather than "guest" within automobile guest statute. Vehicle Code, § 403, St.1935, p. 154.

3. Automobiles 🔑181(2)

Whether certain benefits or considerations to driver of automobile from one riding therein constitute "compensation" for ride, so as to render such rider a passenger rather than guest within automobile guest statute, depends on motive prompting driver to furnish transportation. Vehicle Code, § 403, St.1935, p. 154.

4. Automobiles 🔑245(24)

Whether driver of automobile received compensation for transportation of another therein or such transportation was intended and received as mere gratuity, so as to render rider a guest of driver within automobile guest statute, rather than passenger, is question for trier of facts on proper evidence. Vehicle Code, § 403, St.1935, p. 154.

5. Automobiles 🔑246(2)
Trial 🔑260(8)

In action for injuries to one riding in automobile owned and driven by defendant, failure to instruct jury that defendant owed plaintiff duty to drive with ordinary care was error, but did not require reversal of judgment on verdict for defendant, in view of correct instructions as to law concerning passengers, guests and compensation for rides. Vehicle Code, § 403, St.1935, p. 154.

6. Automobiles 🔑244(20)

In action for injuries to one riding in automobile, owned and driven by defendant, when it collided with parked truck, contradictory testimony of plaintiff, defendant, and another rider warranted finding by jury that defendant was not negligent, even if jury found that plaintiff was a passenger rather than guest of defendant. Vehicle Code, § 403, St.1935, p. 154.

7. Appeal and error 🔑930(4)

The rule that all intendments are in favor of correctness of jury's verdict precludes assumption, on appeal from judgment on verdict for defendant in action for injuries to one riding in automobile owned and driven by defendant, that verdict was based on finding that plaintiff was defendant's guest rather than finding warranted by evidence that defendant was not negligent and hence not liable even if plaintiff was a passenger. Vehicle Code, § 403, St.1935, p. 154.

8. Appeal and error 🔑930(4)

On appeal from judgment on jury's general verdict, appellate court must assume that jury passed on every material fact issue submitted to them and that findings thereon were such as to support verdict.

9. Appeal and error 🔑930(4)

Where there is sufficient jury finding, sustained by evidence, to warrant judgment appealed from, such finding will be regarded by appellate court as finding on which judgment rested.

10. Appeal and error 🔑930(4)

In action for injuries to one riding in automobile owned and operated by defendant, where evidence warranted finding by jury that defendant was not negligent in running automobile into parked truck, appellate court must conclude, on appeal from judgment on verdict for defendant, that verdict was based on findings that plaintiff was a passenger and that defendant was not negligent rather than finding that plaintiff was defendant's guest. Vehicle Code, § 403, St.1935, p. 154.

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* Subsequent opinion 167 P.2d 193.

11. Trial ⚷260(1)

Refusal of plaintiff's requested instructions on matters adequately covered by instructions given was not error.

◆

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Action by Edwin D. Huebotter against P. T. Follett for personal injuries sustained in a collision between defendant's automobile, in which plaintiff was riding, and a parked truck. Judgment for defendant, and plaintiff appeals.

Affirmed.

Marion P. Betty, of Los Angeles, for appellant.

Nourse & Jones and Everett W. Thompson, all of Los Angeles, for respondent.

PARKER WOOD, Justice.

Plaintiff brought this action to recover damages for personal injuries sustained by him when the automobile in which he was riding, and which was owned and operated by defendant, collided with a parked truck. The driver of the truck was joined as a defendant under a fictitious name but was not served with summons and complaint, and did not appear in the action. Trial was by jury, and the verdict was in favor of defendant. Plaintiff appeals from the judgment on the verdict, and contends that the instructions were inadequate, confusing and prejudicially erroneous.

The evidence shows that plaintiff and defendant were cousins and had been friends for many years. Plaintiff, defendant and one Wilson were employed at Los Angeles Harbor. Plaintiff was a foreman supervising steel processing, and defendant and Wilson worked under his supervision. The three men went to and from their work in the same automobile. They worked 6 days per week, and each man drove his automobile 2 consecutive days each week, calling for the other two men in the morning at their homes, and returning them to their homes at night. On the day of the accident, Friday, March 27, 1942, it was defendant's turn to drive his automobile. He called for plaintiff and Wilson, at the regular time, in his 1939 Oldsmobile coupe. They proceeded toward the harbor along the same route which they had followed each morning. The accident occurred on a Los Angeles River bridge, on Atlantic Boulevard, a state highway in Los Angeles County. (That site is not in a business or residential district.) There is a curve in said highway about 240 feet north of the bridge, and from the curve to the approach to the bridge the highway is straight except for a slight bend in the highway at the approach to the bridge. The highway is 60 feet wide at the curve, 40 feet wide between the curve and the bridge, and 60 feet wide on the bridge. The bridge is about 500 feet long, extends approximately north and south, and has an incline upward of 12 to 15 feet from the north end to the middle of the bridge. The highway over the bridge has a double white line in the center, and on one side of the double line there are two traffic lanes for southbound vehicles and on the other side there are two traffic lanes for northbound vehicles. The two inside traffic lanes, adjoining the double line, are each 10 feet wide, and the two outside traffic lanes are each 20 feet wide. Defendant was proceeding in the outside lane for southbound vehicles, which will be referred to herein as lane 1, and another automobile was proceeding in the inside lane for southbound vehicles,which will be referred to herein as lane 2. The truck, a Ford with a stake body, was parked on the bridge, about 189 feet from the north end of the bridge, at an angle in lane 1, with the right front wheel about 2 feet from the west curb and the left rear corner of the truck about 15 feet from the west curb. The left rear wheel was not on the truck (the truck driver had taken the wheel off to have the tire repaired). The accident occurred about 6 a. m., before daylight, and the headlights of defendant's automobile were lighted. As defendant approached the truck, he swerved to the left about 5 feet but was unable to pass the truck without colliding with the automobile in lane 2, and the right side of his automobile collided with the left rear portion of the parked truck, causing the injuries to plaintiff. It is undisputed that the truck was parked in violation of the Vehicle Code; and that defendant could not have swerved to the right without striking the right curb or bridge structure.

Plaintiff testified that as they came out of the curve they were in a straight line of vision with the bridge, and he noticed an object on the bridge outlined against the skyline; that he could not determine the shape of it—he could not "see from the light that was there"; that "there was a sort of an overcast that morning"; that he did not recall seeing any lights on either side of the highway; that he never "did actually identify the object on the bridge"—he "never tried to identify" it "because he realized it was stopped," and he "was more interested in the car that was alongside" of them, as they "would be forcibly put into it" unless they "got a chance to get out of there"; that when he first noticed the object they were about 200 feet away from the north end of the bridge; that he first saw the object when they were about 400 feet from the north end of the bridge—that it was then approximately 600 feet away; that after he saw the object they traveled about 300 feet and then he (plaintiff) said, "Look out, Bud"; that he turned to defendant but defendant did not seem to be paying any particular attention to the object, and he seemed to be looking at the car to their left; that when he (plaintiff) said, "Look out, Bud," they were approximately 100 feet from the north end of the bridge; that defendant seemed to freeze at the wheel and his automobile seemed to gain momentum; that defendant did not put his brakes on at any time before the impact; that when they were about 200 feet from the bridge he looked at defendant's speedometer and they were traveling 55 miles an hour; that he did not form any estimate of the speed at which defendant was traveling at the time of the collision except he did not "recall any slackening of speed at any time" after he looked at the speedometer. On cross-examination plaintiff testified that he did not say (on direct examination) that defendant accelerated his speed—that defendant "didn't seem" to change his speed or "to do anything"; that he (plaintiff) "realized they were in a jackpot" unless defendant could "bring the thing to a stop." He further testified that he drove his automobile to work on Mondays and Tuesdays and took Wilson and defendant with him; that Wilson drove his automobile on Wednesdays and Thursdays, and defendant drove his automobile on Fridays and Saturdays; and that it was their general practice to drive their automobiles on those days but sometimes they changed to other days. A map of the bridge and vicinity was received in evidence and plaintiff marked thereon the position of defendant's automobile when he (plaintiff) first saw the truck, which was at a point approximately 600 feet from the truck.

Wilson testified that he was riding in defendant's automobile on a share-the-ride basis; that at the time plaintiff said, "Look out, Bud," he (the witness) noticed a "dark object on the bridge" when they "got into the turn going onto the bridge"; that they were between 300 and 425 feet from the truck when he first saw it; that he did not pay "any particular attention" as to what defendant's speed was, but he "should judge around 45, between 45 and 50"; that defendant's automobile was 175 to 250 feet from the bridge when plaintiff gave the warning, and it seemed that defendant then increased his speed; that he got the impression defendant increased his speed after said warning because they "got up to that truck awful fast"; that he did not observe defendant put on his brakes; that afterward he "noticed that as he [defendant] applied his brakes," they "stayed right with that car there [in lane 2] for awhile"; that it seemed defendant "was going to pass it," and he (the witness) knew if they "got by ourselves it would be all right," but it seemed to him defendant was "going kind of fast"; that defendant tried to swing around the truck; that at the time they collided they were traveling "closer to 50 miles an hour"; that he was certain it was dark when the accident occurred; that the truck and defendant's automobile were touching after the accident; that after the impact defendant's automobile went forward about 3 feet; that "the truck was moved some"; that defendant had good lights on his automobile; that plaintiff did not seem excited when he said, "Look out, Bud"; and that the automobile reached the truck "just like that (snap of the fingers)." Later in the day the witness was recalled by counsel for plaintiff who stated that the witness wished to correct a mistake in his previous testimony. The witness then testified to the effect that he had been misled in his testimony by counsel for defendant who had snapped his fingers—that from the time he saw the truck to the time of the collision it was longer than a snap of the fingers; that several seconds elapsed—he "would say about ten or eleven seconds." On cross-examination, at the request of counsel for defendant, the reporter read the question and answer in connection with the snapping of fingers, after which said counsel stated, "Now, you see from that that the snap of the fingers was started by you, Mr. Wilson, and it didn't come from me," to which the witness replied: "I didn't recall that; I had it in mind all of the time it was you that was snapping your fingers." Counsel for defendant asked the witness to watch the second hand on the clock in the court room for eleven seconds. After complying with that request, the witness said, "It seems to me that it was that length of time." He further testified that he realized after testifying that morning that, if they were 400 feet away from the truck when he first saw it, it would take longer than a snap of the fingers to reach the truck and he "wanted to bring" that out (in his subsequent testimony); that he based his testimony as to 10 or 11 seconds on a "check" which he had made with his own automobile that morning before he testified the first time; that in making that check he traveled "30 miles an hour" and it took him "from that point" (where he first saw the truck) to the "point of the accident," 11 seconds, and that was the basis for "this eleven seconds instead of the snap of the fingers."

A police officer testified that he investigated the accident; that he arrived at the scene of the accident at 6:15 or 6:20 a. m.; that it was dark when he arrived; that defendant's automobile collided with the left portion of the rear of the truck; that the front and right side of defendant's automobile were damaged "back to the wheel," including the windshield and the right post supporting the windshield, and the lights on the right side were broken; that at the time he arrived "there was no tail light lit" on the truck; that he was unable to determine whether defendant's automobile made skid marks at the scene of the accident because there was rubbish on the pavement, apparently from the truck (the truck was loaded with leaf mold); that the truck had been moved forward by the impact but not a great distance; that he talked with defendant at the scene of the accident and defendant told him he was driving between 40 and 45 miles per hour, and that "he was approximately 140 to 150 feet" from the north end of the bridge before he saw the truck; that defendant told him he "attempted to stop after he got up to about 150 feet before he got onto the bridge"; that defendant also told him the truck was parked with no flares, and that his (defendant's) headlights did not pick up the truck until he was about 50 feet from it; that he applied his brakes and started to turn out around the truck, but the car on his left (in lane 2) came up and prevented him from going any farther to the left.

Defendant testified that it was very dark at the time of the accident; that there was "a fog, a slight overcast"; that his headlights were on the low beam; that he "must have been going around 45 miles an hour when" he "went into that curve"; that he slackened his speed going around the curve; that when he got to the bridge he "was picking up speed again," but he didn't know what speed that was; that when plaintiff said, "Look out, Bud," they were about 50 feet from the truck, and he (defendant) was looking straight ahead; that he knew there was an automobile in lane 2, but he was not watching it; that there were no lights on the truck; that as he looked up he saw "what must have been the tail light" about the same time plaintiff called his warning; that at that time the automobile in lane 2 had "pulled up a little bit further" and it was "approximately right around half a car length past" him; that he did not "recall whether" his brakes "had taken hold sufficient to slacken the speed"; that he did not recall that he was able to apply his brakes; that he was sure he tried to put his brakes on; that his highest speed prior to the accident was "around 45 miles an hour"; and that the collision nearly tore the body off his automobile. Portions of defendant's deposition, read into evidence, included the statements that defendant was traveling between 40 and 45 miles an hour when the collision took place, and that the impact moved the truck about 4 or 5 feet.

Another police officer testified that he was an accident investigator; that he went to the scene of the accident on the day of the accident or the following day; that when he saw the truck it had one tail light, and it was about 2 feet under the left rear portion of the body of the truck; that he did not recall seeing any skid marks on the highway; that the truck was loaded with leaf mold and sacks; that the load weighed about "300 pounds," and was about 3 feet high; and that he thought the truck weighed about 6200 pounds.

[1-10] Plaintiff contends that, as a matter of law, he was a passenger, and the court should have instructed the jury that he was a passenger. Section 403 of the Vehicle Code, St. 1935, p. 154, provides that, "No person who as a guest accepts a ride in any vehicle upon a highway *without giving compensation* for such ride * * * has any right of action for civil damages against the driver of such vehicle * * * on account of personal injury to * * * such guest during such ride, unless the plaintiff in any such action establishes that such injury * * * proximately resulted from the intoxication or wilful misconduct of said driver." (Italics added.) Whether plaintiff's status was that of passenger or guest, under section 403, depends upon whether plaintiff gave "compensation" for the ride. Benefits or considerations to the driver other than cash or its equivalent may be "compensation." Kruzie v. Sanders, 23 Cal.2d 237, 241, 143 P.2d 704. The nature of the compensation as contemplated by the statute is as variable as the particular facts involved. Whitechat v. Guyette, 19 Cal.2d 428, 431, 122 P.2d 47. There is no compensation where nothing more than the exchange of social amenities and reciprocal hospitalities are involved. Kruzie v. Sanders, supra, 23 Cal.2d at page 243, 143 P.2d at page 706. Whether certain benefits or considerations constitute "compensation" depends upon the motive which prompted defendant to furnish the transportation. It was stated in Swink v. Gardena Club, 65 Cal.App.2d 674, at page 677, 151 P.2d 313, at page 314, that the question as to compensation "depends on whether 'a special tangible benefit to the defendant was the motivating influence for furnishing the transportation.'" It was said in Fiske v. Wilkie, 67 Cal.App.2d 440, at page 448, 154 P.2d 725, at page 729, "The law of this state is well settled that the payment for gas and oil used on an automobile trip taken for the mutual pleasure of the driver and an injured occupant does not constitute compensation for the ride." Whether there is compensation or whether the transportation is intended and received as a mere gratuity is a question for the trier of fact upon proper evidence. Humphreys v. San Francisco Area Council, 22 Cal.2d 436, 442, 139 P.2d 941. Whether there is compensation within the meaning of section 403 of the Vehicle Code must, therefore, be determined from the circumstances of each particular case. Plaintiff argues that the allegations of paragraph VII of his complaint, except the first four lines thereof, were admitted by defendant, and by such admission it was established that plaintiff was a passenger. That paragraph is as follows—the portion thereof denied by defendant being in italics: "*That prior to and at the time of the said accident the plaintiff Edwin D. Huebotter was riding as a passenger in the said automobile of said defendant P. T. Follett which was being operated by said defendant on a 'share the ride' basis,* or pooling of transportation, with the said defendant Follett and one other passenger, one William Wilson. That said 'share the ride' or pooling transportation basis upon which the said plaintiff and said Wilson were operating was done for the purpose of preserving tires pursuant to the direction of the Federal Government of the United States. That at the time of the said accident, the said parties were on their way from their homes to their work at the Roosevelt Fleet Operating Base of the United States Navy, located on Terminal Island. That pursuant to their said co-operative plan of pooling transportation, each of the three persons had agreed to and were using their respective cars two days out of each week to transport themselves to and from their work to their homes. That the said defendant Follett at the time of the said accident was using his car on the first day of his regular allotted two days and the same would have ended on Saturday night; that the plaintiff, Edwin D. Huebotter would thereafter have operated his automobile in carrying as passengers the said defendant Follett and the said Wilson. Thereafter, Tuesday and Wednesday, said Wilson would have used his automobile to carry the plaintiff Edwin D. Huebotter and defendant Follett." The denial of a portion of that paragraph was not made until after the close of the testimony, and then upon motion by defendant the court granted him permission to make that denial. The denial, as shown above by italics, was to the effect that plaintiff was not a passenger on a "share the ride" basis. The portion of the paragraph which was not denied was in substance a statement of purported facts allegedly constituting the basis for sharing the rides. It is to be noted that the first sentence of the undenied portion of the paragraph states the purpose of the plaintiff and Wilson in operating on a "share the ride" basis, namely, to preserve

tires pursuant to the direction of the government. It is to be noted also that the purpose of *defendant* was not stated in that sentence. The remainder of said undenied portion, however, related to the manner in which the three persons, including the defendant, went to and from work. The pleadings and unconflicting evidence established that the three persons traveled together six days a week from their homes to their work, each using his own automobile two days a week. By using one automobile each day to transport all of them, instead of using a separate automobile for each one, the cost of transportation for each person was reduced. It was held in Peccolo v. City of Los Angeles, 8 Cal.2d 532, 537, 66 P.2d 651, that transportation under a similar arrangement was for compensation. The jury should have been instructed that defendant owed plaintiff a duty to drive with ordinary care, but the failure to so instruct it does not require a reversal of the judgment. The court instructed the jury clearly and correctly as to the law concerning a passenger, a guest, and compensation. It instructed the jury that: "A guest is one who is invited, either expressly or impliedly, to enjoy the hospitality of the driver of a vehicle; who accepts such hospitality; and who takes a ride either for his own pleasure or on his own business. Where, however, the driver received some compensation, which is the chief inducement for the rider's transportation, and which is given and received as compensation and as a business transaction, such a rider is a passenger, not a guest." It further instructed the jury that: "The compensation required to make a person a passenger, rather than a guest, need not be in money and need not be paid directly by the one who thereafter becomes a plaintiff. If, as the chief inducement for the transportation, any benefit is conferred on the driver, which has a then present pecuniary value, the person transported is a passenger, not a guest." Of course it cannot be determined whether the jury found that plaintiff was a passenger or a guest. In either event the verdict was for the defendant, and it is to be assumed the jury followed the instructions and found that plaintiff was a passenger. If it found that the plaintiff was a passenger, it does not follow necessarily that the verdict should have been for the plaintiff. The testimony of each of the three riders, as shown above, was contradictory and inconsistent within itself and was contradictory and inconsistent with the testimony of the others, and therefore, even if the jury found that plaintiff was a passenger, the evidence was such that the jury might have found that defendant was not negligent. There is in the verdict an implied finding that defendant was not guilty of any negligence which was a proximate cause of the accident. Appellant insists that the verdict should be regarded as one based upon a finding that plaintiff was a guest and not upon a finding that defendant was not negligent. The rule that all intendments are in favor of the correctness of the verdict precludes this assumption. Upon appeal from a judgment based upon a general verdict it must be assumed that the jury passed upon every material issue of fact submitted to them, and that the findings thereon were such as to give support to the verdict. Shahabian v. Najarian, 14 Cal.App.2d 435, 443, 58 P.2d 396. If there is a sufficient finding sustained by the evidence upon which the judgment may rest, it will be regarded on appeal as the one upon which the judgment did rest. American National Bank v. Donnellan, 170 Cal. 9, 15, 148 P. 188; Thayer v. Tyler, 169 Cal. 671, 147 P. 979; Bowers v. Union Trust Co., 117 Cal.App. 259, 265, 3 P.2d 614. It must therefore be concluded that the verdict was based upon findings that plaintiff was a passenger and that defendant was not guilty of negligence rather than upon a finding that plaintiff was a guest.

[11] Plaintiff further contends that the court's refusal to give plaintiff's requested instructions 10, 11, 13 and 20 is reversible error. The first portion of proposed instruction 13 was, in substance, that if defendant looked but did not see that which he could have seen in the exercise of reasonable care, he was negligent. The court gave an instruction, from the California Jury Instruction Book, which fully covered that portion of proposed instruction 13. The remainder of said instruction 13, and proposed instructions 10, 11 and 20 were to the effect that if the jury found that defendant had failed to use ordinary care in the operation of his automobile and such failure in the slightest degree contributed to the cause of the collision, then defendant's negligence was "a" proximate cause of the accident, and defendant would be liable for the full amount of plaintiff's damages even though it should

appear that the concurrent negligence of the truck driver was greater than the negligence of defendant. Plaintiff asserts that the whole theory of his case "rested on the question of whether defendant's conduct constituted negligence which concurred with the conceded negligence of the truck driver, and proximately caused the collision," and that no instruction was given which told the jury that any lack of care by defendant which contributed as "a" proximate cause of the collision would make defendant liable in damages. The trial court gave an instruction defining "proximate cause." Immediately following that instruction, the jury was instructed as follows: "This does not mean that the law seeks and recognizes only one proximate cause of an injury, consisting of only one person. To the contrary, the acts and omissions of two or more persons may work concurrently as the efficient cause of an injury, and in such a case, each of the participating acts or omissions is regarded in law as *a* proximate cause." (Italics added.) The court also instructed the jury that if plaintiff was a passenger at the time of the accident, defendant owed him the "duty to exercise ordinary care, and if any negligent conduct on defendant's part was *a* proximate cause of plaintiff's injury, ***defendant is liable.***" (Italics added.) The court gave the further instruction: "You are instructed that *before plaintiff can recover damages* for any injuries sustained by him as a result of the accident in question, you must first find that defendant was negligent and that such negligence on his part, if any, was *a* proximate cause of injury to the plaintiff." (Italics added.) Another instruction, given at the request of plaintiff, was, in substance, that if the jury found in favor of plaintiff it should, *in arriving at the amount of the award,* determine each item of "claimed detriment," provided it found such detriment was suffered by plaintiff "as *a* proximate result of defendant's negligence." (Italics added.) It appears that the jury was adequately instructed as to the matters set forth in plaintiff's requested instructions 10, 11, 13 and 20.

Appellant further contends that the court's refusal to give his requested instructions 6 and 9 constituted reversible error. Proposed instruction 6 was to the effect that if the jury found that the defendant's speed before he reached the bridge was greater than that which an ordinarily prudent driver "in the exercise of reasonable care would have been traveling under such conditions or circumstances," then it must find defendant guilty of negligence. Proposed instruction 9 was in substance that if the jury found that plaintiff warned defendant about an obstruction on the bridge in sufficient time in which the said defendant "in the exercise of ordinary care could have slowed his car and stopped it before he struck the obstruction or truck," and he failed to do so, then it must find defendant guilty of negligence. It will be noted that both instructions are to the effect that if the jury found the defendant failed to exercise ordinary care under certain circumstances, it must find that defendant was negligent. The court instructed the jury that if plaintiff was a passenger, defendant owed him the duty of exercising ordinary care, and it gave full and proper instructions from the California Book of Jury Instructions as to negligence and ordinary care. The requested instructions 6 and 9 were covered by instructions which were given.

The judgment is affirmed.

DESMOND, P. J., and SHINN, J., concur.

HUNT et al. v. AUTHIER. *

Civ. 14845.

District Court of Appeal, Second District,
Division 3, California.

Aug. 28, 1945.

Hearing Granted Oct. 25, 1945.

1. Action 🔑16

The nature of cause, not form of action, determines its character.

2. Death 🔑30

An action for wrongful death of murdered man does not survive tort-feasor's death under statute authorizing maintenance, by and against executors and administrators, of actions which might have been maintained by or against their testators or intestates for recovery or possession of property or action by any person or decedent's personal representative against executor or administrator of estate of decedent who, in his lifetime, wasted, destroyed, took, converted, or trespassed on plaintiff's property. Probate Code, §§ 573, 574.

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* Subsequent opinion 169 P.2d 913.

3. Death ⟹30

Injury to decedent's widow and surviving minor children as result of decedent's murder by tort-feasor who immediately committed suicide was of a personal nature, based on their relationship to decedent and his obligation to support them, and was not an injury to their "property" within statute authorizing action against personal representative of decedent who, in his lifetime, wasted, destroyed, took, converted, or trespassed on plaintiff's "property", since pecuniary loss to widow and children was an incident or element of damage growing out of decedent's wrongful death. Probate Code, § 574.

See Words and Phrases, Permanent Edition, for all other definitions of "Property".

4. Constitutional law ⟹70(1)

The District Court of Appeal cannot, by liberal definition of term "property" in statute authorizing action against personal representative of decedent who, in his lifetime, wasted, destroyed, took, converted, or trespassed on plaintiff's property, permit a murdered man's widow and surviving minor children to recover damages from deceased murderer's personal representative for deprivation of deceased husband's support and society, but direct legislative action in form of unambiguous statute is required to render such a rule of law effective. Probate Code, § 574.

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Action by Lois M. Hunt and others, minors, suing by and through their guardian ad litem, Mona S. Hunt, and Mona S. Hunt, individually and as guardian ad litem of minor plaintiffs, against Louise Authier, as administratrix with the will annexed of the estate of Ephrem Mounsey, deceased, for the wrongful death of Verne C. Hunt. From an order and judgment dismissing the action, plaintiffs appeal.

Affirmed.

Mitchell, Silberberg & Knupp, of Los Angeles, for appellants.

Henry Brouillette, of Los Angeles, for appellee.

DESMOND, Presiding Justice.

Plaintiffs appeal from an order and judgment entered thereon dismissing their action upon their failure to amend their complaint within the time allowed after defendant's demurrer to the complaint had been sustained.

On December 13, 1943, Dr. Verne C. Hunt, a physician and surgeon, was murdered in his office by Ephrem Mounsey, who, immediately after shooting the doctor, shot and killed himself. Plaintiffs, the surviving wife and three minor children of Dr. Hunt, filed an action in the Superior Court of Los Angeles, entitled "Damages for Wrongful Death," against Louise Authier, as Administratrix-with-Will Annexed of the Estate of Ephrem Mounsey, deceased, which alleged that "as a direct and proximate result of the * * * said wrongful acts of the said Ephrem Mounsey, deceased, and the death of the said Dr. Verne C. Hunt, these plaintiffs, each and all, did suffer and sustain great pecuniary loss and damage and the property, property rights and estate of said plaintiffs, and each of them, were thereby wasted and destroyed, all to their damage in the sum of $150,000.00," and that a claim in that sum, filed against the estate, had been rejected. The prayer asked that the court "adjudge and declare that the estate of said Ephrem Mounsey, deceased, is indebted to these plaintiffs in the sum of $150,000.00" and that the sum constitutes a valid claim against the estate.

Appellants state in their brief that: "A general demurrer to the complaint was sustained upon the ground that the cause of action on behalf of the plaintiffs abated upon the death of the *tort feasor*." They concede that this action could not be maintained at common law, and unless express statutory authority sanctioning its survival can be found the ruling upon the demurrer was correct. They admit, also, that unless the case of Clark v. Goodwin, 1915, 170 Cal. 527, 150 P. 357, L.R.A.1916A, 1142, "can be distinguished upon the ground that statutory authority for the survival of the cause of action now exists, which did not exist—or was not called to the attention of the court—when the Clark case was decided," it is express authority for the ruling on the question of abatement and necessitates an affirmance of the judgment. In the Clark case a widow sought to recover judgment from the estate of Goodwin on the ground that he murdered her husband on the same day that he, himself, died, but the court held that under our statutes, then in effect, the cause of action for damages for wrongful death abated with the death of Goodwin and could not be maintained against his personal representative. See, also, to the same effect, Norton v. City of Pomona, 1935, 5 Cal.2d 54, 62, 53 P.2d 952; Gosling v. Nichols, 1943, 59 Cal.App.2d 442, 444, 139 P.2d 86. Appellants take the position that certain changes in our statutory law which became effective when the Probate Code was adopted in 1931, sixteen years after the decision was rendered in Clark v. Goodwin, supra, furnish the necessary statutory authority for their present action. They rely upon the latter part of section 574 of the Probate Code. That section reads as follows:

"*Sec. 574. Actions for trespass* [*Injury to property or destruction or conversion thereof.*] Executors and administrators may maintain an action against any person who has wasted, destroyed, taken, or carried away, or converted to his own use, the *property* of their testator or intestate, in his lifetime, or committed any trespass on the real property of the decedent in his lifetime, and any person, or the personal representative of any person, may maintain an action against the executor or administrator of any testator or intestate who in his lifetime has wasted, destroyed, taken, or carried away, or converted to his own use, the *property* of any such person or committed any trespass on the real property of such person." (Our emphasis.)

The first portion of this statute substituted the word "property," which we have italicized, for "goods" as it was printed in former section 1583, Code of Civil Procedure, which was repealed when the Probate Code was adopted. The present action, however, is in no way concerned with the first part of section 574, but there is a change in the latter portion which is all important from appellants' point of view. It consists of the substitution of the word "property," which we have placed in italics, for the words "goods and chattels," which had appeared in the former section 1584, Code of Civil Procedure. Appellants contend that the right to support and maintenance and to the comfort, society and protection of their deceased husband and father "constitute property within the meaning of the section and that such property was destroyed by the tortious act which resulted in the death of Dr. Hunt."

[1-3] While the present action, exclusive of its title, purports to be one arising under, and is couched in the language used in, section 574 of the Probate Code, nevertheless it is the nature of the cause and not the form of the action which determines its character. Vragnizan v. Savings Union, etc., Co., 1916, 31 Cal.App. 709, 711, 712, 161 P. 507. The gravamen of plaintiffs' action here is the tort-feasor's wrongful act and, in our opinion, it is not included among the tortious actions which survive under section 574 or section 573 of the Probate Code, or under any other statute of California. Section 573, in its opening passage, is an exact copy of former section 1582 of the Code of Civil Procedure. Both sections provide that: "Actions for the recovery of any property, real or personal, or for the possession thereof * * * may be maintained by and against executors and administrators in all cases in which the same might have been maintained by or against their respective testators or intestates * * *." In the case of Singley v. Bigelow, 1930, 108 Cal.App. 436, 291 P. 899, damages were sought from the estate of a druggist whose employee had, by mistake, delivered to one of the plaintiffs a package containing mercury powder instead of quinine, which was requested by written order. Because of the death of the druggist before the action was brought, the plaintiffs sought to avoid abatement of the action by resort to the language of section 1582, Code of Civil Procedure. In that case, as in the present instance, a demurrer was sustained for the reason that the action was one in tort and abated upon the death of the tortfeasor. In that case, as in this, the plaintiffs were allowed time within which to amend, and failing to amend, judgment was entered in favor of the representative of the decedent. In commenting upon the situation the court said, 108 Cal.App. at page 440, 291 P. at page 900: "Our attention is specially called to the words 'any property,' found in section 1582, Code of Civil Procedure. However, a reading of the section and a reference to the facts set forth in the complaint which we have detailed shows that this is not an action for the recovery of any property, either real or personal, or for the possession thereof. It is strictly an action to recover damages. No property

belonging to the plaintiffs was taken possession of by the deceased. So far as the complaint is concerned it does not show that there is any real or personal property in the possession of the executrix of the estate of the deceased to which the plaintiffs have any right, title, or claim to the possession thereof; nor are there any adverse claims involved in this action. The mere fact that, in an action for damages, judgment is entered for a certain sum of money, and that the money or judgment, when paid to the plaintiff in such an action, is property, does not characterize the action or bring it within the terms of section 1582, Code of Civil Procedure, as one for the recovery of any property, real or personal, or the possession thereof." See, Gerberich v. Southern California Edison Co., 1938, 26 Cal.App.2d 471, 482, 79 P.2d 783. This language, while used in construing section 1582, is equally persuasive in considering the meaning of the word "property" as used in section 574 of the Probate Code. The death of Dr. Hunt and the resultant pecuniary loss sustained by the widow and the minor children arise from and flow out of the wrongful act of the deceased tort-feasor. The injury to plaintiffs is one of a personal nature based upon their relationship to the deceased and his obligation to support and maintain them and is not an injury to their property or estate within the meaning of the word "property" as used in section 574, for the pecuniary loss to the wife and minor children is an incident—an element of damage—growing out of the wrongful death. Singley v. Bigelow, supra; Russell v. Sunbury, 1881, 37 Ohio St. 372, 376, 377, 41 Am. Rep. 523; Hegerich v. Keddie, 1885, 99 N. Y. 258, 1 N.E. 787, 792–793, 52 Am.Rep. 25.

[4] The appellants argue earnestly that "by the enactment of Section 574, it was the intention of the Legislature to obviate the hardship and obvious injustice of the common law rule as established in the case of Clark v. Goodwin, 170 Cal. 527, 150 P. 357, L.R.A.1916A, 1142," and point out that "A liberal definition of the term 'property' * * * will enable the courts to avoid the glaring inconsistency and obvious injustice of holding that a wife may recover against a deceased tort feasor for injuries done to her automobile, but she cannot recover for the infinitely greater loss which she has suffered in being deprived of the support and society of her husband." While, naturally, we must sympathize with the bereaved widow and children in this case, we cannot, nor could the trial court, by a liberal definition furnish the relief which they seek. The new rule of law, for which their counsel so eloquently argues, if ever it is to become effective will require direct legislative action in the form of a statute free from ambiguity.

Judgment and order affirmed.

PARKER WOOD, J., and FOX, Justice pro tem., concur.

70 Cal.App.2d 657

HARLAN v. HARLAN.

Civ. 14885.

District Court of Appeal, Second District,
Division 3, California.
Aug. 31, 1945.

Hearing Denied Oct. 29, 1945.

1. Divorce 🔑327

In husband's action to annul marriage on ground of wife's bigamy, evidence that neither of parties to wife's Mexican action for divorce from former husband resided in Mexico established invalidity of Mexican decree granting wife divorce, since Mexican court had no jurisdiction of parties to or subject matter of action.

2. Divorce 🔑327

A husband's consent to granting of divorce to his wife in Mexico, wherein neither spouse resided, conferred no jurisdiction of her divorce suit on Mexican court.

3. Divorce 🔑327

A Mexican court's decree, granting wife divorce without residence or presence of either spouse in Mexico, is not entitled to recognition by California courts under statute providing that final judgment of foreign country's tribunal, having jurisdiction over cause of action, parties thereto and thing involved under such country's laws, shall have same effect in California as in such country. Code Civ.Proc. §§ 1915, 1917.

4. Divorce ⟹330

Under principle of "quasi estoppel", a man taking active part in arranging to obtain Mexican court decree, granting a woman a divorce, and paying her attorney's fee and expenses, so that he might marry her after living with her illegally, could not question validity of such decree in action to annul his subsequent marriage to her on ground of her bigamy.

See Words and Phrases, Permanent Edition, for all other definitions of "Quasi Estoppel".

5. Estoppel ⟹63

The principle of "quasi estoppel" is based on principle that one having full knowledge of facts shall not be permitted to act in manner inconsistent with his former position or conduct to another's injury.

6. Estoppel ⟹68(2)

Under principle of quasi estoppel, one invoking exercise of jurisdiction within court's general powers cannot seek to reverse its orders for lack of jurisdiction.

7. Estoppel ⟹99

Estoppel does not validate thing complained of, but merely closes mouth of party complaining thereof.

◆

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Richard R. Harlan against Mericia G. Harlan to annul the parties' marriage, in which defendant filed a cross-complaint for divorce. Judgment for plaintiff, and defendant appeals.

Reversed, with directions.

August J. O'Connor and George J. Hider, both of Los Angeles, for appellant.

Button, Herzog & Butts, of Hollywood, for respondent.

FOX, Justice pro tem.

Plaintiff brought this action to have his ceremonial marriage to defendant annulled on the ground that at the time of said ceremony defendant had a former husband living, and that her marriage to said former husband had not been dissolved by divorce or otherwise.

Defendant is a native of Cuba. In December, 1921, she married, in Havana, Karl Hugo Karlsson, a national of Sweden. In 1927, plaintiff was in Havana making some motion pictures. He met defendant, a housewife, and employed her for a brief period in making two pictures. When plaintiff and his party returned to California later on that year, defendant came with them on the same boat. Defendant testified that plaintiff promised her work in certain pictures he had under contract to make if she would come along. Sometime after arriving in California plaintiff and defendant began living together as man and wife. In 1929 defendant went back to Havana and, at the request of the plaintiff, discussed with her husband the matter of her getting a divorce. He consented. Soon after her return to California plaintiff, with whom she continued to live, took her to a Mexican attorney in Los Angeles and made arrangements with him to secure a Mexican divorce for defendant. She did not then speak or understand English, and testified at the trial herein through an interpreter. The part that plaintiff had in arranging for this divorce is best shown by the deposition of the attorney who was employed to procure this divorce. The following interrogatories and answers are pertinent on this point:

"Q. Did Richard Harlan and Mericia G. Harlan engage your services to secure a Mexican divorce for Mericia G. Harlan from her then husband, Karl Hugo Karlsson? A. Yes, that's right.

"Q. Did Mr. Richard Harlan ask you about securing this divorce for Paulina Mericia Gonzales Karlsson? A. Yes, that's right.

"Q. Please state what you recall Richard Harlan said regarding that matter at that time. A. Mr. Richard Harlan expressed to this deponent that he desired to obtain a divorce for Paulina Mericia Gonzales Karlsson, with whom he wanted to get married after the divorce. * * *

"Q. After you secured the decree of divorce, did you inform Mr. Richard Harlan and Paulina Mericia Gonzales Karlsson of that fact? A. Yes, I informed them.

"Q. Thereafter, did you receive any monies from Richard Harlan for your fee? And if so, how much, if you recall? A. Yes, I received the money from Mr. Harlan, and I assume it was in the neighborhood of $300.

"Q. Did Richard Harlan pay you anything for your services in connection with this divorce? A. Mr. Harlan from its beginning undertook to pay the costs of this divorce, and he paid them.

"Q. Did Richard Harlan tell you at any time that he wanted you to secure this foreign divorce so that he could marry Paulina Mericia Gonzales Karlsson? A. Yes, that is true, as I have expressed hereinabove. * * *

"Q. Please relate the conversation which you claim took place between you and Mrs. Karlsson and Mr. Harlan at your first interview, stating in substance what each person said. A. The conversation that took place in the first interview consisted in the fact that the persons who came expressed to deponent that they desired a Mexican divorce. They asked for details regarding price, time of duration, validity of the same; and Mr. Harlan expressed the desire that he wanted this divorce rapidly because he desired to marry Mrs. Karlsson.

"Q. Isn't it true that Mr. Harlan was simply introduced as a friend of Mrs. Karlsson and that he took no active part in engaging you? A. Mr. Harlan took active part in the matter, because it was he who undertook to pay for the matter I have expressed in my answer hereinabove. * * *

"Q. On how many occasions, if any, did you contend Mr. Harlan accompanied Mrs. Karlsson at such conferences? A. I cannot fix the occasions when Mr. Harlan accompanied Mrs. Karlsson to the office of the deponent, but I do remember that besides the first time on the conference when he was in my office, Mr. Harlan telephoned me inquiring regarding the decree, the final decree.

"Q. Did you ever confer with Mr. Harlan alone? A. I don't remember if Mr. Harlan was alone in my office or in the office of the dependent, but I do remember that he called me over the telephone a number of times. * * *

"Q. Do you know of your own knowledge who owned the funds with which you were paid? A. Deponent does not know who was the owner of the funds, but I repeat that Mr. Harlan was the one who undertook to pay them."

This lawyer also testified that he advised the parties that they would be free to marry when the Mexican decree was granted. Pursuant to the foregoing arrangements an action for divorce from Karl Hugo Karlsson was filed on behalf of the defendant herein in the State of Sinaloa, Republic of Mexico, in the summer of 1930. Neither of the parties established any domicile or residence in the State of Sinaloa or were physically present therein during the pendency of said action. The entire matter was handled by the respective attorneys of the parties through authority given by powers of attorney. Mr. Karlsson filed, through his attorney, his consent that the divorce be granted to his wife, and such decree was granted to her in December, 1930. Plaintiff and defendant went through a marriage ceremony in Los Angeles, California, on March 11, 1931, and lived together as husband and wife until December, 1943, when they separated. Mr. Karlsson died in 1942.

[1-3] The Mexican divorce granted to the defendant herein from Mr. Karlsson was of the "mail order" class. The decree, however, did not affirmatively show upon its face that neither of the parties had resided there. Upon this fact being shown the invalidity of the decree in this state was thereby established, since the court in Mexico did not have jurisdiction of either of the parties or of the subject-matter of the action. Ryder v. Ryder, 1934, 2 Cal.App.2d 426, 37 P.2d 1069; People v. Harlow, 1935, 9 Cal.App.2d 643, 50 P.2d 1052; Kegley v. Kegley, 1936, 16 Cal. App.2d 216, 60 P.2d 482; In re Estate of McNutt, 1940, 36 Cal.App.2d 542, 98 P.2d 253. The consent of Mr. Karlsson could not confer jurisdiction to grant his wife, the defendant herein, a decree of divorce. Ryder v. Ryder, supra; Kegley v. Kegley, supra; Andrews v. Andrews, 1903, 188 U. S. 14, 23 S.Ct. 237, 47 L.Ed. 366. Nor is this decree entitled to recognition by the courts of California under the provisions of section 1915, Code of Civil Procedure, for "this section expressly limits its application to final judgments of courts having jurisdiction. And by section 1917 of the Code of Civil Procedure such jurisdiction must be 'over the cause, over the parties, and over the thing, when a specific thing is the subject of the judgment.'" People v. Harlow, supra, 9 Cal.App.2d at page 646, 50 P.2d at page 1053. And, as pointed out in Ryder v. Ryder, supra, 2 Cal.App.2d at page 431, 37 P.2d at page 1070, no assistance is afforded by section 1915, Code of Civil Procedure, "because of the lack of the very elements specified" by that section. In the instant case, as in the

Ryder case, "There is nothing in the record to indicate what the law of Mexico is concerning divorce. We have been directed to no statute or code or other law of that country governing the subject of divorce. If, however, it be assumed that the laws of that country require no residence nor the presence of the parties within its territory as a basis of jurisdiction, and that the formal requirements established by Mexican law were met, then the divorce cannot be recognized under the laws of this state." 2 Cal.App.2d at page 432, 37 P.2d at page 1071.

[4-7] Plaintiff, however, is not in a position to take advantage of the invalidity of the Mexican divorce decree which the defendant obtained from Mr. Karlsson. The record is clear that plaintiff paid the attorney's fee and expenses for obtaining said divorce and that he had an active and dominant part in arranging for same and in seeing that it was carried through expeditiously. Plaintiff herein was not technically a party to the Mexican suit. But he certainly was interested in its outcome. He was anxious that defendant be in a position so that he could marry her. He would thereby extricate himself from the immoral and illegal relationship in which he had been living. He as much as any other, not excepting the defendant, was responsible for institution of the suit and obtaining the decree. His interest then was to procure the result which he now seeks to nullify, after having lived with defendant as husband and wife for over twelve years. That the sweet may have turned sour does not make it conscionable that the plaintiff should be allowed now to undo what his own hand and mind had so much to do in creating. Plaintiff is therefore not in a position to question the validity of defendant's divorce. This is on the principle of quasi estoppel "which is based upon the principle that one cannot blow both hot and cold, or that one 'with full knowledge of the facts shall not be permitted to act in a manner inconsistent with his former position or conduct to the injury of another.' 10 Cal.Jur., p. 645. McDanels v. General Ins. Co., 1 Cal.App.2d 454, 459 [35 P.2d 394], 36 P.2d 829. Another way of stating the same general principle (applicable directly to the instant case) is that one who has invoked the exercise of a jurisdiction within the general powers of the court cannot seek to reverse its orders upon the ground of lack of jurisdiction. 'The principle opposing such action is one of estoppel in the interest of a sound administration of the laws whereby the regularity or even validity of an act procured by one himself cannot be raised—not that the act is valid, for it may not be, and estoppel does not make valid the thing complained of but merely closes the mouth of the complainant. Spence v. State Nat. Bank, Tex.Com.App., 5 S.W.2d 754. The principle is known as the doctrine of acquiescence, often referred to as quasi estoppel.'" In re Estate of Davis, 1940, 38 Cal.App.2d 579, 584, 585, 101 P.2d 761, 763, 102 P.2d 545. In the Davis case the deceased urged respondent to go to Nevada, establish a residence for the sole purpose of securing a divorce, and then to marry him. He paid the costs and expenses of the divorce, and went to Reno and took an active part in the preparation of the case, and married respondent on the day the divorce was granted. Upon the death of Mr. Davis his heir attacked the validity of respondent's divorce and subsequent marriage to Mr. Davis. The court held that because of Mr. Davis' part in procuring the Nevada decree for respondent he would have been foreclosed from denying the validity thereof or the subsequent marriage under the doctrine of quasi estoppel and that his heir was in no better position.

In Goodloe v. Hawk, 1940, 72 App.D.C. 287, 113 F.2d 753, 756, the plaintiff husband sought an annulment of his marriage with defendant on the ground that her Virginia divorce was not valid. He claimed that she was never either domiciled in or a bona fide resident of Virginia. It appeared, however, that the plaintiff had asked her to get a divorce so that he could marry her and that he had paid for the divorce. After they had lived together more than a decade plaintiff brought an action for annulment in the District of Columbia. The United States Court of Appeals, in an opinion by Mr. Justice Fred M. Vinson, held that the husband "should be barred by the salutary principles of laches or estoppel from challenging the Virginia court's finding" that the defendant wife was domiciled there.

In Saul v. Saul, 1941, 74 App.D.C. 287, 122 F.2d 64, in an opinion written by Mr. Justice Rutledge (now of the United States Supreme Court) the principle of estoppel was applied to prevent the plaintiff husband in an annulment action from questioning the sufficiency of the notice that was given in the defendant's prior divorce action to her then husband, Mr. Gardner. This was upon the basis that he had financed the divorce and actively aided her in procuring it.

In Margulies v. Margulies, 1931, 109 N.J.Eq. 391, 157 A. 676, it is said in the syllabus by the court that "One who induces a defendant to obtain a foreign divorce and pays the expenses thereof, and afterwards marries her, is precluded from attacking the validity of the divorce."

In Van Slyke v. Van Slyke, 1915, 186 Mich. 324, 152 N.W. 921, 923, the plaintiff wife sued defendant for a divorce. He sought to show that she had procured her divorce from a former husband through misrepresentation of her residence and that therefore said decree was not valid and consequently their marriage was invalid. The court pointed out that he was "quite as much interested in procuring the decree of divorce as was the complainant, proposed to pay her counsel and advised her and her counsel of his interest. He intended to profit by the decree of divorce, not in a financial way, but in removing an obstacle to his marriage with complainant." The court held that by reason of these circumstances he had no standing to present such a defense. See, also, Bowen v. Finke, D.C., 1940, 34 F.Supp. 235.

That the defendant was imposed upon by the plaintiff is clear. After discussing the evidence at great length at the close of the trial, the learned trial judge at the very conclusion of his summation of the case said: "I think here the defendant is the innocent party. No question about it in my mind. The plaintiff is not innocent." Under such circumstances and in view of the evidence and authorities, the defense of quasi estoppel should have been sustained. To hold otherwise protects neither the welfare nor morals of society but, on the contrary, such holding is a flagrant invitation to others to attempt to circumvent the law, cohabit in unlawful state, and when tired of such situation, apply to the courts for a release from the indicia of the marriage status.

Respondent relies on Sullivan v. Sullivan, 1934, 219 Cal. 734, 28 P.2d 914. That case has no application here because the plaintiff there only had an "interlocutory" decree when she remarried. She was not divorced.

The judgment is reversed with directions to retry only the issues made by the amended cross-complaint for divorce and the answer thereto.

SHINN, Acting P. J., and PARKER WOOD, J., concur.

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70 Cal.App.2d 619

MAJORS v. MAJORS.

Civ. 14925.

District Court of Appeal, Second District, Division 3, California.

Aug. 30, 1945.

Rehearing Denied Sept. 28, 1945.

Hearing Denied Oct. 25, 1945.

1. Divorce 🔑160

In wife's divorce suit, where amended complaint prayed only for divorce and approval of parties' community property settlement agreement, default judgment refusing such approval and awarding plaintiff one dollar per month for support was erroneous as establishing plaintiff's right to support in disregard of such agreement and prayer. Code Civ.Proc. § 580.

2. Divorce 🔑254

Where complaint in wife's action for divorce on ground of extreme cruelty prays assignment or division of parties' community property, superior court owes duty to decide how such property shall be divided and render judgment accordingly. Civ.Code, § 146.

3. Divorce 🔑203

Where complaint of wife suing for divorce does not pray for support or none is awarded her by judgment, she cannot obtain judgment for support later.

4. Divorce 🔑160

Provisions of wife's default divorce judgment, refusing approval of parties' property settlement agreement in lieu of support and awarding wife one dollar per month for support, without determining whether agreement was valid or invalid and ineffective to influence or control judgment, were erroneous. Civ.Code, § 146.

5. Divorce ⚿203

The superior court's discretion to approve community property settlement agreement between parties to wife's divorce suit or refuse to approve it and give wife general judgment for support must be exercised with due consideration for pleadings and undisputed facts in evidence. Civ. Code, § 146.

6. Judgment ⚿193

A court has no discretion to refuse to give judgment declaring a right properly pleaded and well established by evidence.

7. Judgment ⚿193

Where good grounds exist for granting legal or equitable relief, judgment is given to party entitled thereto as matter of right, not of grace.

8. Equity ⚿39(1)

In equity action, court, in order to avoid unnecessary litigation, will decide all controversies arising out of matter in dispute, if possible.

9. Divorce ⚿287

A wife's default divorce judgment, erroneously refusing to approve parties' community property settlement agreement, as prayed in wife's complaint, and awarding her one dollar per month for support, not prayed for therein, should be modified on appeal by striking out support provision and substituting for provision disapproving agreement one giving it court's approval.

◆

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by Hazel J. Majors against William L. Majors for divorce. From provisions of a default decree refusing approval of the parties' community property settlement agreement and awarding plaintiff one dollar per month for support, defendant appeals.

Reversed for modification of judgment.

Irwin M. Fulop and Mark M. Cohen, both of Los Angeles, for appellant.

O. B. DeCamp, of Santa Monica, for respondent.

SHINN, Justice.

This is an appeal by defendant from a decree of divorce in a default action. It is taken only from the provisions which refused approval of a property settlement agreement and awarded plaintiff one dollar per month for support. The marriage was without issue. Defendant's contention is that these provisions were in excess of the relief sought by the amended complaint and that they were based upon implied findings which were without support in the evidence. The action was commenced September 23, 1944; on October 6, 1944, the parties entered into a written property settlement agreement; on October 10, 1944, plaintiff filed an amended complaint; defendant accepted service but made no appearance in the action and his default was duly entered. The original complaint alleged that there was community property of unstated value, consisting of a residence, furniture and furnishings therein, an automobile and a "community interest in the Group Diagnostic Offices." The cause of action was for cruelty and the prayer was for a divorce, for an award of all the community property to plaintiff except the interest in the Group Diagnostic Offices, and for temporary and permanent alimony, attorney's fees and costs. In the amended complaint the foregoing allegations were omitted and it was alleged that the parties had entered into an agreement disposing of their property interests and that the agreement was satisfactory to plaintiff, and the prayer was for a divorce and "that the community property settlement agreement entered into between the parties be approved and that the court make its order in accordance therewith, and for such other and further relief as the court may deem just." Upon the trial it was proved that the parties had been married for a little over eight years; that defendant had been guilty of cruelty; that a property settlement agreement had been entered into under which plaintiff had conveyed her interest in the home, the furnishings and the automobile to defendant, in consideration of $500 in cash and $3,000, payable at the rate of $30 per month, evidenced by defendant's promissory note and a trust deed on the property, subject to existing encumbrances. She relinquished all other claims to property and to support. Plaintiff testified that she was working at the time of trial as a graduate nurse; that she had been so employed during all of her married life, and that she was satisfied with the terms of the property settlement agreement. She also testified that she had some small bank accounts of her own. There was no evidence as to the value of the residence, the furniture or the automobile, and no evidence as to the amount of defendant's earnings nor as to the age or condition of health of either of the parties. No suggestion was made to the court that the agreement was in any respect unreasonable or unjust to either party nor that plaintiff's consent thereto had not been given voluntarily and advisedly. At the conclusion of the trial the cause was taken under submission. The decree contained no reference to the agreement other than the provision "The property settlement agreement is not approved."

[1] The relief awarded plaintiff was in excess of that which she sought by the amended complaint; her demand for a money judgment was based upon the contract, while the judgment for support was predicated upon a statutory right which she did not assert. She did not pray for support, as such, nor allege facts which would have entitled her to it. Defendant having defaulted, the court could not properly award plaintiff a judgment for support. The late cases of Eddy v. Eddy, 1944, 64 Cal.App.2d 672, 149 P.2d 187; Peck v. Peck, 1942, 52 Cal.App.2d 792, 127 P.2d 94; and Darsie v. Darsie, 1942, 49 Cal.App.2d 491, 122 P.2d 64, hold that section 580 of the Code of Civil Procedure, which limits the relief which may be granted in default cases to that sought by the complaint, has application to default divorce cases. Plaintiff insists that these cases should be overruled, contending that we should follow the example of the trial judge in the case at bar, who, as justice pro tempore of another division of this court, wrote the first opinion in the Darsie case, reported in 118 P.2d 898, which was reversed on rehearing, supra, 49 Cal.App.2d 491, 122 P.2d 64, and who also wrote the dissenting opinion on rehearing. Although we are impressed by the fact that the learned and sincere trial judge has the courage of his convictions, we are unable to agree with his conclusions.

The agreement contained the following provision: "It is hereby agreed that this agreement may be submitted to the court for approval in the aforesaid divorce action and shall be incorporated in any interlocutory decree of divorce rendered by such court in such proceedings, and such decree shall provide for the division of the property of the parties and payments to wife as herein provided." Defendant was justified in believing that plaintiff would not be granted relief which was altogether different from or in excess of that which she sought by her amended complaint. Even if there had been no property settlement agreement and the complaint had made a demand for a specific division of the community property, without a separate prayer for support, a decree in accordance with the demands, defendant having defaulted, would have had the force of a binding contract. Franklin v. Franklin, 1945, Cal.App.2d, 155 P.2d 637; Maxwell v. Maxwell, 1944, 66 Cal.App.2d 549, 552, 152 P.2d 530; Brown v. Brown, 1915, 170 Cal. 1, 5, 147 P. 1168. It is to be presumed that he defaulted in anticipation of the granting of a decree to plaintiff and approval of the agreement by the court and that if he and his wife had not reached an agreement he would have resisted her plea for a divorce and perhaps filed a cross-complaint for divorce. The judgment establishes plaintiff's right to receive support from defendant independently of the contract and leaves her in a position to apply at any time for an increase of the amount awarded for her support. Although by her amended complaint she limited her demands to those which were recognized by the agreement, it is her position now that she could not by an agreement with defendant waive her right to a judgment for support and that she is entitled to support in whatever amount the court may see fit to award her, and this in addition to what she is entitled to receive under the contract. While the amount of the present award is insignificant, the right which the judgment establishes in disregard of the agreement and the prayer of the amended complaint is in excess of that which plaintiff demanded, and in this respect the judgment is erroneous.

[2-4] This, however, is not the only reason why the provisions of the judgment appealed from cannot be sustained. There were issues in the case which is was necessary for the court to decide and which have not been decided. The agreement purported to adjust not only the community property rights of the parties, but it also fixed and settled plaintiff's right to receive support. By section 146 of the Civil Code it is made the duty of the court upon dissolution of the marriage to assign the community property to the respective parties in such proportions as the court, from all of the facts of the case and the condition of the parties may deem just, if the decree is rendered upon the ground of adultery, incurable insanity, or extreme cruelty, and equally between the parties if the decree is

rendered upon any other ground. If there is no prayer for an assignment of the community property in the divorce action the court is not required to do anything about it. But if there is a prayer for the assignment or division of it, it is the duty of the court to decide how it should be divided and to render judgment accordingly. The action is not fully tried until this has been done. Furthermore, when plaintiff filed her action for divorce, her right to receive a judgment for support was necessarily involved. If the complaint of a wife does not pray for support or if none is awarded her by the judgment, she cannot obtain a judgment for support later. The question of her right to support by virtue of the statute must be determined in the divorce action. If the agreement which plaintiff placed in evidence was valid, she was entitled to the unpaid balance of $3500 which she was to receive for her interest in the property and in lieu of support. She could not be given a judgment for support unless the validity of the agreement had been placed in issue and it had been held invalid. The fact that the validity of the agreement was not questioned did not require the court to approve it. If the evidence had disclosed facts which caused the court to question either its validity or fairness, the parties should have been given an opportunity to raise the issue by proper pleadings and it should have been tried and determined. Plaintiff had sought approval of the agreement and had testified that she was satisfied with it. It stood in the way of any division of the community property and of any judgment for plaintiff's support contrary to or inconsistent with its provisions, and the court could not properly ignore its existence. If there was no good reason for questioning the validity or fairness of the agreement and for placing that matter in issue, then there was no good reason for refusing to approve it. In order to dispose of the matters of community property and support, the agreement had to be regarded as valid, in which case the judgment should have followed it, or it had to be found invalid and therefore ineffective to influence or control the judgment.

[5-9] Plaintiff insists that it was within the discretion of the court to approve the agreement or to refuse to approve it and to give a general judgment for support, and that no abuse of discretion has been shown. There are several answers to this contention. As already stated, the mere refusal to approve the agreement left the court in a position where the issues as to the community property and plaintiff's right to support could not be determined. The discretion of the court had to be exercised with due consideration for the pleadings and the undisputed facts in evidence; otherwise it would not have been the exercise of judicial discretion. Gossman v. Gossman, 1942, 52 Cal.App.2d 184, 126 P.2d 178. The facts before the court were those admitted by the pleadings and established by the evidence and, in addition, material facts, if any such existed, of which the court had judicial knowledge. As already stated, there was no evidence as to the value of the community property nor as to the amount of defendant's earnings or his ability to earn and to support plaintiff. The best evidence that the agreement was not unfair to plaintiff and that she had not been overreached in the settlement was her own testimony that she was satisfied. Defendant must have been satisfied, since he defaulted to the amended complaint, which prayed for approval of the agreement. The parties were competent, they had no children, and they had the benefit of counsel when they made the agreement. They had a right to separate upon their own terms and to divide their property as they wished. If they failed to make a good agreement, that was something for them to worry about and make an issue of. They wished the agreement to be approved by the court so as to foreclose future argument and litigation. While the court was not bound by their request that the agreement be approved, it was bound to render judgment in accordance with the pleadings and the evidence. It is not within the discretion of the court to refuse to give judgment declaring a right which is properly pleaded and well established by the evidence. Where good grounds exist for the granting of legal or equitable relief, judgment is given to the party entitled thereto as a matter of right and not of grace. And in equity, in order to avoid unnecessary litigation, the court will, if possible, decide all controversies arising out of the matter in dispute, which is the foundation of the equitable action. Here the parties have been left in somewhat of a predicament. Their purpose to insure to themselves an enduring peace appears to have been frustrated. Plaintiff does not complain of this. Now that she has obtained her divorce without a contest, she is willing to keep what she gets under the agreement and to obtain more if she can.

But she is entertaining false hopes. The agreement and the judgment as it stands are inconsistent and she cannot claim under both. There is, however, no need for further litigation or controversy. The judgment should be modified by striking therefrom the provision awarding plaintiff one dollar per month for her support and by substituting for the provision disapproving the agreement one which gives it the court's approval.

The provisions of the judgment appealed from are reversed for further proceedings in accordance with the views herein expressed.

DESMOND, P. J., and PARKER WOOD, J., concur.

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70 Cal.App.2d Supp. 862

PEOPLE v. WALTON.

Cr. A. 2102.

Appellate Department, Superior Court, Los Angeles County, California.

Aug. 23, 1945.

1. Indictment and Information ⇨119

In view of Los Angeles county ordinance, modifying curfew ordinances by eliminating inhibitions against permitting minor to stroll on, use, or be on street between certain hours, words "to be", in complaint charging violation of ordinance by permitting minor to be and remain on public highway between such hours, must be treated as mere surplusage insufficient of itself to vitiate complaint.

2. Counties ⇨21½

Omission of words "or loiters" from complaint charging violation of Los Angeles county ordinance prohibiting minor child's parent, guardian, or custodian from permitting minor to remain, stroll on, use, loiter, or be on street between certain hours without adult companion or sheriff's permit, does not affect sufficiency of complaint to state cause of action, as pleader may describe offense either in words of ordinance or words sufficient to give accused notice of offense charged. Pen.Code, § 1426.

3. Counties ⇨21½

One charged with violation of Los Angeles county ordinance by permitting minor to remain on public highway between 9 p.m. and 4 a.m. without sheriff's permit or adult companion may not attack unconstitutional features of curfew legislation generally, as they do not deprive him of any right under federal Constitution.

4. Counties ⇨21½

The provisions of Los Angeles county ordinances, declaring minor's parent, guardian, or custodian, permitting minor to remain on street between certain hours without adult companion or sheriff's permit, guilty of crime, are regulatory, not prohibitory, and are intended to prevent minors from tarrying and staying unnecessarily on streets, not to restrict minors using or being on streets while going to or from places of business or amusement, as "remain" means to stay behind while others withdraw, to tarry or stay. Pen.Code, § 7, subd. 16.

See Words and Phrases, Permanent Edition, for all other definitions of "Remain".

5. Counties ⇨21½

County ordinances will be presumed to have been inspired by general intention to add needed protection of public health, morals, or safety and correct some specific, if not specified, evil.

6. Counties ⇨55

County ordinances must be deemed to have been enacted in accordance with legislative body's implied powers, unless they bear unmistakable imprint of arbitrary or oppressive action or some characteristic inducement closely akin thereto.

7. Counties ⇨55

County ordinances will not be presumed to be invalid, but every intendment will be indulged in favor of their validity.

8. Constitutional law ⇨253
Counties ⇨21½

The Los Angeles county ordinances, declaring parent, guardian, or custodian of minor under 18 years old guilty of crime in permitting such minor to remain on street between 9 p.m. and 4 a.m. without adult companion or sheriff's permit, are not unconstitutional as containing arbitrary and unreasonable classification discriminating in favor of adults and minors over 18 years old, and exceeding in its scope and effect county legislative body's powers under state and federal Constitutions or police power. Const.Cal. art. 1, § 1; art. 3, § 1; U.S.C.A. Const. Amend. 14.

9. Constitutional law ⚷208(3)

Minors constitute a class founded on natural and extrinsic distinctions from adults, and legislation peculiarly applicable to minors, when induced by rational considerations looking to their proper protection, is not invalid as class legislation.

10. Constitutional law ⚷83(1)

A police regulation is not invalid as interfering with citizen's liberty because it prevents a person from doing something that he wants to do or might do if it were not for such regulation.

11. Constitutional law ⚷253
States ⚷4

The 14th Amendment and other parts of federal Constitution do not interfere with state's power to prescribe regulations to promote the people's health and general welfare. U.S.C.A.Const. Amend. 14.

12. Constitutional law ⚷208(1)

Legislation limited in application in carrying out public purpose is not within constitutional prohibition of class legislation discriminating against some and favoring others, if it affects all persons similarly situated within sphere of its operation.

13. Counties ⚷21½

The provisions of Los Angeles county ordinances, authorizing sheriff to grant written permit for such use of streets by minor between 9 p.m. and 4 a.m. as is reasonably necessary in sheriff's opinion after filing of written application, explaining necessity for minor remaining on street during such hours, by his parent or guardian, are not unconstitutional as unlawfully delegating to sheriff power to exempt certain persons regulated by ordinances from penalties thereof on grounds deemed sufficient by sheriff, whose discretion is not arbitrary, but based on grounds of reasonable necessity as shown by facts stated in such application.

14. Constitutional law ⚷318

The essential requirement of "due process of law" is merely that administrative officer or body be required to determine existence or nonexistence of necessary facts before making decision, and statute requiring such determination does not vest uncontrolled discretion in such officer or body.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

15. Municipal corporations ⚷122(2)

In determining constitutionality of municipal ordinances, presumption is that municipal officers will not use small powers granted them thereby villainously and for purposes of oppression and mischief.

◆

Appeal from Justice's Court of San Antonio Township; Stanley Moffatt, Judge.

Proceeding by the People against Raymond A. Walton for violation of a curfew ordinance of the County of Los Angeles by permitting a child under 18 years of age in defendant's legal care, custody, and control to be and remain on a public highway between 9 p.m. and 4 a.m. without a sheriff's permit or an adult companion. From a judgment of dismissal, plaintiff appeals.

Reversed and remanded.

Fred N. Howser, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for appellant.

Morris Lavine, of Los Angeles, and Thomas A. Law, of Huntington Park, for respondent.

KINCAID, Judge.

This appeal is by the plaintiff from the judgment of dismissal by the court as to one of the defendants, Raymond A. Walton. The motion to dismiss and the order thereon were made prior to any trial and on the sole ground that the Ordinance No. 4256, New Series, of the County of Los Angeles, commonly known as the Curfew Ordinance, is wholly unconstitutional and void. The constitutional provisions claimed as violated by the ordinance are Article I, Section 1, and Article III, Section 1, of the Constitution of California, and Amendment XIV to the United States Constitution.

The complaint in question, in effect, charged the defendant Raymond A. Walton with a violation of said Ordinance No. 4256, in that, on April 7, 1945, within the County of Los Angeles, California, he did wilfully and unlawfully, while having the legal care, custody and control of Richard Walton, a minor child under the age of eighteen years, being sixteen years of age, allow and permit said child to be and remain on a named public highway between the hours of 9 p.m. and 4 a.m. the next day, said child not having then and there in his possession a permit so to do and not being then and there accompanied by a parent, guardian or other adult having the care and custody of said minor child.

[1, 2] The complaint here before us is not attacked by any motion in arrest of judgment or otherwise than upon the ground of the unconstitutionality of the ordinance as previously indicated. It seems necessary, however, as Ordinance No. 4256 is an amendment only to the basic ordinance, No. 3611, dealing with the subject of "Curfew for Minors," which basic ordinance had been further substantially amended by Ordinance No. 4464, prior to the time of the commission of the alleged offense, to examine the three ordinances for the purpose of ascertaining if a criminal offense has been here properly charged.

Ordinance No. 3611, under Section 2 thereof, made it a crime for any parent, guardian, or other person having the legal care, custody, or control of any minor under the age of sixteen years to allow or permit such minor to remain, stroll upon, use, loiter on or be upon any street or public place between the hours of 9 p.m. and 4 a.m. of the following day, unless accompanied by an adult having the care and custody of such minor, or unless the minor had in his possession a permit issued by the sheriff showing the necessity of such minor to so use such street or public place. Ordinance No. 4256 had the effect of raising the applicable age of the minor from sixteen to eighteen years. Ordinance No. 4464 went into effect on or about March 30, 1945 and by this amendment the "Curfew" prohibitions were so modified as to eliminate the inhibitions against any of the included minors who "strolls upon," "uses," "or is upon" any street or public place. Acts remaining as offenses are "who remains, or loiters" upon any street, etc., or public place. This latter amendment seems to have been completely overlooked by all concerned with the trial but greatly simplifies the constitutional problem now presented to us for determination and the elimination of the prohibition against the included minors from using, strolling or being upon any street or public place within the designated hours removes much of the basis for objections raised by the defendant as to the ordinances.

The complaint herein charges the defendant with wilfully and unlawfully allowing and permitting said minor "to be and remain on" a named public highway in violation of Ordinance No. 4256. It is thus seen that that portion "to be" is no longer chargeable as a criminal offense but must be treated for the purposes here under consideration as mere surplusage which of itself does not vitiate the complaint. People v. Steelik, 1921, 187 Cal. 361, 371, 203 P. 78; People v. Meyer, 1928, 94 Cal.App. 696, 698, 271 P. 751; People v. Beesly, 1931, 119 Cal.App. 82, 86, 6 P.2d 114, 970; People v. Rose, 1938, 26 Cal.App.2d 513, 515, 79 P.2d 737. At the same time the pleader omitted from the charging clause of the complaint the words "or loiters" which would be permissible under the amendment Ordinance No. 4464. Such an omission has no legal effect on the pleading, however, in so far as stating a cause of action is concerned, as the pleader may describe the offense either in the words of the statute or in any words sufficient to give the accused notice of the offense of which he is accused. Penal Code, sec. 1426; People v. Mitchell, 1940, 40 Cal.App.2d 204, 208, 104 P.2d 545; People v. Pierce, 1939, 14 Cal.2d 639, 96 P.2d 784. The offense thus charged then is that the defendant parent did wilfully and unlawfully allow and permit his minor child to remain on a public highway in violation of the provisions of such ordinance.

[3] The motion to dismiss the complaint and the order granting such motion were based upon the unconstitutionality of the ordinances as a whole and including that portion specifically charged in the complaint as having been violated. Such motion and order are further made upon the theory that any legal attempt by way of the exercise of the police power to restrain or regulate the movements of minors upon, or use to be made by them of the public streets or public places between certain hours is an unlawful usurpation and breach of their constitutional rights and liberties as citizens. However, the defendant is not legally privileged to here attack the unconstitutional features of curfew legislation generally, they being questions which do not concern or injure him, nor have they operated to deprive him of any right under the federal Constitution. Gorieb v. Fox, 1926, 274 U.S. 603, 47 S.Ct. 675, 71 L.Ed. 1228, 53 A.L.R. 1210; Queens-

boro Farms Products v. Wickard, 2 Cir., 1943, 137 F.2d 969, 979; A. F. Estabrook Co. v. Industrial Accident Comm., 1918, 177 Cal. 767, 769, 177 P. 848.

[4] So far as the provisions of such ordinances do affect the defendant, we find them to be regulatory and not prohibitory. The words "remains upon" must be construed according to the context and the approved use of the language. Sec. 7, subd. 16, Penal Code. Webster's New International Dictionary, 2d Ed., defines the word "remain" as, "To stay behind while others withdraw"; "to tarry"; "to stay." Volume 54 Corpus Juris 104 gives substantially the same definition. Such a provision is aimed then at preventing such minors from tarrying and staying unnecessarily upon the streets and public places, and does not restrict those minors who are using or are on such streets or places while actually in the process of going to or from places of business or amusement or otherwise.

[5-8] The question thus presented is whether, in so restricting and limiting the movements and personal privileges of such minors and in making the parent or person having legal control over the minor criminally responsible where he allows or permits such minor to violate the provisions of the ordinance, the Board of Supervisors of the County of Los Angeles has exceeded its legislative powers.

It is the contention of the defendant that the ordinances here in question contain an arbitrary and unreasonable classification and are discriminatory in that minors over eighteen years of age and adults are excepted from their provisions. It is further argued that there is no reasonable relationship between the evil sought to be controlled and the regulatory measures enacted for such purpose and that such legislation exceeds in its scope and effect the right of such legislative body to enact the same under either the state or federal Constitution or the police power.

In construing the validity of the ordinances in question, we are guided by the well established rule as recorded in the case of Hart v. City of Beverly Hills, 1938, 11 Cal.2d 343, 348, 79 P.2d 1080, 1083, where the court said: "In that regard, the formulated rule seems well established, in substance, that a statute having been enacted, the presumption will be indulged not only that it was inspired by a general intention to add needed protection to the health, morals, or safety of the public, but that the statute would be corrective of some specific, if not specified evil;—from which significant, if not controlling influence, has been evolved the additional principle that unless the questioned legislation bears the unmistakable imprint of arbitrary or oppressive action on the part of the legislators, or some characteristic inducement closely akin thereto, the statute must be deemed to have been enacted in accordance with the implied powers of the legislative body. In other words, no presumption of invalidity of the statute will obtain; but to the contrary, every intendment will be indulged in favor of its validity. (Citing cases.)" To the same effect see In re Spencer, 1906, 149 Cal. 396, 400, 86 P. 896, 117 Am.St.Rep. 137, 9 Ann.Cas. 110; Jersey Maid Milk Products Co. v. Brock, 1939, 13 Cal.2d 620, 636, 91 P.2d 577. Examined in this light, we find the objections of the defendant as to the validity of the ordinances to be without merit and unfounded.

[9] While no legal precedent arising in this state or in the federal courts construing so-called "Curfew" legislation relating to minors has come to our attention, it is well settled that minors constitute a class founded upon a natural and intrinsic distinction from adults; that legislation peculiarly applicable to them is necessary for their proper protection and when induced by rational considerations looking to that end its validity may not be challenged. 5 Cal.Jur. 840, sec. 199; 15 Cal.Jur. 574; In re Spencer, supra.

To that end the courts have repeatedly upheld the right of legislative bodies to enact such laws. Former sections 272 and 273 of the Penal Code (now sections 1308, 1309, Labor Code St. 1937, pp. 222, 223) were upheld in the case of In re Weber, 1906, 149 Cal. 392, 86 P. 809. Under these laws parents and persons having control over minors under sixteen years of age are prohibited from causing or encouraging such minors to engage in certain businesses or to be employed at certain places. In response to the contention that such statutes were arbitrary, unreasonable in their classification, and not of uniform operation, and discriminated against those minors under sixteen in favor of those over that age, the court said: "There is no sound reason for any such criticism. The same reasoning might be applied to a large number of laws which are universally conceded to be valid and constitutional. The law providing that a male person under 21 years of age is a minor, subject to the legal disabilities of minority, might be rendered unconstitutional by the same process of reasoning. It is competent for the Legislature to provide regulations for the protection of children of immature years. The growth of a child is gradual and the age of maturity varies with different children. It is impossible for any person to fix the exact time when a child is capable of protecting itself. The legislative judgment in regard to the proper age at which such regulations shall become applicable to the child cannot be interfered with by the courts." See also In re Spencer, supra.

[10-12] The right of the legislature to enact a law requiring the uniform vaccination of school children has been upheld as being within the police power of the state. French v. Davidson, 1904, 143 Cal. 658, 77 P. 663. As was there said, 143 Cal. at page 662, 77 P. at page 664: "Police regulations generally interfere with the liberty of the citizen in one sense. To arrest a man for a breach of the peace is an interference with his liberty. It is no valid objection to a police regulation that it prevents a person from doing something that he wants to do, or that he might do if it were not for the regulation. When we have determined that the act is within the police power of the state, nothing further need be said. The rest is to be left to the discretion of the lawmaking power. * * * Nor does the fourteenth amendment or any other part of the federal Constitution interfere with the power of the state to prescribe regulations to promote the health and general welfare of the people. 'Special burdens are often necessary for general benefits.' 'Class legislation, discriminating against some, and favoring others, is prohibited, but legislation, which in carrying out a public purpose is limited in its application, if within the sphere of its operation, it affects all persons similarly situated, is not within the amendment.' "

The right of the state to make and enforce provisions for the compulsory education of all children is clearly recognized as is the right to enact laws classifying persons by their age for the purpose of dealing with them as dependent or delinquent persons, such as the juvenile court law and laws to prevent school children from joining fraternities. 5 Cal.Jur. 842, Par. 199.

The only case specifically dealing with a curfew law which has come to our attention is the Texas case of Ex parte McCarver, 1898, 39 Tex.Cr. 448, 46 S.W. 936, 42 L.R.A. 587, 73 Am.St.Rep. 946, noted in 43 C.J. 363. That dealt with an ordinance making it unlawful for any minor under twenty-one years of age to go upon the streets after 9 p.m., with certain exceptions. The court there held that such a rigid restriction of the right to go upon the streets was an undue invasion of the personal liberty of the citizen. The ordinances before us, however, do not restrict the right of the included minor from going upon the streets between the specified hours but only from remaining or loitering upon such streets or places. The distinction between such terms has been previously alluded to herein. If the McCarver case can be intrepreted to prevent the enactment of any regulatory curfew legislation whatsoever, which we seriously doubt, it is out of step with the great weight of authority dealing with the right of legislative bodies to pass laws properly necessary to the protection of minors.

[13-15] The defendant further argues that the instant ordinances are unconstitutional and void because they unlawfully delegate to the sheriff the power to exempt persons so regulated from their inhibitions and penalties upon any grounds which he deems sufficient. Ordinance No. 3611 as now amended provides for an exception thereto as to a minor who has in his possession a permit granted by the sheriff, obtainable subject to the following conditions:

"Section 3. If it is necessary for any minor under the age of eighteen years to remain or loiter upon any street, highway, avenue, alley, public park, or public place between the hour of nine o'clock P.M. of any day, and four o'clock A.M. of the following day, the parent or guardian of such minor may file with the Sheriff an application for a permit to allow such use of such streets, highways, alleys, or public places, at such times by such minor as is necessary.

"Section 4. The application for a permit shall: (a) Be in writing. (b) State the name and age of such minor. (c) Describe the height, weight, sex, color of eyes and hair, and other physical characteristics of such person. (d) Explain the necessity which requires such minor to remain or loiter upon the streets, highways, alleys, avenues, public parks, and public places after the hour of nine o'clock P.M.

"Section 5. After the filing of an application therefor, the sheriff may grant a permit in writing for such use of the streets, highways, alleys, avenues, parks, and public places, at such hours, by the minor described in the application, as in his opinion is reasonably necessary."

It is readily apparent that the discretion so reposed in the sheriff to grant or deny such permit is not an arbitrary, unbridled or unlimited one, but is based upon grounds of reasonable necessity as shown by the facts and reasons therefor set forth in the written application. "The essential requirement of due process is merely that the administrative officer or body be required to determine the existence on nonexistence of the necessary facts before any decision is made. If the statute requires this, it does not vest an uncontrolled discretion, and the officer or body may not act arbitrarily." People v. Globe Grain & Milling Co., 1930, 211 Cal. 121, 126, 294 P. 3, 5. In that case the Fish and Game Commission of California was given authority to grant a permit to take fish upon a showing that to do so would not deplete the species or result in waste, and it was held that such a discretion was not arbitrary or unguided so as to invalidate the statute. To the same effect, see In re Porterfield, 1944, 63 Cal.App.2d 518, 528, 147 P.2d 15, wherein the city council was given authority, after hearings, to determine the fitness of applicants for licenses to solicit for memberships in organizations, and to grant or deny such application. An ordinance prohibiting the beating of a drum within the city unless a special permit was obtained from the president of the board of trustees of the city, which permit he might grant whenever, in his judgment, the issuance of the same shall not conflict with the purposes of the ordinance, was upheld in the case of In re Flaherty, 1895, 105 Cal. 558, 38 P. 981, 27 L.R.A. 529. As was there said, 105 Cal. at page 562, 38 P. at page 982, 27 L.R.A. 529: "In dealing with this and similar questions,—such as repairs of wooden buildings within fire limits, carrying concealed weapons, using public buildings and grounds, ringing bells on buildings where many operatives are employed, haranguing on the streets by lecturers, preachers, etc., singing or playing on musical instruments on the streets, and the like,—our federal, state, and municipal governments have always recognized the practical impossibility of providing in advance for proper exceptional cases, and the necessity of giving to a public officer some discretion in the premises; and laws and ordinances based on that principle have nearly always been upheld when subjected to judicial test. Laws are not made upon the theory of the total depravity of those who are elected to administer them; and the presumption is that municipal officers will not use these small powers villainously and for purposes of oppression and mischief." In the case of In re Hartmann, 1938, 25 Cal.App.2d 55, 60, 76 P.2d 709, the ordinance was sustained which provided for a written application to canvass the community to be filed with the chief of police which was to issue on a satisfactory showing that the applicant was entitled thereto. An authorization to refuse a license by the Real Estate Commissioner of California, if he is not satisfied as to the honesty, truthfulness and good reputation of the applicant, was approved in Riley v. Chambers, 1919, 181 Cal. 589, 592, 185 P. 855. The phrase "such as he may deem necessary" was held not to confer arbitrary power in the state engineer in Tarpey v. McClure, 1923, 190 Cal. 593, 601, 213 P. 983, 987. A like holding in McDonough v. Goodcell, 1939, 13 Cal.2d 741, 746, 91 P.2d 1035, 123 A.L.R. 1205, approved the discretion left in the Insurance Commissioner to reject an application for a permit to engage in the bail bond business unless proof is submitted to him that applicant is a fit and proper person to engage in such business. To the same general effect, see Jersey Maid Milk Products Co. v. Brock, 1939, 13 Cal.2d 620, 642, 91 P.2d 599; 18 Cal.Jur. 840, sec. 142; 16 Cal.Jur. 230, sec. 29.

The judgment and order dismissing the complaint herein as against the defendant Raymond A. Walton and discharging him are hereby reversed and the cause remanded for further proceedings.

SHAW, P. J., and BISHOP, J., concur.

26 Cal.2d 842

STEVENSON v. SAN DIEGO COUNTY.
L. A. 19351.

Supreme Court of California.
Aug. 31, 1945.

1. Appeal and error ⚿1008(3)

If interpretation of written document depends solely on language of instrument itself, trial court's construction is not binding and reviewing court will determine its meaning as a matter of law.

2. Appeal and error ⚿1008(3)

If parol evidence is necessary to explain the meaning of instrument, appellate court will follow trial court's construction if such construction is supported by the evidence.

3. Appeal and error ⚿1008(3)

Resolution by county board of supervisors requiring plaintiff and others to furnish necessary data for application for federal funds to finance construction and remodeling of county buildings without charge to county and contracts previously entered into by county with plaintiff for architectural services in connection with same project, when read together, did not establish as matter of law the work required of plaintiff by resolution was identical with that performed under contracts.

4. Counties ⚿129

Evidence that services, rendered by plaintiff under resolution by county board of supervisors requiring him and others to furnish necessary data for application for federal funds to finance construction and remodeling of county buildings, were different from those theretofore performed by him under contracts with county for architectural services and that he did not intend to waive right to compensation under contracts, supported trial court's finding that the only work to be done free of charge by plaintiff under resolution was work in addition to that provided for in contracts.

5. Counties ⚿129

Where contract with county for architectural services provided for progress payments to architect as work progressed and reserved to county right to abandon work at any time upon payment of compensation earned up to time of abandonment, architect's action against county, upon its abandonment of the contracts, was on the contracts and not for damages for breach of contracts.

6. Counties ⚿127

Where contract with county for architectural services provided for progress payments to architect as work progressed and reserved to county right to abandon work at any time upon payment of compensation earned to time of abandonment, approval by county of preliminary plans and estimates fixed architect's right to recover initial percentage payments provided therefor under contracts, notwithstanding subsequent abandonment by county.

7. Counties ⚿127

Architect, by contracting with federal agency which took over construction of county buildings to serve as architect on the project at a fixed fee, did not thereby lose right to compensation under previous contract with county for preparation of preliminary plans and estimates for such buildings previously approved by county.

In Bank.

Appeal from Superior Court, San Diego County; Robert B. Burch, Judge.

Action by F. W. Stevenson against County of San Diego to recover for services rendered as an architect. Judgment for plaintiff, and defendant appeals.

Judgment affirmed.

Prior opinion, App., 155 P.2d 688.

Thomas Whelan, Dist. Atty., Frank T. Dunn, Asst. Dist. Atty., and Carroll H. Smith, Chief Trial Deputy Dist. Atty., all of San Diego, for appellant.

George H. Stone, Monroe & McInnis, and C. M. Monroe, all of San Diego, for respondent.

GIBSON, Chief Justice.

Plaintiff, an architect, was employed by defendant county to prepare preliminary plans and estimates, working plans and specifications and to supervise the construction of a group of buildings for a tuberculosis sanitarium. Upon approval of the preliminary plans and estimates plaintiff was to be paid 1½ per cent of the estimated cost of construction. A second contract with the county employed plaintiff to do similar work in connection with alterations and additions to county hospital buildings.

Under this employment plaintiff was to receive an initial payment of 2½ per cent of the cost. Subsequent progress payments provided for in the contracts are not involved here. In the event of abandonment of the projects, plaintiff was to be paid the amount earned up to that time.

Plaintiff prepared preliminary plans and estimates for the work and the county decided to seek federal aid to finance construction. Accordingly, on July 14, 1941, the board of supervisors passed a resolution directing that an application be made to the Federal Works Agency for financial assistance. The resolution, among other things, authorized and directed certain county officers and plaintiff, as architect, to furnish "the necessary data and information" required in the application for federal financial aid, plaintiff's services "in this matter to be without charge to the county." Plaintiff and the others named in the resolution assembled the required data and information from the plans theretofore prepared by him, subject to such changes as were necessary to comply with government requirements. This data and information were placed on a form of application furnished by the government and copies of the modified preliminary plans were attached. The application and attached exhibits, including plaintiff's preliminary plans and estimates, were approved by the board of supervisors in August, 1941.

The federal government did not approve the entire proposed project but agreed to finance the construction of two new buildings and the remodeling of two buildings, for which it appropriated $620,000 and $60,500, respectively. The new construction was to be done under federal contract and the remodeling work was to be done under contracts let by the county. In February, 1942, the federal government employed plaintiff by contract to act as architect on the new construction work for a fee of $29,760. Later, because of differences between them, the county terminated plaintiff's contracts and he brought this action to recover for services rendered to the county thereunder. The trial court found for plaintiff on all material issues and entered judgment in his favor for $21,539.10, representing the aggregate of four items or amounts which plaintiff alleged he was entitled to recover under his contracts.

In his attack upon the judgment the county contends that its resolution of July 14, 1941, which directed plaintiff to furnish the necessary data and information for the application for federal funds and provided that his services in connection therewith were to be without charge, modified the contracts and relieved the county of any obligation to pay for the preliminary plans and estimates theretofore prepared by plaintiff. The county argues that the resolution is clear on its face and as a matter of law forecloses recovery by plaintiff for services performed under the contracts. It is plaintiff's position that the work done pursuant to the resolution was different from and in addition to the services rendered in the preparation of the preliminary plans and estimates, and that the finding of the court to this effect is supported by the evidence.

[1] It is settled that if the interpretation of a written document depends solely upon the language of the instrument itself the trial court's construction is not binding and a reviewing court will determine its meaning as a matter of law. Moore v. Wood, Cal.Sup., 160 P.2d 772.

[2] On the other hand, if parol evidence is necessary to explain the meaning of an instrument, an appellate court will follow the trial court's construction if it is supported by the evidence. Medico-Dental Bldg. Co. v. Horton & Converse, 21 Cal. 2d 411, 430, 132 P.2d 457; Eastman Oil, etc., Corporation v. Lane-Wells Co., 21 Cal. 2d 872, 875, 136 P.2d 564.

[3, 4] When the resolution and contracts are read together it cannot be said as a matter of law that the work directed by the resolution was identical with that performed under the contracts. Plaintiff testified that the services rendered under the resolution were not the same as those theretofore performed by him under the contracts and that although he was willing, without charge, to aid the county in preparing the application for federal funds, it was not his intention to thereby waive his right to compensation under the contracts. The evidence supports the conclusion of the trial court "that it was intended and understood by said resolution that the only work expected to be done free of charge by plaintiff was work in addition to that provided for in his said contracts."

[5, 6] Nor do we find merit in the county's contention that the action is for damages for breach of contract and that, if en-

titled to recover at all, plaintiff is only entitled to his prospective profits and not to the full amount of the earned percentages. As stated above, plaintiff was entitled to progress payments under the contracts. The county was given the right to abandon, conditioned, however, upon payment of the compensation then earned. The approval by the county of the preliminary plans and estimates in August, 1941, therefore fixed plaintiff's right to recover the initial percentage payments under the contracts.

The county makes a further contention with respect to an item of $15,500, included in the judgment, which represents the initial progress payment of 2½ per cent of $620,000 which the federal government allotted as the cost of construction of the two new buildings. It is argued that this item was improperly allowed because it assertedly covers compensation for services for which plaintiff received payment under his contract with the federal government. It is claimed that plaintiff's contract with the federal government contemplated the preparation of preliminary plans and that a portion of the fee therein fixed consequently served as compensation therefor. Upon this premise the county concludes that by entering into the federal contract plaintiff evidenced his intention to abandon any claim he might have under his prior contract with the county for the preparation of the preliminary plans.

The trial court found that the preliminary plans were prepared pursuant to the second contract between plaintiff and the county; that he was entitled to the specified 2½ per cent fee upon approval by the board of supervisors in August, 1941; and that plaintiff's later contract with the federal government did not include any compensation for such plans.

[7] It is argued by the county that the provision in plaintiff's contract with the government requiring him to furnish certain "preliminary documents" in connection with the working drawings is evidence that he consented to look to the government for payment of services rendered the county in the preparation of "preliminary plans and estimates." It appears, however, that the "preliminary documents" referred to are not the same as the preliminary plans and estimates, which had theretofore been furnished the government in connection with the county's application for funds. There is no evidence that the federal government by undertaking to finance the construction of the project also obligated itself to pay for the preparation of the preliminary plans that accompanied the application for financial aid. The project engineer employed by the Federal Works Agency, who was in charge of the transaction in question, testified that preliminary plans and sketches accompanying an application for federal aid must be furnished by the applicant without cost to the federal government. As stated above, the plans had been previously prepared under plaintiff's contract with the county, which had agreed to pay for them. Later, and upon approval of the county's application for funds, the federal government took over the construction work and in accordance with its established procedure made its own contract for architectural services incident thereto. Although the contract for such services was executed with plaintiff, it need not have been, since the federal government was free to employ any architect it desired. If an architect other than plaintiff had been employed by the federal government, it could not be successfully urged that as a consequence plaintiff lost his right to compensation for the services he had rendered the county, and the fact that the federal government contracted for plaintiff's services in connection with the construction work did not deprive plaintiff of the right to be compensated by the county for the preparation of the preliminary plans and estimates.

Plaintiff's claim that he is not receiving double compensation is further supported by an analysis of his contracts with the county and the federal government. Following the approval by the federal agency of the county's application for financial aid plaintiff proceeded under his subsequently executed contract with the federal government to prepare working plans and specifications. Under his contract with the county, plaintiff was entitled to receive (1) upon approval of the preliminary plans, the sum of $15,500, being 2½ per cent of $620,000, the estimated cost of construction, (2) upon the completion of the working drawings, an additional 5 per cent, or $31,000. Therefore, if plaintiff had proceeded solely under the county contract he would have received a total of $46,500 from the county for the preparation of preliminary plans and working drawings. Under the federal contract, however, he received for the working drawings a total of $29,760. This figure is a little short of, but approximately offsets, the $31,000 he would have received under his county contract for the preparation of the working drawings.

The judgment is affirmed.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.

26 Cal.2d 847

WOOD v. SAMARITAN INSTITUTION, Inc.

L. A. 19364.

Supreme Court of California.

Aug. 31, 1945.

Rehearing Denied Sept. 27, 1945.

1. Appeal and error 🔑989, 927(7)

On plaintiff's appeal from a judgment for defendant upon a directed verdict, Supreme Court could consider only the evidence most favorable to plaintiff together with every inference which could reasonably be drawn and every presumption which could fairly be deemed to arise therefrom in support of plaintiff

2. Hospitals 🔑7

The extent and character of care that a hospital owes its patients depends on circumstances of each particular case.

3. Hospitals 🔑7

A private hospital owes its patients the duty of protection and must exercise such reasonable care toward a patient as his known condition may require.

4. Hospitals 🔑7

The measure of duty that a hospital owes its patients is to exercise that degree of care, skill, and diligence used by hospitals generally in that community and required by express or implied contract of the undertaking.

5. Hospitals 🔑7

A hospital is liable for want of ordinary care, whether from incompetency of a nurse or failure in duty by a fully qualified nurse.

6. Hospitals 🔑7

The duty of care imposed on a hospital extends to safeguarding the patient from dangers due to mental incapacity.

7. Hospitals 🔑7

A private hospital is not an insurer of patient's safety, and the rules as to care required are limited by rule that no one is required to guard against or take measures to avert that which a reasonable person under the circumstances would not anticipate as likely to happen.

8. Hospitals 🔑8

Evidence presented question for jury as to whether plaintiff, during hours between her arrival at defendant's sanitarium for treatment as a chronic alcoholic and time she received her injuries when she jumped or fell through window, was in a condition from which a reasonable person could conclude that she might do harm to herself unless restrained, so as to establish negligence on part of defendant in failing to restrain plaintiff.

9. Hospitals 🔑7

Generally, where evidence establishes that means of harm were at hand and that operator of hospital had notice or knowledge of facts from which it might reasonably be concluded that the patient would be likely to harm herself or others unless preclusive measures were taken, operator of hospital must use reasonable care in the circumstances to prevent such harm.

In Bank.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Florence Margaret Wood against the Samaritan Institution, Incorporated, for injuries sustained by plaintiff when she fell or jumped through a window in defendant's sanitarium. From a judgment for defendant upon a directed verdict, the plaintiff appeals.

Reversed.

Prior opinion 156 P.2d 470.

F. Murray Keslar, of Los Angeles, for appellant.

Chas. E. R. Fulcher, of Los Angeles, for respondent.

SCHAUER, Justice.

Plaintiff appeals from a judgment for defendant entered upon a verdict directed by the court after plaintiff had rested following presentation of her evidence in this action to recover for injuries suffered by her when she fell or jumped through a second-floor window of the sanitarium conducted by defendant for the cure of chronic alcoholics. In her complaint plaintiff charges that defendant was negligent in failing to guard and restrain her and in failing to properly guard or bar the window of her second-story room to prevent her plunging through the window to the ground below. Plaintiff contends, among other things, that her evidence constituted a prima facie showing of negligence by defendant, entitling plaintiff to have the case go to the jury. Such contention must be sustained.

[1] According to established principles it is our duty, in determining an appeal from a judgment entered on a directed verdict, to consider only the evidence most favorable to plaintiff, together with every inference which can reasonably be drawn and every presumption which can fairly be deemed to arise therefrom in support of plaintiff. See Anthony v. Hobbie, 1945, 25 Cal.2d 814, 817, 155 P.2d 826; Lashley v. Koerber, 1945, 26 Cal.2d 83, 156 P. 2d 441.

From the evidence it appears that for several years prior to January 5, 1943, plaintiff had been addicted to the excessive use of intoxicating liquor, and that on such date, between the hours of 9 and 9:30 o'clock in the evening, she voluntarily entered defendant's sanitarium to submit herself to treatment. Nursing attendance is maintained in the sanitarium for twenty-four hours each day. Mrs. Nellie Henke, a practical nurse who was on duty as an employee of defendant sanitarium between the hours of 4 p.m. and 12 midnight, testified that at the time of plaintiff's entry plaintiff "sort of seemed drowsy * * * I thought myself she carried on. * * * She was highly nervous and she told me she was afraid she was in the insane asylum." When Mrs. Henke came back on duty the following afternoon plaintiff "said she believed she felt a little better and she seemed brighter at the time, but later on she had delusions and carried on all evening. * * * She would talk about them. She thought she was in the insane asylum. She wanted to get out because she thought she was in the insane asylum." The witness reported these facts to the nurses from whom she received her instructions but they did not "tell me to do anything at that time." Later the same evening the witness found plaintiff "on the floor. She thought she was home scrubbing her floor and I had an awful time convincing her she was not, and I finally got her up in bed." The witness then explained to the nurses how plaintiff "was acting" and the subject of placing restraints on plaintiff was discussed. However, "they said the next shift [which came on at midnight] would take care of it." Before the witness went off duty she discussed with the nurse who came on duty at midnight "about her [plaintiff] being on the floor scrubbing and they came on and I went home." However, no restraints were placed upon plaintiff, and at 12:45 a.m. on January 7, 1943, she was found lying on the cement courtyard beneath the window of her second-story room, suffering from the injuries for which she now seeks recovery.

From other evidence it appears that during the approximately twenty-seven hours that plaintiff had been in the sanitarium she had, pursuant to orders of a physician employed by defendant, received treatment consisting of the administration hypodermically of certain drugs and chemicals and the drinking of various intoxicating liquors, and that on January 6, 1943, and prior to the time plaintiff received her injuries, such physician had ordered for plaintiff "Nourish—Sedatives—Restraint PRN" which abbreviation he stated, means "as the occasion requires." He further testified, "I think the nurse would be justified in putting on restraints if the patients were injuring themselves or attempting to. * * * I recall I wanted her placed in restraint for her own protection." The physician testified also that he had never seen "A confirmed alcoholic mind" that followed "a normal pattern. * * * You cannot determine what an alcoholic will do from one time to another," that you cannot "determine in advance what action" an alcoholic "person is going to take," that in defendant's sanitarium persons with delusions were not always put under restraint, and that restraint was used only when a patient's delusions "indicate a desire to injure someone else" or for the patient's "own protection." On the chart upon which the sanitarium recorded plaintiff's condition appears the following notation under date of January 5: "4:30 a.m. Patient delusional—persecution complex."

Mrs. Henke testified further that there were three large windows in plaintiff's room with double screens that "pull together" and could be pushed "back and forth." The screens were "closed * * * on the outside" but "together in the center." They overlapped and were locked on each side of the window. When so locked they could not be moved "unless you pushed them out." The windows were open and "hanging loose."

Plaintiff's sister testified that she visited plaintiff at defendant's sanitarium for about forty-five minutes during the afternoon of January 6, 1943, but plaintiff failed to recognize her and "just laid there with the covers up to her neck and she was staring at the ceiling, and I spoke and she didn't look one way or the other; just stared all the time." This witness testified also that there were no nurses in sight on either the first or the second floor when she entered the sanitarium and it was necessary for her to find her way alone to plaintiff's room; that during her forty-five-minute visit to plaintiff only one nurse entered plaintiff's room and such nurse remained for "about two minutes" and then left and did not reappear.

Dr. Homer O. Zumwalt, an osteopathic physician and surgeon, licensed and practicing in this state since 1930, experienced in the methods of treating alcoholics at the various hospitals in Los Angeles and acquainted with the kinds and types of restraints that are used on various alcoholic patients and of the nursing conditions required in the various institutions in which alcoholics are treated, testified as follows:

"Any patient who is in a mental condition to make him or herself dangerous to themselves or to others, should be in some way restrained. * * *

"Q. As I understand it, if they are dangerous because of their mental aberrations and apt to do injury to themselves or any other person, then they should be put in restraint? A. They should be protected, yes * * *

"Q. It is only those persons who have a tendency to injure themselves or somebody else that should be placed under restraint ordinarily; isn't that the test? A. I would add to that the qualification that they would be a patient that might be afraid to injure themselves or some one else."

[2-7] As stated in 41 C.J.S., Hospitals, § 8(3), p. 349, "The extent and character of the care that a hospital owes its patients depends on the circumstances of each particular case. A private hospital owes its patients the duty of protection, and must exercise such reasonable care toward a patient as his known condition may require. The measure of duty of a hospital is to exercise that degree of care, skill, and diligence used by hospitals generally in that community, and required by the express or implied contract of the undertaking. A hospital is liable for want of ordinary care, whether from incompetency of a nurse or failure in duty by a fully qualified nurse. * * * The duty of care imposed on a hospital extends to safeguarding the patient from dangers due to mental incapacity. * * * On the other hand, a private hospital is not an insurer of a patient's safety, and the rules as to care required are limited by the rule that no one is required to guard against or take measures to avert that which a reasonable person under the circumstances would not anticipate as likely to happen."

[8] Despite the above epitomized evidence defendant argues that no showing was made by plaintiff from which a jury could justifiably conclude that plaintiff was in a condition in which she might reasonably be expected by defendant to do harm to herself or to another, and that therefore the court correctly instructed the jury that defendant was not liable to plaintiff for the injuries she has sustained. However, it appears to us that plaintiff's evidence if believed by a jury is not as a matter of law insufficient to establish that plaintiff during the hours between her arrival at defendant's sanitarium and the time she received her injuries, was in a condition from which a reasonable person could conclude that she might do harm to herself unless restrained and that such condition was known to and recognized by defendant's attendants who were charged with the care of plaintiff. The whole of such evidence points to the fact that the behavior of one in plaintiff's condition could not be foretold with any degree of certainty and that, as reported by Mrs. Henke, the practical nurse, to her superiors in the sanitarium, plaintiff "thought she was in the insane asylum. She wanted to get out because she thought she was in the insane asylum." Thereafter, even though the matter of restraints was discussed among the nurses and even though the physician in charge had ordered "restraint" as the occasion re-

quired, and testified that he wanted plaintiff "placed in restraint for her own protection," no measures were taken to prevent plaintiff from attempting to escape from the sanitarium either by leaping through a window, or otherwise. The windows in plaintiff's room were open, apparently the screens could be opened by "pushing them out," plaintiff was not physically restrained in any way from leaving her bed, and no nurse was in sufficiently close attendance upon her to prevent her from attempting to leave the sanitarium. Under such circumstances it cannot be said that as a matter of law plaintiff's evidence failed to establish the negligence with which she charges defendant. The issue presented should have been resolved as one of fact rather than as one of law.

[9] Defendant cites the cases of Papini v. Alexander Sanitarium, Inc., 1936, 12 Cal.App.2d 249, 55 P.2d 270, and Wilbur v. Emergency Hospital Ass'n., 1915, 27 Cal. App. 751, 151 P. 155, in support of its contention that plaintiff's evidence would fail to sustain a verdict in her favor. It is sufficient to observe that those two cases and the evidence there considered differ factually from the case here before us to such an extent as to have no persuasive force in defendant's favor. We have also reviewed at some length cases from other jurisdictions cited by both plaintiff and defendant, in which likewise the factual situations differ. From them can be drawn, however, the general proposition that where, as here, plaintiff's evidence establishes that the means of harm were at hand (existent in the physical surroundings) and that defendant had notice or knowledge of facts from which it might reasonably be concluded that a patient would be likely to harm himself or others unless preclusive measures were taken, then defendant must use reasonable care in the circumstances to prevent such harm. As stated above, we are satisfied that plaintiff's evidence, if believed by a jury, is sufficient for such purpose.

Because of our conclusion that for the reasons stated hereinabove the judgment must be reversed it becomes unnecessary to consider other points raised by plaintiff.

The judgment is reversed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SPENCE, JJ., concurred.

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70 Cal.App.2d 728

BUTLER v. BELL OIL & REFINING CO.

Civ. 14908.

District Court of Appeal, Second District, Division 3, California.

Sept. 7, 1945.

1. Automobiles ⚷121

The Highway Carriers' Act authorizes licensed highway contract carrier or its assignee to sue shipper for difference between minimum transportation rate prescribed by State Railroad Commission and lower rate agreed to and accepted by carrier when transportation service was rendered. St. 1935, p. 878, as amended.

2. Automobiles ⚷121

The provision of Highway Carriers' Act, authorizing licensed highway contract carrier to recover from shipper difference between minimum transportation rate prescribed by State Railroad Commission and rate paid by shipper under contract with carrier, is not regulation of shipper, but merely incident in aid of effective enforcement of commission's order fixing rates, so that notice to shipper of hearings before commission for such purpose is unnecessary. St.1935, p. 878, as amended.

◆

Appeal from Superior Court, Los Angeles County; Jess E. Stephens, Judge.

Action by J. P. Butler, as assignee for collection of the Bradley Truck Company, against the Bell Oil & Refining Company for the difference between the minimum rate, prescribed by the State Railroad Commission for transportation of crude oil from certain wells to defendant's refinery, and a lower rate paid by defendant under a contract with assignor. Judgment for plaintiff, and defendant appeals.

Affirmed.

John W. Preston, Oliver O. Clark, and Robert A. Smith, all of Los Angeles, for appellant.

Henry W. Wyatt and Elmo L. Morris, both of Los Angeles, for respondent.

FOX, Justice pro tem.

Defendant appeals from a judgment in favor of plaintiff, who brought this action as the assignee for collection of the Bradley Truck Company. Plaintiff's assignor was at all times herein engaged in business as a licensed highway contract carrier under the Highway Carriers' Act (Stats. 1935, Chap. 223, p. 878, as amended by Stats. of 1937, p. 2006 and 1939, p. 1814, respectively; Deering's Gen.Laws, Act 5129a, as amended), transporting property for compensation by motor vehicle over the public highways of the state. As such highway contract carrier, plaintiff's assignor transported crude oil for defendant (and its predecessor) from certain wells to defendant's refinery. It charged and collected freight charges less than the minimum rates prescribed by the California Railroad Commission for such services. Plaintiff, therefore, seeks to recover the difference between the legally prescribed rate and the rate paid by the defendant pursuant to a purported contract with said carrier.

[1] In the language of the appellant, "the sole question here presented is: Does the Highway Carriers' Act permit a suit by the carrier to collect from the shipper a higher rate of transportation than that solemnly agreed to and accepted by it at the time the service was rendered?" This question has been answered in the affirmative by the recent decision of this court in the case of Gardner v. Rich Mfg. Co., 1945, 68 Cal.App.2d 725, 158 P.2d 23. It was there stated (68 Cal.App.2d at page 730, 158 P.2d at page 25): "The schedule of minimum rates * * * [established by the Railroad Commission] became a part of every contract between a highway contract carrier and the shipper. [Citing cases.] The tariff applicable, on the facts, to any particular shipment cannot be changed by an agreement between the parties * * * and the carrier or it assignee is entitled to collect the proper rate. [Citing authorities.] Otherwise the statute would be ineffectual for the purpose for which it was enacted."

[2] The only argument here advanced that was not presented in the Gardner case is that the Act does not and was not intended to regulate the conduct of the shipper; that to enforce the tariff established by the Railroad Commission against the appellant is, in effect, to regulate the shipper, and that said tariff is not binding on appellant because the Act does not require notice to be given to the shipper. It is true, as stated in Entremont v. Whitsell, 1939, 13 Cal. 2d 290, 300, 89 P.2d 392, 397, that "The statute does not cover shippers, but carriers * * *." The collection of undercharges, however, is simply a step toward making the authorized regulation of highway carriers more effective. It is in furtherance of the purposes of the Act, among which are the establishment of just and reasonable rates and the prevention of discrimination. Gardner v. Rich Mfg. Co., supra, 68 Cal. App.2d at page 725, 158 P.2d 23. As pointed out in Johnson v. L. B. Hartz Stores, 1938, 202 Minn. 132, 277 N.W. 414, 416, "the permitting of such a recovery is a much more effective way of enforcing the law than any other could possibly be." Fines and penalties may be imposed on the carrier for violating the minimum schedule of rates fixed by the commission but, as is also pointed out in the Johnson case, "the pressure of the shippers upon the carriers for reduced rates in violation of the statute will almost entirely be relieved if the shippers know that notwithstanding any illegal bargain that is made, recovery may still be had on the basis of the minimum rate fixed by the commission. Collusion between the carrier and the shipper to circumvent the law, which would otherwise be easy of accomplishment, will be practically eliminated." 277 N.W. at page 416. The fact that the shipper has to pay the difference between a legally established rate (appellant does not dispute the legality of the tariff here involved), and a lesser rate for which he was able to bargain privately, does not mean that the shipper is being regulated. It is merely an incident in aid of the effective enforcement of the Railroad Commission's order. Hence, notice to the shipper of the hearings before the commission for the purpose of fixing a schedule of minimum rates for highway contract carriers is not necessary. If appellant's theory were sound and carried to its logical conclusion, it would follow that acts of the legislature would not be binding on those who did not have notice of such contemplated legislation. This, of course, is not the law.

Appellant relies on Entremont v. Whitsell, supra, 13 Cal.2d 290, 89 P.2d 392. We find nothing in that case which supports a conclusion different from that herein reached. It might, however, be noted that the court there upheld the order of the Railroad Commission which required the carrier to collect the amount of the undercharges.

The judgment is affirmed.

DESMOND, P. J., and PARKER WOOD, J., concur.

70 Cal.App.2d 705

GEISENDORFER v. RAINBOW MILL & LUMBER CO.

Civ. 7155; Sac. 5709.

District Court of Appeal, Third District, California.

Sept. 5, 1945.

Hearing Denied Nov. 1, 1945.

1. Corporations 🔑389

The authorized business of a corporation must be determined primarily from the provisions of its charter or articles of incorporation.

2. Corporations 🔑596

A lumber corporation which had abandoned its primary purpose of incorporation for a long period of time was not "doing business" as a lumber corporation so as to prevent dissolution at suit of a minority stockholder because it owned stock in another lumber corporation which was not a subsidiary corporation of the former corporation. Civ.Code, §§ 278, 404(B) (1), (E).

See Words and Phrases, Permanent Edition, for all other definitions of "Doing Business".

3. Corporations 🔑377(2)

Corporate charter provision authorizing lumber corporation to acquire and vote shares and obligations of other corporations did not constitute the corporation a "holding corporation" authorizing it to carry on the business of buying or selling stocks and bonds as an occupation distinct from its primary business of manufacturing lumbering products. Civ.Code, § 278.

See Words and Phrases, Permanent Edition, for all other definitions of "Holding Corporation".

4. Corporations 🔑614(5)

In stockholder's suit for dissolution of corporation, testimony offered to ascertain what activities corporation had engaged in in recent years, so that court could determine by independent construction of charter whether corporation had abandoned for more than one year business it was authorized by its charter to perform, was properly admitted. Civ.Code, § 404(B) (1), (E).

Appeal from Superior Court, Siskiyou County; James M. Allen, Judge.

Suit by H. A. Geisendorfer, a minority stockholder, against Rainbow Mill & Lumber Company, Incorporated, to procure the involuntary dissolution of the corporation on ground of abandonment of business for more than one year. From an adverse judgment, defendant appeals.

Affirmed.

C. J. Luttrell and J. Everett Barr, both of Yreka, and Carlton & Shadwell, of Redding, for appellant.

Roy A. Weaver, of Dunsmuir, for respondent.

THOMPSON, Justice.

This is a suit instituted by a minority stockholder of the defendant Rainbow Mill and Lumber Company, a corporation, under Section 404(B) (1) of the Civil Code, to procure the involuntary dissolution of the corporation on the ground that it had "abandoned its business for more than one year." The judgment was rendered in the alternative, pursuant to Subdivision (E) of that section as amended in 1941. It provides that unless the holders of 50% of the outstanding shares of stock vote to purchase stock belonging to plaintiff at a fair cash value thereof, and notify him to that effect within ten days from the entry and notice of judgment, the corporation shall become dissolved. No such notice of proposed purchase of stock was served. The decree of dissolution became effective. From that judgment the defendant has appealed.

It is urged that the findings and judgment are not supported by the evidence for the chief reasons that it does not appear the corporation abandoned its business for more than a year prior to the commencement of the action, or that it mismanaged its business, and that the court erred in receiving oral evidence to vary the terms of the charter.

In the sixth finding of fact the court determined:

"That the defendant corporation had abandoned its business for more than one year prior to the filing plaintiff's complaint for dissolution in this action; that no Corporate meetings of the stockholders or directors of said Corporation had been held for more than one (1) year prior to the filing of said complaint; that all of the physical assets of said Company have been sold; that all of the operating assets of said Company used in the operation of its sawmill and lumbering business were sold by said Company in the year 1921, and said Company has not since said date engaged in the lumber manufacturing or sawmill business; that the defendant Corporation has not engaged in any business for more than one (1) year prior to the filing of plaintiff's complaint."

In the ninth finding of fact the court further determined:

"That those in control of the Corporation have been guilty of persistent abuse of authority and unfairness toward the plaintiff and have used their control of said Corporation for purposes personal to the majority stockholders and without benefit but to the contrary thereof to the detriment of the plaintiff and said Corporation."

We are of the opinion the findings and judgment are adequately supported by the evidence. The defendant is a California corporation organized prior to 1921, primarily to operate a logging and lumber business, with its principal place of business in Siskiyou County. For a number of years the defendant did actively conduct a lumber and logging business. There were 40,000 shares of capital stock issued and outstanding. At, and for sometime prior to, the commencement of this action, the plaintiff owned 11,561.81 shares, which was one-third of the outstanding stock. There is some evidence that the stock was worth about $35 per share. There were 8,375 shares held as treasury stock. Frank, Joe and Tom Ball, who are members of the same family, owned and controlled more than 50% of the stock. Frank Ball was the President of the corporation. In November, 1921, the "Mill Plant" was sold for $18,000. About the same time the "Logging Equipment" was sold to Pioneer Box Company, another corporation, for $16,500, in which company Frank Ball owned a one-ninth interest. Since the last-mentioned sales of the equipment, assets and property of the defendant corporation, it did not engage in further logging or lumber business.

The Pioneer Box Company was succeeded in 1928 by the Mt. Shasta Pine Manufacturing Company, which assumed its indebtedness to Rainbow Mill and Lumber Company for the milling equipment purchased. The Mt. Shasta Company issued and delivered to the defendant corporation 401 shares of its capital stock in payment of that debt. That stock is still held by the defendant. No dividends have been declared or paid upon defendant's stock since 1937. That Mt. Shasta stock is the only property held by the defendant. It is not contended the defendant corporation has engaged in or operated a logging or lumber business since it disposed of its milling plant, equipment and property prior to 1928.

The board of directors of the defendant corporation passed a resolution after the sale of its property, directing the procuring of dissolution of the corporation. The President, Mr. Frank Ball, failed and refused to proceed to procure a dissolution because, as he testified, "I believe to dissolve the Rainbow Corporation would have a bad effect on the value of this [Mt. Shasta Company] stock held by Rainbow." He said he considered the Rainbow Mill and Lumber Company was engaged in doing business for which it was incorporated because it was holding the 401 shares of Mt. Shasta Pine Manufacturing Company upon which "It has been keeping a watchful eye on this business that they own stock in." It is conceded that no stockholders' meeting of the defendant corporation has been held since 1937. It has not pretended to carry on or operate a logging or lumber business since 1928.

[1-3] The important issue on this appeal is the question of whether a lumber corporation which has abandoned its primary purpose of incorporation for a long period of time may be considered as maintaining its lumber business merely because it owns stock in another corporation. We think that question must be answered in the negative. The authorized business of a corporation must be determined primarily from the provisions of its charter or articles of incorporation. Silveira v. Associated Milk Producers, 63 Cal.App. 572, 219 P. 461; 6A Cal.Jur. 143, sec. 60. The first article of the defendant's charter clearly indicates that the purpose of the corporation was to conduct a logging and lumber manufacturing business. It reads:

"1. To carry on the business of lumber manufacturing in all its branches, and for the purpose to acquire by purchase or otherwise, and to operate, logging camps and equipment; to log timber lands for itself or others under contract or otherwise; to purchase, construct, or otherwise acquire, and to operate, sawmills, planing mills, and any or all kinds of factories for lumber and wood-working; and generally to do all things necessary or convenient for the complete operation of a lumber manufacturing business."

Incidental to the operation and maintenance of a lumber and logging business, article six of the charter authorizes the corporation:

"To subscribe for, purchase, or otherwise acquire, and hold with the same rights of ownership therein, including the right to vote the same, as may be permitted to natural persons, the shares, bonds and obligations of any corporation organized under the laws of any state, * * *."

Clearly the last quoted article did not constitute the defendant a "holding corporation" authorizing it to carry on the business or traffic in buying and selling stocks and bonds as an occupation separate and distinct from its primary business of logging and manufacturing lumber products. The Mt. Shasta Pine Manufacturing Company, in which the defendant held 401 shares of stock, was not a subsidiary corporation of the Rainbow Mill and Lumber Company. Civil Code, sec. 278; People v. Alexander Goldstein Co., 66 Cal.App.2d 771, 774, 152 P.2d 1016. It has been held a corporation which is organized for the chief purpose of conducting a specified mercantile or manufacturing business, with the incidental right to acquire or hold notes, stocks, bonds, or other evidences of indebtedness, may not be deemed to be "doing business" merely because it holds such stock or maintains a suit to collect indebtedness due to it, after the business property has been sold and the maintenance of the business has been abandoned for years. Van Oss v. Premier Petroleum Co., 113 Me. 180, 93 A. 72; People ex rel. Butterick Co. v. Gilchrist, 213 App.Div. 533, 211 N.Y.S. 75, 77; Rose v. Nunnally Inv. Co., 5 Cir., 22 F.2d 102; Chile Copper Co. v. Edwards, D.C., 294 F. 581; Three Forks Coal Co. v. United States, D.C., 9 F.2d 946; 13 Words and Phrases, Perm.Ed., p. 194.

[4] Conceding, without so deciding, that the articles must necessarily determine the purpose for which the corporation was organized and authorized to do business, and that oral evidence is incompetent by means of which to vary the terms of the charter, we are of the opinion the court did not err in the admission of evidence tending to vary the terms of the charter. The challenged evidence was offered for the purpose of determining what business, if any, the corporation engaged in during the fifteen years which had elapsed after its lumbering equipment and mill property had been sold. Objections were made to plaintiff's question propounded to Mr. Ball, the President of the corporation, as follows:

"Q. Mr. Ball, isn't it true that the Rainbow Corporation is not engaged in the lumber business at all since the transfers were made as shown by the minutes we were just discussing?"

The preceding question was followed by the inquiry:

"Q. Is it your opinion * * * Mr. Ball, that the Rainbow Corporation was in the lumber business by reason of being a stockholder in another lumber company? * * * A. Yes, I think so."

It will be observed those questions do not call for evidence to vary the terms of the charter. On the contrary, they sought to elicit an admission that the corporation had not engaged in "the lumber business" since it disposed of its logging and lumber equipment and property. That seemed to be a conceded fact, for the President, Mr. Ball, explained that he assumed the corporation had not abandoned its lumber and logging business, in spite of its disposal of all other property, because it still held 401 shares of stock "in another lumber company." The foregoing questions were merely propounded to ascertain what activities the corporation had engaged in so as to determine by an independent construction of the charter whether it had abandoned for more than one year the business it was authorized by its charter to perform. The rulings of the court in that regard were not erroneous.

In view of what we have previously said, it is unnecessary to determine whether there is sufficient evidence to support the findings that the directors of the corporation mismanaged the business.

The judgment for dissolution and liquidation of the corporation appears to have been justified by ample proof that it is for the necessary protection and best interest of a minority stockholder who owns one-third of the capital stock of the corporation. We find no reversible error in the record.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

70 Cal.App.2d 740

HICKS v. HAITIAN COFFEE CO. et al.

Civ. 14926.

District Court of Appeal, Second District, Division 2, California.

Sept. 13, 1945.

1. Appeal and error 🔑948

Relief cannot be granted by appellate court from an order denying a motion for change of place of trial for convenience of witnesses unless movant has made a positive showing of abuse of discretion.

2. Venue 🔑70

Where plaintiff's and defendants' affidavits disclosed no disparity in quality and quantity of evidence available in both cities, superior court of Long Beach did not abuse its discretion in denying defendants' motion for transfer of action to superior court of Los Angeles on ground of convenience of witnesses.

◆

Appeal from Superior Court, Los Angeles County; Fred Miller, Judge Pro Tempore.

Action by Jessie Belle Hicks against Haitian Coffee Company and others. From an order denying defendants' motion for a change of place of trial, defendants appeal.

Affirmed.

Hugh G. Maddox, of Long Beach, for plaintiff and respondent.

Marshall Denton, Jr., of Los Angeles, for defendants and appellants.

MOORE, Presiding Justice.

After due notice defendants moved for an order transferring the action from the Superior Court at Long Beach to the same court in the city of Los Angeles on the ground of convenience of witnesses. In support of their motion they filed and presented the affidavit of defendant Burgess specifying various items of evidence essential to the defense and alleging that all of their witnesses as to such matters reside in Los Angeles. In response to such affidavit, plaintiff averred the same items of proof as essential to the establishment of her cause and that all of her specified witnesses reside in the seaside city. The motion was denied.

[1, 2] From an order denying a motion for the change of place of trial no relief can be granted by the appellate court unless the movant has made a positive showing of abuse of discretion by the trial court. Wrin v. Ohlandt, 213 Cal. 158, 1 P.2d 991; Scott v. Stuart, 190 Cal. 526, 213 P. 947. No such showing has been made herein. The two affidavits disclose no disparity in the quality or the quantity of the evidence available in the two cities.

The order is affirmed.

McCOMB, J., concurs.

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70 Cal.App.2d 856

WHITAKER v. HAITIAN COFFEE CO et al.

Civ. 14927.

District Court of Appeal, Second District, Division 2, California.

Sept. 13, 1945.

1. Appeal and error 🔑948

Relief cannot be granted by appellate court from an order denying a motion for change of place of trial for convenience of witnesses unless movant has made a positive showing of abuse of discretion by trial court.

2. Venue 🔑70

Where plaintiff's and defendants' affidavits disclosed no disparity in quality and quantity of evidence available in both cities, superior court of Long Beach did not abuse its discretion in denying defendants' motion for transfer of action to superior court of Los Angeles on ground of convenience of witnesses.

◆

Appeal from Superior Court, Los Angeles County; Fred Miller, Judge Pro Tempore.

Action by Mrs. R. C. Whitaker against Haitian Coffee Company and others. From an order denying defendants' motion for a change of the place of trial, defendants appeal.

Affirmed.

Hugh G. Maddox, of Long Beach, for plaintiff and respondent.

Marshall Denton, Jr., of Los Angeles, for defendants and appellants.

MOORE, Presiding Justice.

[1, 2] This case is a companion to that of Hicks v. Haitian Coffee Co. et al., Cal. App., 161 P.2d 564. The averments in the affidavits filed on behalf of the respective parties are practically identical with those contained in the affidavits filed in the Hicks case. The order entered is the same. For the reason stated and upon the authorities therein cited the order herein is affirmed.

McCOMB, J., concurs.

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70 Cal.App.2d 711

FREITAS v. MARSH.

Civ. 12837.

District Court of Appeal, First District, Division 1, California.

Sept. 6, 1945.

1. Automobiles ⇒19

In claim and delivery action to recover automobile sold by borrower thereof, who was plaintiff's agent for sole purpose of securing new registration, evidence was insufficient to warrant inference that plaintiff indorsed ownership and registration certificates or that he authorized borrower to indorse them or that borrower indorsed them in presence of plaintiff or that they were indorsed with knowledge of plaintiff for purpose of sale.

2. Estoppel ⇒72

To apply the maxim that, where one of two innocent persons must suffer by the acts of a third, he, by whose negligence it happened must be the sufferer, it must appear that negligence of one of the parties was the cause of the loss. Civ.Code, § 3543.

3. Appeal and error ⇒1008(1)

Where plaintiff loaned his automobile to third person and intrusted such person with blank certificate of ownership for sole purpose of securing new registration certificate and defendant purchased automobile from third person but failed to examine ownership and registration certificates which bore crudely forged indorsements of plaintiff's name, whether plaintiff or defendant was negligent within maxim that, where one of two innocent persons must suffer by act of a third, he, by whose negligence it happened must be the sufferer, was for trial court. Civ.Code, § 3543.

4. Principal and agent ⇒99

An agent has such authority as is given by statute unless deprived thereof by his principal, and even then has such authority ostensibly, except as to persons who have actual or constructive notice of restriction upon authority. Civ.Code, §§ 2304 et seq., 2317, 2318, 2334.

5. Principal and agent ⇒99

Ostensible authority rests upon doctrine of estoppel, and its essential elements are representation by principal, justifiable reliance thereon by a third party, and change of position or injury resulting from such reliance. Civ.Code, §§ 2317, 2318, 2334.

6. Automobiles ⇒19

The delivery by plaintiff to third person, who had borrowed plaintiff's automobile, of unindorsed certificate of ownership to enable third person to obtain a new registration certificate, did not make third person an ostensible agent to sell automobile, so as to bar plaintiff from recovering automobile from defendant who had purchased it without examination of certificates of ownership and registration, which were indorsed with crude, easily detectable forgeries of plaintiff's name. Civ.Code, §§ 2304 et seq., 2317, 2318, 2334, 3543.

◆

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Claim and delivery action by Antone T. Freitas against R. P. Marsh, involving the sale of an automobile. Judgment for plaintiff, and defendant appeals.

Affirmed.

R. A. Rapsey, of San Bruno, for appellant.

Joseph A. Garry, of San Francisco, for respondent.

WARD, Justice.

This is an appeal by defendant in an action for claim and delivery involving the sale of an automobile. It is contended that the facts as found compel a finding of ostensible agency in the seller in negotiating a sale of plaintiff's automobile, and that the trial court erred in not protecting defendant in his claimed title.

Plaintiff loaned the automobile in question to one Stone for personal use during a short period when Stone's car was out of order. Stone used the borrowed automobile to convey plaintiff to and from work. He also used it to peddle eggs. While the car was in Stone's possession, plaintiff delivered to Stone the pink certificate of ownership, entirely in blank as to signature, for the purpose of procuring a new registration certificate to replace his certificate which had been lost. Stone, while using this vehicle in his temporary business of peddling eggs, became acquainted with defendant and agreed to sell defendant certain furniture and the automobile for $1,400 cash, of which $850 represented the purchase price of the automobile. At the time of the sale Stone delivered to defendant the pink and white certificates bearing plaintiff's purported endorsements. Stone told defendant that Freitas, the plaintiff, owed him money and had authorized him to sell the car to pay the indebtedness, all of which was untrue. During this period of ten days plaintiff and defendant were unknown to each other, and defendant had met Stone only a few times. Defendant did not get in touch with plaintiff before the sale of the automobile and made no further inquiry relative to plaintiff's interest in the car or the amount of the claimed indebtedness. The trial court found that the automobile which was sold for $850 was of the value of $1,100. At the time of the delivery of the slips by Stone to defendant no examination was made of the contents thereof other than to note that some name had been written thereon.

[1] No inference may be drawn from the evidence that plaintiff endorsed the certificates or that he authorized Stone to endorse them, or that Stone endorsed the slips in the presence of plaintiff, or that they were endorsed with the knowledge of plaintiff for the purpose of sale.

The transcript of evidence discloses that the endorsements were crude forgeries. The name of plaintiff, "Antone T. Freitas," was typed on the face of each certificate. It appears that the person who wrote the signatures wrote "A. Freitas" on both certificates in blue ink. On the registration card, the signature had later been traced in black ink, and "nton" had been added between the "A" and "Freitas." The final "e" of the given name was left out, as was also his middle initial "T". On the certificate of ownership, where the signatures had also later been traced in black ink, the second had been written with the initial "A" so close to "Freitas" that the full given name could not be placed between them and "Anton" had been written anew so that the "o" of "Anton" covers the initial "A" which had been originally placed there. Here, too, the final "e" and the initial "T" had been omitted. Defendant testified that he did not examine the certificates because his glasses happened to be in the house.

[2] It is appellant's position that this case falls within the rules governing ostensible agency and the maxim in Civil Code, section 3543, that, "Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer." To apply this rule it must appear that negligence of one of the parties must have been the cause of the loss of the property. Jeannerette v. Taylor, 2 Cal.App.2d 568, 38 P.2d 831. It was within the province of the trial court to determine whether negligence might be based on the act of plaintiff in loaning the car to Stone and giving him the unendorsed pink slip, which when endorsed is an indicia of ownership, or upon the conduct of the defendant, including the failure to examine the forged signatures. The judgment must be affirmed unless this court, as a matter of law, must determine that the acts of plaintiff created an ostensible authority to sell the automobile for plaintiff's account. "'Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess.' Cal.Civ.Code, § 2317. An agent also has such authority as is given by statute (Cal.Civ.Code, § 2304 et seq.), unless deprived thereof by his principal; 'and has even then such authority ostensibly, except as to persons who have actual or constructive notice of the restriction upon his authority' (Cal.Civ.Code, § 2318). Ostensible authority rests upon the

doctrine of estoppel, and its essential elements are representation by the principal, justifiable reliance thereon by the third party, and change of position or injury resulting from such reliance. Cal.Civ.Code, § 2334; * * *." Ernst v. Searle, 218 Cal. 233, 236, 237, 22 P.2d 715, 716; Hobart v. Hobart Estate Co., 26 Cal.2d 412, 159 P.2d 958; Restatement of the Law, Agency, sec. 265. Civil Code, section 2334, expressly provides: "A principal is bound by acts of his agent, under a merely ostensible authority, to those persons only who have in good faith, and without want of ordinary care, incurred a liability or parted with value, upon the faith thereof." In the majority opinion in County First Nat. Bank v. Coast Dairies & Land Co., 46 Cal.App.2d 355, 366, 115 P.2d 988, 994, it is said: "The two essential elements of an ostensible agency are: (1) The third person must believe that the agent had authority; and (2) such belief must be generated by some act or neglect of the person or company to be held. Harris v. San Diego Flume Co., 87 Cal. 526, 25 P. 758."

It is true that Stone became an agent of plaintiff for the purpose of procuring a new registration certificate for the one which had been lost. But this is not the agency relationship upon which the defendant claims to have relied. No such representation was made by Stone. Defendant contends that by the delivery of possession of the automobile, even with the pink slip unendorsed, the plaintiff created a deceptive situation from which anyone could reasonably have concluded that Stone was the agent to sell the car for plaintiff.

Appellant's citation of cases does not assist in presenting his contentions. In W. P. Herbert Co. v. Powell, 90 Cal.App. 782, 266 P. 620, the automobile was transferred with the understanding that payment therefor would be made at some indefinite time in the future. Under such circumstances the recipient of the car was authorized to have the car registered in his name and to sign the previous owner's name to the pink slip. Mitchell v. Porter, 123 Cal.App. 329, 11 P.2d 58, involves forging the name of the owner on the ownership slip and selling the automobile to a party in the business of buying and selling cars. It was held that the owner was entitled to reclaim his property. At page 333 of 123 Cal.App., at page 59 of 11 P.2d, the court said: "If the plaintiff had inserted his signature in the blanks on the reverse side of the certificate of ownership, and if he had thereafter intrusted his automobile and the certificate so filled out into the hands of Marks, the defendants might have cause to complain." In the present case the owner's name had not been inserted by the owner on the certificate. In Carter v. Rowley, 59 Cal.App. 486, 211 P. 267, the purchase price of the automobile was embezzled. The facts are set forth at page 492 of 59 Cal.App., at page 269 of 211 P., as follows: "Plaintiff, who employed McNabb as his agent to find a purchaser, voluntarily left his car with McNabb, a dealer in secondhand cars * * *. His premises were surrounded by conspicuous signs advertising to the world that his business was that of selling used cars. Plaintiff testified that he knew McNabb's line of business. With this knowledge he left his car with McNabb in order that the latter might find a purchaser for it. McNabb was more than a mere bailee; he was plaintiff's agent to find a purchaser. Whatever may have been the private arrangement between plaintiff and McNabb, whatever the latter's actual authority may have been, plaintiff, by his own voluntary act, clothed McNabb with such indicia of authority to sell the car as usually accompanies such authority according to the custom of trade and the general understanding of business men." At page 491 of 59 Cal.App., at page 269 of 211 P., the court said: "But where, in addition to possession by the vendor, the owner has given such evidence of authority to sell as usually accompanies such authority according to the custom of trade or the general understanding of business men, then, as was stated by Mr. Justice Field in an early California case, Wright v. Solomon, 19 Cal. [64], 76, 79 Am. Dec. 196 the vendor's possession under such circumstances is evidence, not that he is the owner, but that he has received authority from the owner to sell." The Carter case is particularly applicable where the legal owner gives possession of an automobile to one who is in the recognized business of selling second-hand cars. Pacific Finance Corporation v. Hendley, 119 Cal. App. 697, 7 P.2d 391. In the Carter case the "dealer" was authorized to find a purchaser at a particular price. To that extent the purchaser should be protected. Further, by reason of the agent's business of selling second-hand cars, the purchaser was justified in relying on the appearance of authority to sell evidenced by the true owner's giving possession to a dealer whose business it was to sell. That case is not authority for the proposition here urged—that without any investigation on the part of the prospective purchaser—possession of a car, and the pink slip unendorsed, by a man engaged temporarily in peddling eggs creates the appearance of authority to sell. Under the circumstances surrounding this case plaintiff, the legal owner, is entitled to the possession or the reasonable value of the automobile.

The judgment is affirmed.

PETERS, P. J., and KNIGHT, J., concur.

70 Cal.App.2d 716

PEOPLE v. GREGORIS.

Cr. 2349.

District Court of Appeal, First District, Division 1, California.

Sept. 6, 1945.

1. Poisons 🔑9

Evidence supported conviction of violating statute making it an offense to knowingly plant, cultivate, cut, harvest, dry, or process any loco weed or marihuana or any part thereof. St.1940, 1st Ex.Sess., p. 22, § 11530.

2. Criminal law 🔑351(3)

The flight of a person after commission of a crime is a circumstance which may be considered along with all others as tending in some degree to show a consciousness of guilt.

3. Criminal law 🔑260(11)

Question as to why defendant fled after seeing police at his home was one for trial court trying case without a jury to determine from all the facts before it.

4. Criminal law 🔑260(11)

If not wanting in evidentiary support, decision of trial court trying case without a jury is controlling on appeal.

Appeal from Superior Court, Alameda County; Edward J. Tyrrell, Judge.

Frank C. Gregoris was convicted of violating section 11530 of the Health and Safety Code, St.1940, 1st Ex.Sess., p. 22, § 11530, making it an offense to knowingly plant, cultivate, cut, harvest, dry, or process any loco weed or marihuana or any part thereof, and he appeals.

Affirmed.

Raymond A. Ferrario, of Oakland, for appellant.

Robert W. Kenny, Atty. Gen., and David K. Lener and Miriam E. Wolff, Deputy Attys. Gen., for respondent.

KNIGHT, Justice.

The defendant was accused of violating section 11530 of the Health and Safety Code, St.1940, 1st Ex.Sess., p. 22, which declares that: "No person shall knowingly plant, cultivate, cut, harvest, dry, or process any loco weed or cannabis sativa [marihuana] or any part thereof." He was accused also of having been previously convicted of burglary, in Alameda County, and of having served a sentence therefor in the state prison at San Quentin. He was represented by counsel, pleaded not guilty to the main charge, and stood mute as to the prior conviction; whereupon the court directed that a denial thereof be entered in his behalf. A trial by jury was waived, and after hearing the evidence the trial court found the defendant guilty of the offense charged and that the allegations relating to the prior conviction were true. Motions for probation and a new trial were heard and denied, and defendant was sentenced to imprisonment in the state prison for the term prescribed by law; whereupon he took this appeal.

The only question presented by the appeal is whether the evidence is legally sufficient to sustain the conviction; and after an examination of the record it is our opinion that it is. Among the facts and circumstances disclosed thereby are the following:

Defendant was employed as a brewery truck driver in Oakland, and lived with his wife and two children on Twenty-second Street in that city. He had occupied the premises for about five years. The back yard was enclosed with a five-foot board fence and most of the yard was devoted to the raising of vegetables. On the day of defendant's arrest, in response to a telephone message, two police officers and a state narcotic inspector drove to the premises, and looking over the fence they saw a number of marihuana plants growing among the tomato vines. Thereupon they entered the yard to examine the plants and found eleven of them. The plants were well matured and it was evident from the manner in which they were set in the soil, the size of the plants and the condition of the soil around them that they were not volunteer plants, but on the contrary had been purposely planted some months before and thereafter carefully cultivated. Ten of them were set in even rows, equal distances apart, between the tomato vines; there were no weeds growing around the marihuana plants, and the soil was damp and well cultivated. In fact, some of the plants were supported by stakes driven in the ground. One of the officers testified that when he first arrived at the premises and as he looked over the fence he saw the defendant standing on the back stairs; that he called to the defendant but he ran away.

The circumstances which brought about the discovery of the marihuana plants and the arrest of the defendant are shown by the testimony given by defendant's wife and a friend of the defendant's named Heffley, both of whom were called as witnesses for the defense. Briefly, the circumstances were these: About nine o'clock on the morning of the day defendant was arrested, Heffley called at defendant's home to get a radio tube. Defendant was not home at the time, and before leaving Heffley went out into the back yard to examine defendant's "police" dog, which had been afflicted with an infected foot. As he walked through the yard he observed the marihuana plants growing among the tomato vines, and he called Mrs. Gregoris' attention to the plants. He told her what they were and that she should get rid of them at once. He testified that she thought he "was kidding or lying"; that she asked him what she should do about it and he replied: "You had better call the police and have somebody take care of it right away, because it's awful big." He then left the premises, saying he would be back later that afternoon. The pertinent portions of Mrs. Gregoris' testimony are as follows: "* * * he [Heffley] went in the back to look at the dog's foot because it had been sore, it had been very badly infected, and he walked in the back to call the dog back there and he seen those plants and he drawed my attention to it, he said, 'These are marihuana plants' and he asked me if I knew anything about it. I said no, in fact I didn't believe him, I thought he was kidding, and he said definitely he knew it was because he had seen them before"; that he then said to her, "* * * by all means as soon as Frank gets home you have got to have him get rid of those plants; if they are found on the property it's just too bad, it's a serious offense." Continuing, she testified that before Heffley left he told her again to be sure her husband "got rid of them, that they should be reported to the police or pulled up immediately and destroyed"; that he thought it best to leave them until her husband got home. Mrs. Gregoris then went on to say that before her husband went to work that morning they had engaged in a quarrel, during which he struck her; that because of his treatment of her she did not "care what happened to him"; that soon after Heffley left she cut some leaves off the plants and placed them in a pan near by "to make it look" as if her husband "was going to smoke it"; that after having done so she telephoned to the police, giving her home address and saying that her "husband had marihuana in the back yard"; that she then left the premises and went to her brother's house, and started drinking.

On direct examination Mrs. Gregoris testified that so far as she knew her husband had never smoked marihuana; but on cross-examination she admitted having told the police on two occasions that he did; that she made such statement first on the night he was arrested and again the next morning; but she explained that the first statement was made by her after she had drank considerable liquor, and that the next morning she was still angry with him and that she "thought, 'I am not going to change the story' * * *."

So far as the record shows, the defendant was not at any time asked whether he was a user of marihuana; but at the trial, while testifying in his own behalf, he denied knowing anything about the marihuana plants. He admitted having worked in the vegetable garden, but claimed that he had never seen any of these plants growing in the yard. In this connection he went on to say that about all he did was the digging to prepare the ground for the planting; that his wife did the planting;

that occasionally he watered the garden, and that his boy, eleven years old, weeded the garden. But in contradiction of his testimony, four of his neighbors testified that they had seen him working in the garden very often; that on a number of occasions, during the preceding several weeks, they had seen him digging and cultivating around the tomato vines. And as to the truth of the defendant's statement that he had never seen the plants growing in his back yard, his wife testified, in response to questions asked by the court, that anyone working around the tomatoes would see the marihuana plants "unless he was blind."

[1] The foregoing facts and circumstances are legally sufficient, in our opinion, to support the conclusions which the trial court evidently drew therefrom, that defendant had planted and afterwards cultivated the marihuana plants, knowing the kind of plants they were; and that therefore he was guilty of violating the provisions of the statute hereinabove quoted.

[2, 3] As to the evidence of flight, defendant testified that in driving home that night he was accompanied by a friend; that as he approached his house he saw the police officers there and that believing his wife had complained to the authorities about the trouble that had taken place between them that morning and that he was about to be arrested, he drove on without stopping; that later that evening he called at his mother's home and she "explained all about it" to him; that thereupon he started to drive down to the City Hall to ascertain "what they wanted"; but that on the way there he was picked up by the police. It is well settled, however, that the flight of a person after the commission of a crime is a circumstance which may be considered along with all others as tending in some degree to show a consciousness of guilt. People v. Santora, 51 Cal.App.2d 707, 125 P.2d 606. Therefore, in the present case the question as to why the defendant fled after seeing the police at his home was one for the trial court to determine from all the facts and circumstances before it.

Defendant argues that if he had been growing the marihuana knowingly it is not "reasonable to suppose that he would have done so in such open fashion," among tomato vines which were visible to all the neighbors. In answer to this argument, respondent states that no better place to conceal the plants and to divert suspicion could scarcely be found than in a vegetable garden among tomato vines which were then from two and a half to three feet high. Evidently this was the view taken by the trial court, and since the argument advanced by defendant involves a question of pure fact the trial court's conclusion thereon is binding on appeal.

[4] It is also argued that Heffley must have believed defendant innocent of any wrongdoing, otherwise he would not have suggested to Mrs. Gregoris that she notify the police. Conceding that to be true, the trial court, after considering all the facts and circumstances before it, decided to the contrary, and since its decision is not wanting in evidentiary support it is controlling on appeal, regardless of the belief entertained by Heffley.

Finally, it may be stated that a review of the entire record shows that the defendant was given a fair and impartial trial, and that because of the seriousness of the charge the trial judge was at all times watchful of the defendant's rights. Before proceeding with the trial he clearly pointed out to the defendant the procedure that would be followed by waiving a jury trial; and it is evident from the fairness of the trial judge's rulings on the admissibility of evidence that if after having decided the cause on the merits he had entertained any reasonable doubt as to the defendant's guilt he would have granted a new trial. Therefore, since the evidence is legally sufficient to sustain the finding as to guilt the judgment of conviction and the order denying the motion for a new trial should be affirmed, and it is so ordered.

PETERS, P. J., and WARD, J., concur.

PEOPLE v. BARNETT.*

Cr. 1902.

District Court of Appeal, Third District, California.

Sept. 7, 1945.

Hearing Granted Oct. 4, 1945.

1. Criminal law 🔑625

Trial court did not abuse its discretion in denying motion for separate hearing to determine whether accused, who was a homosexual pervert, 45 years of age, and an architect and artist of considerable intelligence and skill, was a sexual psychopath as defined in Welfare Code and should as such be committed to a state hospital and criminal proceedings against him for acts of sex perversion suspended, particularly where all offenses charged were committed with boys 16 years of age or older. Pen. Code, § 288a; St.1939, p. 1783, §§ 5500, 5501.

2. Criminal law 🔑625

Trial judge had a sound discretion to grant or deny petition for separate hearing to determine whether accused was a sexual psychopath as defined in Welfare Code and as such should be committed to a state hospital but he could not arbitrarily reject such petition without reason. St.1939, p. 1783, §§ 5500, 5501.

3. Criminal law 🔑625

The section of Welfare Code defining sexual psychopath as one predisposed to commit sexual offenses against "children" uses quoted word as meaning very young persons under the age of puberty or discretion and does not include persons over 14 years of age. St.1939, p. 1783, § 5500.

See Words and Phrases, Permanent Edition, for all other definitions of "Children".

4. Statutes 🔑188

Where legislative intention with respect to meaning or application of words or phrases used in a statute is in doubt, such words or phrases should be construed in the common, usual and ordinary acceptation of their meaning.

5. Criminal law 🔑507(7)

Victims of sexual assaults over the age of 14 years may be accessories to the crime, so that their testimony must be corroborated before convictions for sex offenses may be sustained, but if under the age of 14 they are presumed to be incapable of committing crime and, in absence of proof of knowledge and appreciation of the wrongfulness of the acts, they may not be deemed to be accessories. Pen.Code, §§ 26, 288a, 1111.

6. Infants 🔑1

Where laws for protection of "children" do not define quoted word or specify age to which law applies, and the limitation cannot be ascertained from context, quoted word must be construed in its ordinary and common acceptation which is that of very young persons under the age of puberty or discretion and not old enough to dispense with maternal aid and care.

7. Criminal law 🔑565

Time of commission of offense charged in one of 12 counts of indictment, each charging a separate offense of sex perversion committed with various boys, all over 16 years of age, was sufficiently established and corroborated when boy named in such count testified in detail to particular offense charged therein and that it was committed in July of 1944 though he was unable to fix exact date, accused admitted commission of such offense during summer of 1944, and it was the only offense charged with that boy during summer months of 1944. Pen.Code, §§ 288a, 1111.

8. Criminal law 🔑1144(13)

Court, in absence of proof to the contrary, must assume that boys over 14 years of age with whom accused committed acts of sex perversion were accessories to respective crimes in which they were involved, so that corroboration of their testimony was necessary to sustain conviction. Pen.Code, §§ 288a, 1111.

9. Criminal law 🔑511(7)

Accused's voluntary testimony before grand jury, admitting commission of sex perversions charged, was sufficient corroboration of testimony of boys with whom offenses were committed who, because of their ages, were assumed to be accessories. Pen.Code, §§ 288a, 1111.

10. Criminal law 🔑511(7)

Extrajudicial declarations of accused may be sufficient to corroborate the evidence of an accessory so as to sustain a conviction. Pen.Code, § 1111.

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* Subsequent opinion 166 P.2d 4.

11. Criminal law ⟹511(1)

Evidence is sufficient to corroborate testimony of an accessory if it merely creates more than a suspicion of guilt though it is slight and, when standing by itself, would be entitled to but little consideration. Pen.Code, § 1111.

◆

Appeal from Superior Court, Sacramento County; Raymond T. Coughlin, Judge.

Earl Barnett was convicted on 12 counts of an indictment, each charging a separate offense under Penal Code, § 288a. From the judgment of conviction and order denying his motion for a separate hearing to determine whether he was a sexual psychopath and as such should be committed to a state hospital, he appeals.

Judgment and order affirmed.

Robt. A. Zarick, Wallace Shepard, and Thos. O'Hara, all of Sacramento, for appellant.

Robt. W. Kenny, Atty. Gen., and David K. Lener, and Ward Sullivan, Deputy Attys. Gen., for respondent.

PER CURIAM.

The defendant was convicted by the court sitting without a jury of twelve counts of an indictment, each charging him with a separate offense under Section 288a of the Penal Code. One other count was dismissed. Before trial the defendant moved the court under Section 5501 of the Welfare and Institutions Code St.1939, p. 1783, to grant him a separate hearing to determine whether he is a sexual psychopath as defined by Section 5500 of that Code, and if so to suspend the criminal trial and commit him to a state hospital as therein provided. The motion was heard on an affidavit of the brother of the defendant to which there were attached the written statements of three physicians to the effect that they considered him a sexual psychopath. There was also presented on that motion the testimony, including the voluntary admissions of the defendant, adduced at the hearing before the Grand Jury. The motion was denied.

On appeal it is contended the court erred in refusing to grant the motion to suspend the criminal proceedings and to commit the defendant to a state hospital, and that the evidence, as to count number three, lacks corroboration of the accessory to the crime as required by Section 1111 of the Penal Code.

[1] We are of the opinion the court did not abuse its discretion in denying the motion to suspend the criminal proceedings and to determine in a separate hearing whether the defendant is a sexual psychopath as that term is defined in the statute. The defendant is forty-five years of age. He is an architect and an artist of considerable intelligence and skill. He is a homosexual pervert who has been preying upon young boys of high school age to their great detriment for the past five or six years. There is no evidence that he has ever attempted to interfere with young children under the age of fourteen years. He is not within the class of psychopaths covered by the definition in Section 5500 of the Welfare Code. The trial court properly denied the motion.

[2] Under Section 5501 of the Welfare Code the judge has a sound discretion to grant or deny the petition for hearing on that issue. The first paragraph of that section provides that "the court *may*" adjourn proceedings in the criminal trial and grant the hearing if "it appears by affidavit *to the satisfaction of the court* that such person is a sexual psychopath *within the meaning of this chapter.*" That statute requires the petitioner to show by affidavit that the defendant is predisposed to commit sexual offenses against *children.* The granting of the separate hearing is not mandatory. To be sure, the court may not arbitrarily reject the application without reason. It has a sound discretion to be exercised only pursuant to law. People v. Haley, 46 Cal.App.2d 618, 622, 116 P.2d 498; In re Cook, 67 Cal.App.2d 20, 24, 153 P.2d 578; United States v. Hrasky, 240 Ill. 560, 88 N.E. 1031, 130 Am.St.Rep. 288, 16 Ann.Cas. 279. The only affidavit filed by the defendant in support of the motion was by his brother Chester, to which there were attached the written statements of three physicians. The testimony taken before the Grand Jury was also presented on that motion. It contained the evidence of several boys from sixteen to nineteen years of age who were defendant's victims in the commission of the crimes with which he was charged. It also contained the defendant's own testimony before the Grand Jury, in which he frankly admitted the truth of the charges.

The affiant's averments of his belief that his brother is a sexual psychopath were all based on his "review of the testimony taken before the Grand Jury." That same evidence, together with the defendant's own testimony before the Grand Jury, was presented to the trial judge and considered on that motion. The statements of the physicians, which were attached to the affidavit, were likewise chiefly based upon the testimony taken before the Grand Jury. We must assume the court gave due consideration to all the evidence which was presented to it on that motion. We are unable to say, as a matter of law, that the court abused its discretion in denying the motion.

[3] Moreover, we are of the opinion the court did not abuse its discretion in denying the motion for the further reason that the statute applies to psychopaths who are predisposed to commit sexual offenses against children, only, which, in the sense in which it is used in that statute, does not include persons over the age of fourteen years. Section 5501 of the Welfare Code provides that the court *may* grant the hearing when it appears by affidavit, "to the satisfaction of the court that such person is a sexual psychopath *within the meaning of this chapter.*" Section 5500 of that chapter defines a sexual psychopath, for the purposes of that statute, as one who is predisposed to commit sexual offenses against children. Clearly the benefits of that special proceeding are not extended to, nor is it intended to apply to, all sexual psychopaths regardless of the ages of their victims. It is specifically confined to those who are addicted to commit offenses on children as distinguished from adults or from those presumed to be of sound discretion who are in the period of adolescence. A sexual psychopath may be addicted to the commission of sexual offenses against adults only. It may not be said that psychopaths who prefer and select adults as their victims are included in the definition of those only who are predisposed to commit sexual offenses against "children", to which the statute is confined. Nor do we think the statute was intended to apply to psychopaths who are predisposed to commit sexual offenses against girls or boys in their adolescent age between puberty and majority, or it would have so stated. We must assume by the deliberate use of the word "children" in accordance with its commonest definition that the legislature intended to restrict the application of that special hearing to psychopaths who are predisposed to commit sexual offenses against very young persons under the age of puberty. Otherwise the legislature would have designated the class to which it was intended to apply as minors or persons under the age of majority, which would also include younger persons under the age of puberty. Evidently there was a deliberate purpose to limit that investigation to psychopaths who are addicted to preying upon persons who are *not* adults, for the word "children" as it is used could not possibly have been intended to include adults. Clearly a distinction between classes of psychopaths, dependent upon the ages and discretion of the victims upon whom they are predisposed to operate, was intended. We are convinced the word "children" was used for a limited and definite purpose. It is reasonable to assume the word "children" was also used to distinguish immature and helpless girls and boys under the age of puberty from those under the age of majority who are presumed to have reached the age of discretion. If the legislature had intended to extend the privilege of that special plea to persons who are disposed to commit sexual offenses against those under the age of majority, it would have been very easy to have so stated. The legislature did not do so.

[4, 5] When there is a doubt regarding the intention of the legislature with respect to the meaning or application of words or phrases used in a statute, they should be construed in the common, usual and ordinary acceptation of the meaning of such words or phrases. 23 Cal.Jur. sec. 124, p. 749. Almost invariably statutes for the protection of children specify the ages to which they apply. If we do not accept the foregoing rule of adopting the commonest definition of children to mean those who are under the age of puberty, since the context of the statute furnishes no aid in solving an otherwise uncertain and doubtful meaning of the word, the statute might become void for uncertainty. No doubt the legislature had a definite reason for limiting the statute to those who are psychopaths because they are addicted to committing sexual offenses against children under the age of puberty. It is not necessary for us to determine what that purpose was. But it may have been to afford protection against wrongful convictions of accused persons upon uncorroborated evidence of witnesses so young as to lack understand-

ing and who are therefore unreliable. On numerous appeals from convictions of offenses against young children under the age of puberty who lack discretion, it has been urged that the uncorroborated testimony of such children was inherently improbable, unbelievable and unreliable. If the victims of such sexual assaults are over the age of fourteen years, they may become accessories to the crimes and their testimony is then required to be corroborated before convictions may be sustained. People v. Singh, 121 Cal.App. 107, 8 P.2d 898; 8 Cal.Jur. 176, sec. 254. If the victims are under the age of fourteen, they are presumed to be incapable of committing crimes, and in the absence of proof of their knowledge and appreciation of the wrongfulness of the act, they may not be deemed to be accessories. The presumption is that "children under the age of fourteen" years are incapable of committing crime. Penal Code, sec. 26. In statutes adopted for the protection of children, the Penal Code usually specifies the limitation of the ages to which they apply. Section 288 of that code prohibits lewd and lascivious acts against "a child *under the age of fourteen years.*" Many other California statutes which are particularly applicable to young children specify the ages to which they apply.

In our opinion Section 5500 of the Welfare Code applies only to persons who are deemed to be sexual psychopaths because they are predisposed to commit sexual offenses against very young persons under fourteen years of age. That section provides:

"As used in this chapter 'sexual psychopath' means any person who is affected, in a form *predisposing to the commission of sexual offenses against children,* and in a degree constituting him a menace to the health or safety of others, with any of the following conditions:

"(a) Mental disease or disorder.

"(b) Psychopathic personality.

"(c) Marked departure from normal mentality."

It has been frequently stated by textwriters and in decisions of reviewing courts that when criminal statutes prohibit offenses against "children" without defining that term, or specifying the age to which the law applies, and the limitation cannot be ascertained from the context, it must be construed in its ordinary and common acceptation, which is that of very young persons of tender years; those who have not reached the age of discretion; persons under the age of puberty, usually fixed at fourteen years as applied to boys, and twelve years when applied to girls.

While there are some cases to the contrary, the textwriters and authorities generally support that conclusion. In 2 Century Dictionary and Encyclopedia, page 957, the word "child" is defined in part as follows:

"Specifically, a very young person; one not old enough to dispense with maternal aid and care."

[6] In 14 Corpus Juris Secundum, Child, page 1109, it is said:

"In laws for the protection of children, the term 'child' means generally the young under the age of puberty, and in this age sense the word has been defined as meaning an infant, a young person, a youth, or one of tender years, a very young person, one not old enough to dispense with maternal aid and care."

Likewise in Black's Law Dictionary, 3rd Edition, page 320, the word "child" is defined, in addition to its mere relationship as offspring of its parents, as follows:

"In the law of negligence, and in laws for the protection of children, etc., it is used as the opposite of 'adult', and means the young of the human species (generally under the age of puberty or not old enough to dispense with maternal aid and care), without any reference to parentage and without distinction of sex."

The foregoing definition is supported by several authorities.

In the case of Bell v. State, 18 Tex.App. 53, 51 Am.Rep. 293, in sustaining the conviction of the appellant for an aggravated assault "upon the person of a female or *child*" contrary to statute, the court held that the use of the word "child" without a definition of the word, meant a boy under fourteen years of age or a girl under twelve years of age. The court said:

"Resort, then, must be had to the common meaning and acceptation of the word 'child.' Mr. Webster defines it to mean 'a young person of either sex; hence one who exhibits the character of a very young person;' and this is its common acceptation. It means a young person as contradistinguished from one of age sufficient to be supposed to have settled habits and fixed discretion. * * * As the law now stands, we believe that the age of fourteen in boys and twelve in girls limits the age of childhood."

The affidavit and written statements of physicians which were presented on the motion to suspend the criminal trial and to adjudge the defendant to be a sexual psychopath, together with the evidence adduced before the Grand Jury, including the defendant's voluntary admissions, definitely show that the defendant was predisposed to and invariably did select for his nefarious practices boys only who were sixteen years, or more, of age. He was not predisposed to satisfy his lust upon infants, under the age of puberty. If the statute does not include within the definition of the word "children" either adults or persons over the age of puberty, as we believe that it does not, then it has no application to this case and the court properly denied the motion. That is true even though it satisfactorily appeared, which we do not concede, that the defendant is a psychopath under the general definition of that term and that he was predisposed to commit sexual offenses against individuals without regard to their ages. It does appear that he is a homosexual person with depraved and degenerate habits concealed by shrewd and cunning methods designed to deceive and seduce unwary youth, upon whom he preys to their great injury and to the detriment of society.

Even if the foregoing limitation of the application of Section 5501 of the Welfare Code is not confined to those psychopaths who are predisposed to commit sexual offenses against very young persons under the age of discretion or puberty, we are nevertheless of the opinion the court did not abuse its discretion in denying the motion, as we have previously stated.

The appellant contends that the judgment finding him guilty of the offense charged in count number three is not supported by the evidence because the testimony of the victim upon whom that alleged crime was perpetrated was an accessory thereto and his testimony lacks corroboration of the date thereof and otherwise.

[7] There is no merit in that contention. The defendant was charged in separate counts with thirteen different offenses under Section 288a of the Penal Code with different boys over sixteen years of age. Each count alleged the date "on or about" which the particular offense was perpetrated together with the name of the boy upon whom it was committed. The sixth count was dismissed. The defendant was found guilty of each of the other counts, including the challenged third count, which was alleged to have been committed on a named boy "on or about the 15th day of July, A.D. 1944." It was the only offense alleged in any of the counts to have been committed upon that or any other boy in July, 1944. The boy mentioned in count three testified in detail to his association with other named boys who are involved in other counts of the indictment, and to their frequent visits to the defendant's home and their association and participation in his criminal practices. That witness testified in detail to his participation with the defendant in the crime charged in the third count. Regarding that particular alleged crime he said that he went in company with three other named boys to the home of the defendant "in the summer" of 1944, in the month of July. He was not certain of the exact date, but he testified positively to the details of the crime charged in that count of the indictment which he asserted the defendant then committed upon him. Upon the completion of the boy's testimony regarding that particular offense the prosecuting officer said "That refers to count 3," to which assertion the defendant's counsel made no reply. He did not then challenge the alleged variance regarding the exact time of the occurrence of that crime. The time of that offense was sufficiently fixed. That was the only offense charged against the defendant upon that boy during July 1944, or any of the summer months of that year. The circumstances of those offenses and the revolting practices of the defendant were corroborated in detail by several other boys. Moreover, the commission of the crime charged in count number three, together with all the other crimes charged against him, was freely and voluntarily admitted by the defendant in his sworn statement made to the Grand Jury, which was received in evidence in this case. On the trial, when the names of the several boys were read to the defendant upon each of whom he was separately charged with committing similar crimes, and he was asked specifically if he had committed that particular act upon the boy named in count number three, he replied "With the whole list you have just read." He thereby unequivocally admitted his guilt of that particular offense as charged. He was then

asked if he committed that offense "during or about July 1944." He replied that he did not remember the exact date but that it occurred "during the summer" of that year. Since that was the only offense charged with that boy during any of the summer months of 1944, and the defendant admitted the commission of that offense during the summer months of that year, the time of the commission of the crime was sufficiently established and corroborated. The defendant was not misled or prejudiced by a failure to more definitely fix the date of the crime. He does not claim to have been so misled or prejudiced. The other essential circumstances of that offense were also adequately corroborated by the defendant and by proof of material circumstances related by several other boys.

[8-11] Since each of the victims of the several crimes charged in the various counts of the indictment were over the age of fourteen years, in the absence of proof to the contrary we must assume they were accessories to the respective crimes in which they were involved, and it was therefore necessary to corroborate their testimony as required by the provisions of Section 1111 of the Penal Code. People v. McCollum, 214 Cal. 601, 7 P.2d 301; People v. Singh, supra. Their testimony regarding each alleged offense was adequately corroborated by other competent evidence. 8 Cal.Jur. 178, sec. 256. The admissions of the defendant corroborated it. Extrajudicial declarations of a defendant may be sufficient to corroborate the evidence of an accessory so as to sustain a conviction. People v. Briley, 9 Cal.App.2d 84, 48 P.2d 734. Certainly his voluntary testimony before the Grand Jury, admitting the crimes with which he was charged, furnishes sufficient corroboration to meet the requirements of Section 1111 of the Penal Code. In the recent case of People v. Wilson, 25 Cal.2d 341, 347, 153 P.2d 720, 723, it was held that corroborating evidence was sufficient if it merely created "more than a suspicion of guilt," although it "be slight and when standing by itself, entitled to but little consideration." People v. Thompson, 69 Cal. App.2d 80, 158 P.2d 213, 216; People v. Negra, 208 Cal. 64, 69, 280 P. 354; People v. Dorrance, 65 Cal.App.2d 125, 130, 150 P. 2d 10; People v. Shaw, 17 Cal.2d 778, 112 P.2d 241.

The defendant was not prejudiced by the failure of the prosecution to establish the exact day upon which the crime alleged in count three was accomplished. The defendant admitted the commission of the crime upon the named boy *during* that *summer*. There was not a fatal variance with respect to the proof of the time alleged. The defendant made no objection at the trial on that account. He could not have been misled regarding the particular challenged offense of which he was convicted. The judgment of conviction of the crime charged in count three is not void for lack of corroboration of the approximate date of the commission of that offense or otherwise. People v. Becker, 140 Cal.App. 162, 35 P.2d 196; People v. Tracy, 50 Cal.App. 2d 460, 464, 123 P.2d 138.

The judgment and the orders appealed from are affirmed.

PEOPLE v. COLLUP et al.*

Cr. 3881.

District Court of Appeal, Second District, Division 1, California.

Aug. 31, 1945.

Rehearing Denied Sept. 14, 1945.

Hearing Granted Sept. 27, 1945.

1. Criminal law ⇨409, 517(4)

Upon prima facie proof of the corpus delicti, extrajudicial statements, admissions, or confessions of accused may be admitted in evidence, and proof of the corpus delicti need not be of that conclusive and convincing character necessary to satisfy minds of jurors beyond a reasonable doubt.

2. Criminal law ⇨422(1)

Extrajudicial statements of one of defendants were inadmissible against her codefendant.

3. Criminal law ⇨409

Extrajudicial statements of one of defendants were inadmissible even against defendant making statements, where there was a total lack of proof sufficient to establish prima facie the fact of a conspiracy between parties to commit rape or any assault with intent to commit rape as charged. Code Civ.Proc. § 1870, subd. 6.

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* Subsequent opinion 167 P.2d 714.

4. Criminal law ⇨559

Conviction cannot be founded upon unreasonable inferences, speculation or suspicion, but must be founded upon satisfactory evidence and reasonable inferences predicated thereon.

5. Criminal law ⇨561(1)

Although jurors are sole and exclusive judges of value and effect of evidence, their discretion may not be arbitrarily exercised when, as a matter of law, evidence upon which verdict is predicated is not of such a character that it can be said therefrom that no reasonable doubt of defendants' guilt existed.

6. Rape ⇨16(1)

In charge of assault with intent to commit rape, intent is the vital element.

7. Criminal law ⇨935(1)

Trial judge, in exercise of his salutary supervisory power over jury's verdict, should set verdict aside on motion for new trial, when in his judgment evidence as a whole is not sufficient to uphold the verdict returned.

8. Conspiracy ⇨47
Rape ⇨53(2)

Evidence was insufficient to support conviction of either defendant on charge of assault with intent to commit rape or on charge of conspiracy to commit rape. Code Civ.Proc. § 1870, subd. 6.

9. Assault and battery ⇨92

Evidence was insufficient to support conviction of either defendant on charge of assault by means of force likely to produce great bodily injury. Pen.Code, §§ 240, 242, 245.

10. Assault and battery ⇨56

An assault by means likely to produce great bodily injury may be committed with the hands or fists. Pen.Code, § 245.

11. Assault and battery ⇨82

In order to complete the offense of assault by means likely to produce great bodily injury, it is not necessary to show that defendant actually injured his intended victim, but there need only be evidence that, as result of the physical force used or attempted to be used, there was likelihood of great bodily injury. Pen.Code, § 245.

12. Criminal law ⇨543(2)

Trial judge did not abuse his discretion in permitting testimony of witness given at preliminary examination to be read in evidence on ground that such witness could not with due diligence be found within state, where there was no showing that testimony would have been any different if absent witness had been present at trial, and there was no showing that evidence of an impeaching character had materialized since preliminary examination. Pen.Code, § 686, subd. 3.

13. Constitutional law ⇨266
Criminal law ⇨543(2)
Witnesses ⇨380(3)

Testimony of codefendant and her mother that absent witness who was out of state, and whose testimony given at preliminary examination was read in evidence, had afterwards stated that parts of her testimony were untrue, was inadmissible for purpose of impeaching testimony of absent witness, but trial court should have considered such evidence in exercise of its discretion as to whether testimony of absent witness given at preliminary examination should be read into evidence at trial and failure to do so amounted to a denial of due process. Pen.Code, § 686, subd. 3; U.S.C.A.Const. Amend. 14, § 1.

14. Witnesses ⇨388(2), 389

Before impeaching evidence is offered, witness sought to be impeached must be asked whether he made certain statements or had certain conversations and, if witness admits making such statements or having such conversations, then impeaching testimony is inadmissible because witness stands impeached by his own admission.

15. Constitutional law ⇨251

A compelling consideration in determining whether a right is embraced within due process of law clause of Fourteenth Amendment is whether the right involved is of such a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at base of all our civil and political institutions. U.S.C.A.Const. Amend. 14, § 1.

16. Constitutional law ⇨257, 304

The state has full control over procedure in its courts, both in civil and criminal cases, subject only to qualification that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal Constitution. U.S.C.A.Const. Amend. 14, § 1.

17. Constitutional law ⟹266

"Due process of law", within Fourteenth Amendment, contemplates the opportunity and right to cross-examine each witness on all relevant matters relating to witness' testimony, and, when that right is refused, such refusal constitutes a denial of due process of law. U.S.C.A.Const. Amend. 14, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

18. Witnesses ⟹269(1)

The right to cross-examine as to any matter which has a bearing, directly or indirectly, upon any portion of testimony given by witness on direct examination, is preserved by statute in addition to Fourteenth Amendment. Code Civ.Proc. § 2048; U.S. C.A.Const. Amend. 14, § 1.

Appeal from Superior Court, Los Angeles County; Harold B. Landreth, Judge.

Thomas H. Collup and Lillianne Flaten were convicted of assault with intent to commit rape, of assault by means of force likely to produce great bodily injury, and of conspiracy to commit rape, and they appeal.

Reversed.

William C. Ring, of Los Angeles, for appellant Flaten.

Ward Sullivan, of Los Angeles, for appellant Collup.

Robert W. Kenny, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Fred N. Howser, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for respondent.

WHITE, Justice.

In an information filed by the District Attorney of Los Angeles County, the defendants were charged in count I with the crime of assault with intent to commit rape; count II accused the defendants of assault by means of force likely to produce great bodily injury; and, in count III, the defendants were charged with the crime of conspiracy to commit rape. Pleas of not guilty were interposed to each count and the cause proceeded to trial before a jury, resulting in the conviction of both defendants upon all three counts. A motion for a new trial was denied as to each defendant. Without pronouncing judgment, the court suspended the proceedings and placed defendants on probation, conditioned upon the payment by defendant Collup of a fine of $250; that defendant Flaten pay a fine in the sum of $100; and that both defendants refrain from the use of intoxicating liquors during their respective terms of probation, which were fixed at five years in the case of defendant Collup and two years in the case of defendant Flaten. From the order denying their motions for new trial, defendants prosecute this appeal.

The record reflects that the offenses were allegedly committed in a double apartment located in the city of Los Angeles on March 17, 1944. It appears that some two years prior thereto, the apartment was rented and occupied by Nathalie Rosenman, named as the victim in each count of the information, Sharlyn Curtiss and Marjorie Nelson. During the latter part of 1942, Miss Nelson moved away and defendant Flaten moved in, and, with the remaining two occupants, continued sharing the apartment until the date of the alleged offenses. Miss Nelson subsequently returned to Los Angeles, but did not thereafter occupy the apartment although she was a frequent visitor thereat. Miss Nelson was very friendly with Miss Rosenman, saw her practically every day during the month of March, 1944, and they frequently took their evening meal together. On Sunday morning, March 12th, Miss Nelson observed that Miss Rosenman was talking irrationally. On the same day, defendant, Miss Flaten, returned home from a visit of several months in San Francisco, and also noticed that Miss Rosenman was seriously distraught mentally. It might here be noted that Miss Rosenman's mental infirmity is conceded. A resident psychiatrist at the Psychopathic Department of the Los Angeles General Hospital diagnosed her mental illness as "dementia praecox or chizophrenia, characterized by withdrawal from reality and by periods of excitement, irritation and irrational behavior." Furthermore, at the trial it was stipulated that, if Dr. Worley, a psychiatrist at the State Hospital for the insane at Norwalk, were called as a witness, he would testify that he examined Miss Rosenman on March 22, 1944, and that, in his opinion, she is insane. Count III of the information, charging conspiracy to commit rape alleged that Miss Rosenman, the victim named therein, "was then and there a person of unsound mind, and incapable of giving legal consent." On the evening of

March 16th, Miss Nelson stopped at Miss Rosenman's apartment and found the latter acting very irrationally. Defendant Miss Flaten was also present. On that evening Miss Nelson informed the defendant Miss Flaten that she had contacted Miss Rosenman's father in an eastern city and had been told by him to take care of Miss Rosenman until her mother would arrive in a few days. The father suggested to Miss Nelson that his daughter should go to a rest home and there await the mother's arrival. Miss Nelson called a rest home and made arrangement for Miss Rosenman to go there. On that occasion Miss Flaten stated to Miss Nelson that she was exhausted from taking care of Miss Rosenman for the preceding five days and that she could not stand it much longer. Miss Nelson testified that on the evening of March 16th she observed Miss Rosenman taking a bath and that there were no bruises, scratches, or marks of any sort upon her body.

The owner and manager of the Women's Sanitarium called about nine o'clock on the morning of March 17th to take Miss Rosenman and was informed by Miss Flaten that "we have decided not to send her to the sanitarium; we are going to take care of her." Thereupon the sanitarium manager departed.

On the evening of March 17th about six o'clock, according to her testimony, Miss Marjorie Nelson came to the apartment and observed Miss Rosenman in her bedroom. There was a pile of clothes on the kitchen sink and a portion of such clothes had blood upon them. As Miss Nelson entered the apartment she observed Miss Rosenman in the middle of the bed in a "praying position" and she also observed defendant Collup standing by the foot of the bed. At that time Miss Rosenman and defendant Collup were completely in the nude, there was blood on a sheet and blood was also running down Miss Rosenman's face. Miss Nelson called the police.

The physician at the Los Angeles General Hospital who examined Miss Rosenman on the evening in question testified that he found "a very small cut just not large enough to require suturing and a small amount of blood in connection with it." This injury was on the "back portion of the top of the head". The physician further testified "coming down to the neck there was a bruise, contusion on the throat here. As a matter of fact, I think there was a small abrasion on the back of the neck. Then coming down to the chest, I don't recall finding anything pathological there." Then "on the back of each one of the shoulder blades was also a contusion or an abrasion about two or three inches long * * then coming down to the abdomen, down on the lower portion there were several excoriations, other marks, and those looked like there was some pretty heavy blows because there was a portion all around all of those small scratches as though some more or less heavy pressure had caused them." "I believe it was the right thigh had some marks, reddened portions around it and also some on the inner portion of the right thigh."

With reference to his vaginal examination of Miss Rosenman, this physician testified that the hymen had been ruptured, but as to whether it was a recent rupture he testified "I would be unable to say." This physician testified that, except for the blood he observed on Miss Rosenman's head there was no blood on any other part of her body. In answer to the question, "Doctor, was there anything about the examination to indicate to you that any recent act of sexual intercourse had occurred?" the physician replied "No, sir."

Miss Nelson testified that on the evening of March 17, when she met the defendant Flaten in front of the apartment, defendant told her not to go into the apartment, saying: "'I called a friend of mine, and he sent some friend over that knows all about these things, he has been in one of these institutions and he knows.' I said, 'Did the nurse come?' She said, 'No, the nurse didn't come,' she said, 'The doctor was not going to be there today,' and she said, 'Marge, I think all Nathalie needs is a good lay, so' she said, 'I brought a man over and he has been beating her all day,' she said 'You should see the apartment, it's full of blood, he has been hitting her and everything all day in there,' and I said, 'I am going in the house, Lillianne,' and she stayed out in front and I went in the house."

When the police officers arrived at the apartment Miss Rosenman was dressed and defendant Collup was lying across the bed with a robe on.

Another witness, Sharlyn Curtiss, testified that on March 17th, about 10 o'clock in the morning she called defendant Flaten on the telephone and inquired if Miss Rosenman had been taken to the hospital to which the defendant Flaten replied that the nurse had telephoned stating that her automobile had broken down and that the defendant Flaten did not know when the nurse would call.

On the same evening before she left her office, Miss Curtiss received a telephone call from defendant Flaten advising her not to come home until about 11 o'clock, because, defendant Flaten stated, she "was experimenting. * * * she and a doctor were experimenting on Miss Rosenman and she did not want me to come home." Miss Curtiss further testified that she then requested Miss Flaten to permit her to talk to the doctor, to which defendant Flaten replied: "No, you cannot talk to him. He is busy." Miss Curtiss, however, persisted in her demand to talk to the doctor and finally defendant Collup came to the telephone, whereupon Miss Curtiss said to him "Are you a doctor?" to which he replied "Yes, I am. * * * He said he was taking care of Miss Rosenman. I said 'Well, can I come home?' He said, 'Why, of course you can come.'"

The witness Miss Curtiss arrived about six o'clock and met defendant Flaten as she was entering the apartment, whereupon, according to the witness, the following transpired: "I asked her first, of course, if Nathalie had been taken to the hospital, and she quieted me, said 'Just a moment, I have something to tell you instead.' She said 'Nathalie is fine, there is nothing wrong with Nathalie, she is as normal as you and I, and after what I am doing she will be perfectly normal and she will snap out of this condition that she is in.' She said, 'I brought in a man and he is giving her a good beating, he has been here all day and he has slapped her and beat her up.' She said, 'That will knock her out of this condition she is in,' and she said, 'All Nathalie needs is a man and a good * * *.'"

The witness Miss Curtiss further testified that defendant Miss Flaten told her that the defendant Collup had recommended that Miss Rosenman not be taken to the rest home "because these institutions are horrible places, and he thought he could treat her better, under his treatment that she would snap out of this condition that she was in."

This witness testified further that subsequently, while she was in the dinette, defendant Collup emerged from Miss Rosenman's room "wearing that green robe with blood all over it and blood all over his face and all over his hands." That defendant Collup told the witness, referring to Miss Rosenman, that he "had beat her up."

Defendant Miss Flaten testified that she first observed Miss Rosenman's unusual and irrational conduct on March 12th; that Miss Rosenman told her "she was losing her mind and her life, she said she had an affair previously with one fellow she was with in San Francisco that had bothered her, and that she went to have a physical examination by Dr. Clark, and that he had told her that there was nothing wrong with her, to come back and see him in three months. She did not go back to see him in three months, and that was the reason for that cancer, she said she had. She said she had had a love affair two or three years previously, and she talked a great deal about an imaginary husband she had. She had hallucinations of grandeur that she had a message to give to the world and she told me to write down what she had to give because she was going to die. She talked about a dream, having an affair with me, * * * and hallucinations, people accusing her of all sorts of things. She tried to burn the house down on one occasion, and she beat me up on another occasion, and a lot of conversation that took place was due to the fact that she said she had never had a man to satisfy her and she was living a subdued lovelife."

According to the testimony of defendant Miss Flaten, she had known her co-defendant Collup some three or four months, but had not seen him for two months preceding March 17th, on which morning, according to her testimony, defendant Collup telephoned and Miss Flaten explained to him "the situation that occurred with this girl, and that we had called and arranged for her to go to a sanitarium and he said 'Hold everything, I will be right over.'" According to defendant Miss Flaten's testimony, her co-defendant Collup arrived about ten or ten-thirty o'clock on the morning of March 17th, they went directly to the bedroom where they found Miss Rosenman sitting on "top of the bed with her green slacks on and her T shirt, I had dressed her in the morning. She was waving her arms and nodding her head and pulling her hair like this, going into the same type of motion with him, pulling her hair and waving her arms around and he lifted her off the bed and lifted her down across his lap and started to comb her hair and push her hair out of her eyes, and tried to soothe her, and then said, 'What's her name,' and I said, 'Her name is Nathalie, but she calls herself Nettie,' and he said 'What's the matter Nettie,' and she wouldn't talk and he seemed to try to talk to her but she wouldn't answer." On that occasion, according to defendant Miss Flaten's testimony, she related to her co-defendant some conversations that she had had with Miss Rosenman "about her imaginary husband and the fact that she acted sort of homosexual towards me and I thought that she might be subdued through some sort of treatments. I said that she was in love with me, and in love with this man in Arrowhead, and I also showed him an article I had read in the Reader's Digest pertaining to the treatment of dementia praecox, something that other people said she had, and he said he didn't believe in that stuff." Defendant Miss Flaten testified that her co-defendant took Miss Rosenman off the bed six or seven times, finally the two defendants went into the kitchen. Subsequently Miss Rosenman came into the kitchen whereupon defendant Collup took her by the shoulders and told her to open her eyes, that Miss Rosenman "started talking about something and Collup said 'That's all right' and he slapped her across the face with his hand."

Shortly after the arrival of defendant Collup, he and his co-defendant commenced imbibing alcoholic beverages, which continued throughout the day. Defendant Flaten had one and defendant Collup two drinks of whiskey, and, in addition thereto, they consumed all of the contents of one and practically all of a second bottle of rum. A police officer testified that defendant Collup was intoxicated and that defendant Flaten had been drinking.

Concerning the scarcity of his attire, the defendant Collup testified that he and his co-defendant went into one of the bedrooms about 4:30 p.m. where he "stripped down to my shorts" and engaged in an act of sexual intercourse.

A police officer testified that he and two other officers had a conversation with defendant Flaten at her apartment on March 22nd, which was several days after the occurrence of the incidents which gave rise to this prosecution, and in which conversation the last named defendant stated, among other things, "that she was of the opinion that perhaps Miss Rosenman, that if Miss Rosenman had an act of sexual intercourse with a man it would relieve the nervous tension and probably help her"; that "Mr. Collup had said that he was of the same opinion." At a subsequent conversation on the same day, defendant Flaten was quoted as saying "there was some more talk between Collup and her to the effect that intercourse might relieve the nervous tension, and would probably help Miss Rosenman"; that after she and defendant Collup "had consummated the act of intercourse between themselves, she took Mr. Collup into Miss Rosenman's bedroom and left him there with the idea in mind that he would have sexual intercourse with her." At a third conversation on March 23rd, in the office of the district attorney, defendant Flaten was asked whether she actually knew that her co-defendant had an act of sexual intercourse with Miss Rosenman to which she answered "that she did not actually know but that he went into the bedroom with that intention."

Defendant Collup, testifying in his own behalf, denied that he had sexual intercourse with Miss Rosenman; stated that he telephoned his co-defendant about 9:30 a.m. March 17th, at which time the latter informed him that "my roommate beat me up; I am going to have to put her in some institution," to which he replied "All right, I will be right over." That when he arrived at the apartment Miss Rosenman "was sitting on top of the head of the bed, pulling her hair around in her eyes, and swinging her head back and forth." He went over to her and said, "Here, come on; you are all right; come down from there before you hurt yourself." He put his arm around her back and lifted her off the head of the bed and sat at the foot of the bed holding Miss Rosenman; he brushed the hair out of her eyes. Defendant Flaten got him a comb and he combed Nathalie's hair. She was trying to get away from him and he put his arm behind her and told her: "Come on, Nettie. Just take it easy. You are okeh." He sat with her for about fifteen minutes attempting to quiet her and telling her that she was just unstrung; all she needed was a little rest and not to get excited. He took her and laid her down on the bed and she remained quiet. He stood there and watched her for a few minutes and she remained quiet and he and defendant Flaten then went to the kitchen.

The latter told him she was going to send her to a mental institution and that she had telephoned Miss Rosenman's mother and that her mother would be here. He then said: "I don't know why you don't wait for her mother to get her * * * let her mother handle this. I wouldn't want it on my conscience to send any girl to a mental institution."

While he and Miss Flaten were in the kitchen, he saw Miss Rosenman coming through the door with nothing on but a shirt; she came over and picked up a cloth and wiped her nose. He grabbed her by the shoulders and shook her and said: "Come on, Nettie; snap out of it." She stepped backward and her head hit against one of the cabinets in the kitchen. He grabbed her and pulled her forward and she shook her head from side to side and up and down. At that time he slapped her across the chin and said: "Come on, snap out of it. We wouldn't want to be in any mess like this." He then took Miss Rosenman by the hand into her bedroom and put her to bed, and then went out into the kitchen and made himself a drink.

About 4:30 p.m., after he and Miss Flaten had consumed a number of drinks, they went into a bedroom together and about forty-five minutes later he was called to the telephone.

As he was returning to the bedroom which he and Miss Flaten had been occupying, he heard a noise on the wall and he walked into Nathalie's bedroom where he found her sitting on top of the bed with her head back against the wall. He picked her up and slapped her face several times and then laid her down on the bed. At that time she was in the nude, and there were no bed clothes on the bed and he grabbed a sheet or blanket and put it over her. As soon as he would get her covered, she would kick it off. She got up on her knees and started moving her arms "as though she were swimming" and while doing so she slid off the edge of the bed. He picked her up, put her back in bed, put another blanket on her and went into the kitchen and poured himself a drink.

In explanation of the blood upon himself and Miss Rosenman, defendant Collup testified that, while she was "swinging her head, she bumped her head against his nose causing it to bleed and that he wiped his nose with the sleeve of his robe."

Defendant Collup testified that at no time did his co-defendant say anything to him with reference to his having sexual intercourse with Miss Rosenman. This witness also testified that later in the afternoon of March 17th, Miss Rosenman "was again sitting on top of her bed, that was all that was holding her up, with her head back against the wall, and that is why I heard this sound, so I picked her up and slapped her face several times and then laid her down on the bed. She was in the nude."

[1] Appellant's contention that, before the extrajudicial statements of a defendant can be admitted, the corpus delicti must be proved beyond a reasonable doubt, is without merit. The general trend of authority holds that it is not a prerequisite to the reception in evidence of the extrajudicial statements of the defendant that proof of the corpus delicti of that conclusive and convincing character necessary to satisfy the minds of jurors beyond a reasonable doubt shall be supplied. Upon prima facie proof of the corpus delicti, the extrajudicial statements, admissions or confessions of the accused may be admitted in evidence. People v. Selby, 198 Cal. 426, 434, 245 P. 426; People v. Sameniego, 118 Cal.App. 165, 4 P.2d 809, 5 P.2d 653.

[2-5] As to counts I and III, except for the extrajudicial statements of defendant Flaten, we find no substantial evidence whatever establishing the corpus delicti of the offenses of assault with intent to commit rape or conspiracy to commit rape. In any event the extrajudicial statements of defendant Flaten were inadmissible against her co-defendant and, because of a total lack of proof sufficient to establish prima facie the fact of a conspiracy between the parties to commit rape, Subd. 6, Sec. 1870, Code of Civil Procedure, or any assault with intent to commit rape, such extrajudicial statements were equally inadmissible against defendant Flaten, herself. In the instant case it may be true that appellants had opportunity for commission of the crimes charged against them, but conviction of crime cannot be founded upon unreasonable inferences, speculation or suspicion, but must be grounded upon satisfactory evidence and reasonable inference predicated thereon; and while jurors are the sole and exclusive

judges of the value and effect of evidence, their discretion and power in that regard is not absolute and may not be arbitrarily exercised when, as a matter of law, the evidence upon which the verdict is predicated is not of such a character that it can be said therefrom that no reasonable doubt of defendant's guilt existed.

[6-8] In a charge of assault with intent to commit rape, intent is the vital element. The record before us, exclusive of the aforesaid extrajudicial statements, is barren of any evidence indicative of such required intent. In fact, the surrounding circumstances point strongly toward the conclusion that any assault made upon the person of Miss Rosenman was in an attempt to "snap her out of" the mental condition with which she was afflicted and not for the purpose of ravishing her. We have searched the record in vain for any competent evidence that any assault was made upon Miss Rosenman with intent to commit rape, or of the formation of any conspiracy to commit rape, and, as heretofore pointed out, the medical testimony negatived the inference that any such assault was made. On the hearing of the application for probation of defendant Collup, the trial judge thus expressed himself: "I am not satisfied at all that there was any real serious attempt to have sexual intercourse with Miss Rosenman. I don't know. I think Mr. Collup thought certain things might snap the girl out of it, as he expressed it, just as sometimes a prizefighter is slapped on the head by a trainer to bring him out of it. However, I don't know what was in his mind." While it is not within the province of the trial judge to interfere with or control the jury in passing upon the evidence, he has nevertheless a very salutary supervisory power over their verdict. Possessed of this power he should always be satisfied that the evidence as a whole is sufficient to uphold the verdict returned. When in his judgment it is not, he should not only unhesitatingly say so, as he did in this case, but he should set the verdict aside. One of the most prolific causes of injustice, in view of the restricted right of appellate courts with reference to the value and effect of evidence and the credibility of witnesses, is the reluctance of trial judges to set aside verdicts upon the ground of insufficiency of the evidence to support the verdict, when the judge is not satisfied that the verdict returned by the jury is sustained by the evidence. As suggested in People v. Lum Yit, 83 Cal. 130, 133, 23 P. 228, 229, the judge has the witnesses before him and "an equal opportunity with the jury to observe the manner of the witnesses, the character of their testimony, and to judge of their credibility, and to discover their motives. He, too, had to be satisfied that the evidence, as a whole, was sufficient to sustain the verdict. If he was not, it was not only the proper exercise of a legal discretion, but his duty, to grant a new trial." However contrary to public morals and decency was the conduct of defendants herein, there is no legal and substantial evidence that any assault committed by them, or either of them, upon Miss Rosenman was motivated by an intent to commit rape, nor that they entered into an illegal and unlawful and corrupt agreement to commit the crime of rape upon her. The medical testimony hereinbefore referred to, instead of establishing the fact that an act of sexual intercourse had taken place with Miss Rosenman, negatived that fact. Nor is proof of the corpus delicti of either crime aided to any extent by the extrajudicial statements or testimony of defendant Flaten, whose narrative is replete with statements that she "was of the opinion" that certain things were going to be done; that defendant Collup went into the room with Miss Rosenman "with the idea in mind" of having sexual intercourse; that "such was the intention" of her co-defendant; and that "such was the assumption," all of which amount only to her conclusions and possess no evidentiary weight or probative value.

[9-11] Much of what we have heretofore said is applicable to the offense of assault by means likely to produce great bodily injury as charged in count II of the information. From the evidence in this case it cannot be assumed that all of the injuries sustained by Miss Rosenman were inflicted by either of the defendants. As to defendant Flaten, there is no testimony that she committed any assault upon the alleged victim, and although it be conceded that she aided and abetted in the commission of any assault by her co-defendant, we are still persuaded that the proven assault cannot be classed as one violative of section 245 of the Penal Code. The victim of the alleged assault was concededly insane and unable to properly care for herself. From the reading of this record, it is obvious that neither defendant bore any ill-will toward

the insane Miss Rosenman. Defendant Flaten, for several days prior to March 17, had been caring for Miss Rosenman who was given to violent outbreaks. Other than the testimony given by the defendants themselves that defendant Collup slapped the face of Miss Rosenman on one occasion in the kitchen and again in the bedroom to "snap her out of it," we can find no evidence of any assault on the part of either defendant, and it is not contended that such assaults produced the injuries on the head and other parts of Miss Rosenman's body. We are forced to the conclusion that the assault committed by defendant Collup was not of the kind or character contemplated by section 245, Penal Code, and amounted to no more than a violation of section 240 or 242 of the same code. That an assault by means likely to produce great bodily injury may be committed with the hands or fists is undoubtedly the law, and it is equally well-established that it is not necessary in order to complete the offense to show that the defendant actually injured his intended victim, but there must be evidence that, as the result of the physical force used or attempted to be used, there was likelihood of great bodily injury. If it be the manner in which the force was used that assumes importance, and not so much the degree thereof, then we are impressed that under the facts and circumstances here present it cannot, as a matter of law, be held that the proven force used herein was likely to produce great bodily injury; or that it amounted to the unlawful use of force and violence other than that denounced by section 242 of the Penal Code, or an unlawful attempt, coupled with the present ability to commit a violent injury on the person of Miss Rosenman which is prohibited by section 240 of the same code.

The picture presented by the record before us indicates that defendant Flaten was caring for an insane companion and attempted to help her. When her co-defendant phoned on the morning of March 17th, she explained her plight to him and accepted his offer to aid her; that following the arrival of defendant Collup it was, as stated by the trial court, "their over-indulgence in liquor that was to blame for a great deal of what happened." But, however disgraceful, immoral or reprehensible their conduct may have been, there is no evidence of sufficient substantiality establishing the commission by them of the felonies charged in the information.

Finally, what we regard as the most important question raised on this appeal is the contention of appellants that the court abused its discretion in permitting the prosecution to read into evidence the testimony of the witnesses Nelson and Curtiss given at the preliminary examination, on the ground that such witnesses could not with due diligence be found within the State of California.

[12] As to the witness Curtiss, we are satisfied that there was no abuse of discretion committed by the trial judge in his determination that due diligence had been used and that it was "satisfactorily shown" that the witness could not be found within the state. Sub. 3, sec. 686, Penal Code. As to this witness there was no showing that the testimony in question would have been any different if the absent witness had been present at the trial, nor was there any showing that evidence of an impeaching character had materialized since the preliminary examination. People v. Bernstein, 70 Cal.App.2d 462, 161 P.2d 381.

[13, 14] However, as to the witness Nelson, a very different situation is presented. In the case of this witness, the District Attorney announced that he had received a letter from her in which she advised that since the preliminary examination she had remarried and moved her residence to Caliente, Nevada, where she was permanently employed as a registered nurse in a hospital.

The District Attorney stated that he had received several other communications from the witness asking to be excused, that "she was served with a subpoena before leaving California. * * * I told her we would expect her here, but we have no way of enforcing the subpoena. On that showing the People will ask leave to read the testimony of Miss Nelson." Each defendant objected to the reading of the testimony of this witness on the ground that "I don't think due diligence has been exercised in obtaining this witness. We desire to have the witness present in front of the jury for examination * * *." Thereupon it was stipulated that if the Deputy District Attorney were sworn he would testify to the truth of the facts stated by him; the court ruled that the testimony might be read to the jury; and it was.

After the prosecution had rested its case, and while defendant Flaten was testifying as a witness in her own behalf, she was asked whether subsequent to the preliminary examination she had a conversation with the absent witness, Miss Nelson, relative to the latter's testimony given at the preliminary examination, to which interrogatory she replied in the affirmative. When asked to state the conversation defendant Flaten, over the objection of the prosecution, testified that the witness Nelson in the conversation with her said that "they hadn't gotten this story straight, and that she had said so many things that were prompted by Miss Curtiss that were untrue, she was very sorry, that she was making no charges against me * * *." Defendant Flaten's mother, testifying as a witness, corroborated the foregoing. Thereafter, on motion of the District Attorney, the court struck the foregoing testimony of defendant Flaten and her mother from the record and instructed the jury to disregard the same. In this ruling the trial judge was correct for manifestly such testimony was admissible only for the purpose of impeaching the testimony of the absent witness Miss Nelson. It is elementary that, before the impeaching evidence is offered, the witness sought to be impeached must be asked whether or not he or she made certain statements or had certain conversations. If the witness admits making such statements or having such conversations, then the impeaching testimony is inadmissible because the witness stands impeached by his own admissions. But, if the witness denied making the statements or having the conversations attributed to him, then the impeaching evidence becomes material and proper. But, in the instant case, it was impossible for defendant Flaten to lay the necessary foundation because the witness sought to be impeached was not present at the trial.

While the ruling of the court in striking out the testimony was correct in that it excluded the testimony for impeachment purposes, nevertheless the evidence was material and should have been considered by the court in the exercise of its discretion as to whether the testimony of the witness Nelson given at the preliminary examination should be read into evidence at the trial because of her absence therefrom. It might here be noted that a mere reading of the factual background surrounding this prosecution at once suggests the importance of the testimony of the absent witness.

The testimony of defendant Flaten and her mother should have been offered at the time objection was made to the reading of Miss Nelson's testimony. Had it been so offered it would have been the duty of the court, in view of the importance of the defendant's right to be confronted in person by the witnesses against her, to weigh and consider such evidence in exercising judicial discretion on the motion to permit the testimony given at the preliminary examination to be read. While in the case at bar, the impeaching testimony was not, as it should have been, before the court at the time the motion to read the absent witness' testimony was made, it was later received in evidence, and, while not admissible for the purposes of impeachment, it could and should have been considered by the court in determining whether the testimony of the absent witness should not also have been stricken from the record. In the case with which we are here concerned there was a showing not only that the testimony of the absent witness, Miss Nelson, might have been different from that given by her at the preliminary examination had she been confronted with the impeaching testimony, but there was also a showing that the proffered testimony of an impeaching character materialized subsequent to the preliminary examination.

[15, 16] As an assurance against ancient evils of tyrannical governments, our country, in order to preserve "the blessings of liberty," wrote into its basic law the requirement, among others, that the forfeiture of the lives or liberties of persons accused of crime can only follow if procedural safeguards of due process have been obeyed. Sec. 1, 14th Amendment, Constitution of the United States. A compelling consideration in determining whether a right is embraced within the due process clause of the 14th Amendment is whether the right involved is of such a character that it cannot be denied without violating those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." Hebert v. State of Louisiana, 272 U.S. 312, 316, 47 S.Ct. 103, 104, 71 L.Ed. 270, 272, 48 A.L.R. 1102. It would indeed be vain to give the accused his day in court with no opportunity to cross-examine the witnesses against him. While, as stated by this court in People v. Bernstein, supra, the procedure allowing the introduction of such evidence is not repugnant to pertinent constitutional provisions where the defendant is confronted by the witness and given an opportunity to and did in fact cross-examine the witness, it was

nevertheless, as stated in the case just cited, held in Brown v. State of New Jersey, 175 U.S. 172, 174, 20 S.Ct. 77, 78, 44 L.Ed. 119: "The state has full control over the procedure in its courts, both in civil and in criminal cases, *subject only to the qualification that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal Constitution.*" (Emphasis added.)

[17, 18] It must therefore follow that "due process" contemplates the opportunity and right to cross-examine each witness on all relevant and material matters relating to the witness' testimony, and, when that right and opportunity is refused, such refusal constitutes a denial of "due process." This right to cross-examine as to any matter which has a bearing, directly or indirectly, upon any portion of the testimony given by a witness on direct examination is also preserved by section 2048 of the Code of Civil Procedure. Sharp v. Hoffman, 79 Cal. 404, 408, 21 P. 846, cited with approval in People v. Ebanks, 117 Cal. 652, 655, 49 P. 1049, 40 L.R.A. 269, and In re Estate of Kasson, 127 Cal. 496, 500, 59 P. 950. Whether, on account of the witness' absence, or, if the witness is present, on account of an erroneous ruling the effect is the same. It was no fault of the defendant that the witness was absent. Nevertheless, as a result of such absence, the defendant was denied the opportunity and right to cross-examine and lay the necessary foundation for impeachment, a matter that obviously and vitally affected the substantial rights of the defendant. If therefore the trial court believed that the testimony which was to be offered for the purpose of impeachment concerned transactions, conversations or actions of an absent witness which occurred after the preliminary examination, and of which the defendant could not therefore have had knowledge when she was confronted by the witness at such preliminary examination and had an opportunity to cross-examine her, and, unless there were logical and reasonable grounds for disbelieving and rejecting the testimony of such witnesses, in accordance with accepted rules for determining the credibility of witnesses, then he should have sustained the objection made to the motion of the District Attorney for leave to read into the record the testimony given by the witness before the committing magistrate. Although the evidence above referred to which tended to impeach the absent witness was not offered at the time the objection was made to the reading of the transcript of said witness' testimony, nevertheless, it was not too late in the interests of justice to reconsider the objection at that time to determine whether the testimony of such absent witness should not have been stricken from the record and the jury instructed to disregard it. To hold otherwise would impinge upon the hereinbefore mentioned applicable provisions of the Constitution, and therefore would amount to a denial of due process.

In view of the foregoing conclusions at which we have arrived, we need not consider any of the other several contentions urged by defendants upon this appeal.

The orders denying the motions of the defendants for a new trial are, and each is, reversed.

DORAN, J., concurs.

YORK, P. J., concurs in the order reversing the orders denying a new trial.

70 Cal.App.2d 736

PEOPLE v. PARTEE.

Cr. 2341.

District Court of Appeal, First District,
Division 2, California.

Sept. 12, 1945.

1. Criminal law ⇐398(1)

In prosecution for keeping and occupying a room for recording and registering bets on horse races, a card, written on by defendant and handed by him to police officer, at such officer's request, as copy of card which officer saw defendant write on and place under counter with money bet on horse race, when defendant said he could not find original card, was admissible as original evidence of original card's contents. Code Civ.Proc. § 1855, subd. 1; Pen. Code, § 337a, subd. 2.

2. Gaming ⇐97(2)

In prosecution for keeping and occupying a room for recording and registering bets on horse races, cards on which day's bets were recorded, found in room adjoining hall in which "run-down sheets", bearing names and post positions of horses in each race, were suspended from pipe over counter, were admissible as constituting, with such sheets, day's bookmaking business, though there was no evidence that handwriting thereon was that of defendant or that he knew of cards' presence. Pen. Code, § 337a, subd. 2.

3. Gaming ⚿98(5)

Evidence supported conviction of keeping and occupying a room for recording and registering bets on horse races, though there was no evidence that defendant was owner or lessee of, or employee on, premises in question, and none of racing paraphernalia found thereon was in defendant's handwriting. Pen.Code, § 337a, subd. 2.

4. Gaming ⚿79(1)

In prosecution for keeping and occupying a room for recording and registering bets on horse races, instruction that prosecution need only establish to moral certainty and beyond reasonable doubt that defendant occupied premises in question or aided and abetted in occupancy thereof was not erroneous. Pen.Code, § 337a, subd. 2.

◆

Appeal from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

Gordon Partee was convicted of keeping and occupying a room for the purpose of recording and registering bets on horse races, and he appeals.

Affirmed.

Joseph C. Haughey, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

STURTEVANT, Justice.

The defendant was duly informed against, tried and convicted of violating subdivision 2 of section 337a of the Penal Code. He has appealed from the judgment. Before stating his points it will clarify the case to recite some of the facts.

On the 24th day of May, 1944, Thomas M. Cole and Walter V. Heagney, police officers of the City and County of San Francisco, visited the place known as 83 First Street. Fronting on said street the premises consist of a cigar store and back of the cigar store is a large room 50X20. In that room there is a counter about 18 feet long running lengthwise of the room. Over the counter is a pipe running lengthwise of the counter and a few feet above it. At the time the police officers entered the room there were suspended from the pipe three "turf digest" or "run down" sheets with the names and initials of horses and the post positions of the horses in each race. Said sheets designated the horses and races that were being run on said 24th day of May, 1944. Certain horses on the run down sheets were circled to show which horse won. After another horse a figure "2" was marked to show that that horse ran second, and after another horse was marked the figure "3" showing that that horse ran to show. All of the run down sheets were dated May 24, 1944. At the bottom of the run down sheets were the prices showing what each horse paid. The run down sheets were on cardboard and one was turned toward the audience and the other sheet toward the defendant who was standing behind the counter. While the officers were present they heard the defendant say, "You better place your wagers before we close the race." At about that time a naval chief petty officer stepped up to the counter and asked to bet on 328, $1 to place and $1 to show. At the same time he placed $2 on the counter. The defendant placed the money on a rack under the counter and at the same time he wrote out a card and placed it under the counter. Officer Cole stepped up and asked defendant for the card. The defendant stated he could not find it and Cole then asked for a copy. Thereupon Partee prepared a card and handed it over to Cole as a copy. Such facts were testified to by Cole and also by Heagney. The three sheets just mentioned and also the card were received in evidence. Although the defendant was present he did not take the stand as a witness nor did he call any other persons as witnesses. The officers and Partee then stepped into an adjoining room where there were some tables and chairs. Murray Kleinstein and another whose name was not disclosed were present. On the table were twenty-four cards. Cole asked, "Is that a record of today's bets?" Cole also asked if they wanted copies. Partee interposed directing Kleinstein to make the copies which Kleinstein did. Those twenty-four cards were also admitted in evidence. The card first mentioned was similar in form to the other twenty-four cards just mentioned.

The prosecution introduced as exhibit one the sheet marked California Turf Digest, as exhibit two the sheet marked California Turf Digest for Belmont, New York, as exhibit three the sheet marked Daily Racing News and Sports Bulletin Suffolk Downs, and as exhibit four another sheet, Suffolk Downs Run Down Sheet of May 24, 1944.

The defendant contends: "The mere presence of appellant in a room where bookmaking paraphernalia is found is not in and of itself sufficient to support a charge that appellant was keeping and occupying a room for the purpose of recording and registering a bet on horse races." That is not a comprehensive statement of the evidence. The evidence stated above shows facts that the jury was warranted in holding the defendant was more than merely "present". A careful reading of People v. Rabalete, 28 Cal.App.2d 480, 82 P.2d 707, shows that the facts were quite different. In the instant case the evidence showed a gambling room fully equipped, a counter for the transaction of business and the defendant standing back of the counter transacting the business.

[1] The card written out by the defendant and handed to Officer Cole was introduced as exhibit number five. The defendant contends it was improperly introduced. Code Civ.Proc. sec. 1855, subd. 1. The contention has no support. The officer saw the defendant write out a card and place it under the counter. When the defendant could not find it the officer asked him for a copy. Defendant wrote out the card and handed it, as a copy, to the officer. It was original evidence of its contents.

[2] The twenty-four cards found on the table in the office or room adjoining the main hall hereinabove described were offered in one package as People's Exhibit Six. The defendant contends they should not have been received because the writing thereon was not shown to be the handwriting of the defendant or that the defendant had any knowledge of the presence of said cards. We find no merit in the point. Each of said cards read in connection with the run down sheets authorized the jury to find that said cards constituted the day's business in operating the bookmaking.

[3] In its brief the prosecution cited People v. Hinkle, 64 Cal.App. 375, 221 P. 693 and several other cases as defining the meaning of subdivision 2 of section 337a of the Penal Code. The defendant replies that said cases present a factual situation which is quite different from the facts in the instant record. To a certain extent the distinction is well founded. But comparing the calls of the statute, Penal Code, sec. 337a, subdivision 2, with the facts herein recited we think it is clear that it may not be said the evidence did not fully support the judgment. Again, on page 9 of his closing brief, the defendant says: "In the instant case there is not a particle of evidence that appellant is the owner, proprietor or lessee of the premises in question. There is no evidence showing that he was an employee of such premises. None of the racing paraphernalia was in the handwriting of appellant." That criticism is not helpful. The defendant was charged with "keeping" and "occupying" a certain premises. He was not charged as being the "owner, proprietor or lessee" thereof, nor as an "employee" therein. Nor was he charged as being the author of any "writing". The writings came into the case incidentally as evidence descriptive of the plant kept and occupied by the defendant.

[4] Among others the trial court gave an instruction which contained this language: "It is sufficient on this point if the prosecution establishes to a moral certainty and beyond a reasonable doubt that the defendant Gordon Partee occupied the premises or aided and abetted in the occupancy of the premises at 83 First Street * * *." The defendant contends the giving of said instruction was error. We think not. Bearing in mind that defendant was charged with "keeping" and "occupying" said premises, we think what is said in People v. Steinfeld, 38 Cal.App.2d 280, 101 P.2d 89, was sufficient authority for giving the instruction as written.

The judgment appealed from is affirmed.

NOURSE, P. J., and GOODELL, J., concur.

In re BEVILACQUA'S ESTATE.*

Civ. 12770.

District Court of Appeal, First District, Division 2, California.

Aug. 21, 1945.

As Amended Sept. 17, 1945.

Hearing Granted Oct. 19, 1945.

1. Constitutional law 🔑94

An intestate's alien heirs, before enactment of statutes imposing conditions on nonresident aliens' right to take property by will or succession under state laws, had no vested right of inheritance, but at most only a hope or expectancy of inheritance from intestate. Probate Code, §§ 259–259.2.

2. Descent and distribution 🔑1

The authority which confers a right of inheritance may abolish it at any time or impose conditions on its existence.

3. Descent and distribution 🔑1

Since right of inheritance exists only by statutory authority, law of succession to property of deceased residents of state within boundaries thereof is entirely within state legislature's control, and designation of heirs and their proportions of such decedents' estates are subject to legislative will.

4. Aliens 🔑10

A state, having power to deny aliens privilege of taking property within state either as heirs or legatees, may annex to its grant of such privilege any conditions which it supposes to be required by its interests or policy.

5. Constitutional law 🔑47

In determining constitutionality of statute, court must confine itself to consideration of matters appearing on face of law and facts of which court can take judicial notice, and if statute, thus considered, does not appear to be unconstitutional, court will not go behind it and undertake to ascertain from evidence whether legislature observed constitutional restrictions in enacting statute.

6. Constitutional law 🔑70(3)

The legislature's reasons or motives for enacting statutes imposing conditions on nonresident aliens' right to take property in state by will or succession and for putting them into operation immediately, as expressed in appended statement of urgency, cannot be inquired into, by courts for purpose of invalidating, or preventing full operation of, law. Probate Code, §§ 259–259.2.

7. Constitutional law 🔑47
Evidence 🔑29

While courts take judicial notice of statement of urgency appended to statute made operative immediately, such statement cannot be used to impeach constitutionality of statute. St. 1941, c. 895, § 2; Const. art. 4, § 1.

8. Aliens 🔑10

The statutes, declaring nonresident aliens' right to take property in state by succession or will dependent on existence of citizens' reciprocal right to take property on same conditions as residents and citizens of such aliens' countries, are not unconstitutional as not laws of succession, but primarily intended to control transmission of estate funds and property between United States and foreign countries according to appended statement of emergency requiring immediate effectiveness of acts. Probate Code, §§ 259–259.2; St. 1941, c. 895, § 2; Const. art. 4, § 1.

9. Commerce 🔑48

The statutes, declaring nonresident aliens' right to take property in state by succession or will dependent on citizens' reciprocal right to take property on same conditions as residents and citizens of such aliens' countries are not invalid as violating clause of Federal Constitution, giving Congress exclusive power to regulate foreign commerce. Probate Code, §§ 259–259.2; U.S.C.A. Const. art. 1, § 8, cl. 3.

10. Treaties 🔑2

The statutes, declaring nonresident aliens' right to take property in state by succession or will dependent on United States citizens' reciprocal right to take property on same conditions as residents and citizens of such aliens' countries, are not unconstitutional as invading treaty-making powers of United States by exacting reciprocal rights from foreign countries in exchange for concessions as to succession, though they impose conditions on inheritance under state laws. Probate Code, §§ 259–259.2; U.S.C.A. Const. art. 1, § 10.

11. War 🔑2

The statutes declaring nonresident aliens' right to take property in state by succession or will dependent on citizens' reciprocal rights of inheritance from persons dying in such aliens' countries are not invalid as constituting possible source of embarrassment to United States with respect to neutral countries and its allies or direct impediment to its prosecution of war. Probate Code, §§ 259–259.2.

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* Subsequent opinion 191 P.2d 752.

12. Evidence 🔑39

Courts are bound to take judicial notice of existence or nonexistence of treaties between United States and foreign countries. Code Civ.Proc. § 1875.

13. Constitutional law 🔑47

In proceedings for letters of administration on estate of decedent, leaving alien widow and children residing in Italy, introduction in evidence of Italian statutes, granting foreigners same inheritance rights as Italian citizens on reciprocal conditions, would prove nothing on questions of constitutionality of state statutes imposing such conditions on rights of nonresident aliens to take property in state by will or succession under state laws. Probate Code, §§ 259–259.2; Code Civ.Proc. §§ 1901–1904.

14. Aliens 🔑10

Under statutes declaring nonresident aliens' rights to take property in state by succession or will dependent on citizens' reciprocal rights to take property on same conditions as citizens of such aliens' countries, no interest in estate of state resident dying intestate passed to his widow and children who were citizens and residents of Italy. Probate Code, §§ 259–259.2.

15. States 🔑4

The United States, with its programs of controlling foreign funds and sequestering enemy nationals' property under Trading with the Enemy Act, did not pre-empt field of foreign relationships concerning inheritance rights, and hence did not thereby preclude enactment of state laws imposing conditions on nonresident aliens' right to take property in state by will or succession under state laws. Probate Code, §§ 259–259.2; Trading with the Enemy Act, 50 U.S.C.A. Appendix § 1 et seq.

16. War 🔑2

The entry of United States into war does not automatically curtail state's normal powers to enact legislation, so that state statutes, imposing reciprocal conditions on nonresident aliens' right to take property in state by will or succession under state laws, are not invalid as invading war powers of United States. Probate Code, §§ 259–259.2; U.S.C.A. Const. art. 1, § 10.

17. Evidence 🔑80(1), 81

The presumption that law of foreign state or country is same as that of California is inapplicable in cases arising under statutes imposing reciprocal conditions on nonresident aliens' right to take property in state by will or succession under state laws in view of provision in such statutes that burden shall be on such aliens to establish United States citizens' reciprocal rights to take property in such aliens' countries on same terms as residents and citizens thereof. Probate Code, §§ 259–259.2.

18. Evidence 🔑90

Statutes casting on either party to action burden of proof on certain issue are within Legislature's constitutional power to enact.

19. Evidence 🔑98

Where no direct evidence is introduced on issue, finding thereon should be against party having burden of proof.

20. Aliens 🔑10

Under statutes imposing reciprocal conditions on nonresident aliens' rights to take property in state by will or succession under state laws, inheritance from state resident, dying intestate, should not vest in nonresident Italian nationals subject to defeasance, in view of statutory provision casting burden on foreign heirs to show their right to inherit. Probate Code, §§ 259–259.2.

21. Executors and administrators 🔑20(7)

The right of intestate's cousin, as intestate's only relative residing in state, to letters of administration as against public administrator representing intestate's widow and children residing in Italy, of which they were nationals, was not defeated by such cousin's failure to prove that person under whom he claimed was not an alien or was an alien entitled to inherit, as such statutes impose no such condition. Probate Code, §§ 259–259.2; § 422, subds. 6, 8.

22. Aliens 🔑10

Constitutional law 🔑278(1)

The statutes imposing reciprocal conditions on nonresident aliens' right to take property in state by will or succession under state laws are not invalid as violating

14th Amendment. Probate Code, §§ 259–259.2; U.S.C.A. Const. Amend. 14.

23. Executors and administrators ⇐17(2)

A resident cousin of intestate, having no other relatives in United States and leaving widow and four adult children residing in Italy, of which they were nationals, was an heir, eligible to take intestate's property, and next of kin, entitled to share in his estate, and hence entitled to administer estate in preference to public administrator. Probate Code, §§ 259–259.2; § 422, subds. 6, 8.

◆

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

In the matter of the estate of Ignazio Bevilacqua, also called E. Bevilacqua and Egnazio Beveacqua, deceased. From an order granting the petition of Phil C. Katz, as Public Administrator of the City and County of San Francisco, and denying that of Pietro Bevilacqua, for letters of administration, petitioner Bevilacqua appeals.

Reversed.

Charles Baer, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., and Everett W. Mattoon, Deputy Atty. Gen., amici curiae in support of appellant.

Henry F. Boyen, Frank J. Fontes, and A. E. Levinson, all of San Francisco, for respondent.

Herbert Wechsler, Asst. Atty. Gen. of the United States, Frank J. Hennessy, U. S. Atty., of San Francisco, Harry LeRoy Jones, Chief, Alien Property Litigation Unit, Wallace H. Walker, Richard P. Lott, for Alien Property Litigation Unit, War Div., Dept. of Justice, all of Washington, D. C., and Arthur J. DeLorimier, Asst. U. S. Atty., of San Franciso, Cal., amici curiae in support of respondent.

GOODELL, Justice.

This appeal is from an order granting the petition of the public administrator, and denying that of the appellant, for letters of administration.

The question presented for decision is as to the constitutionality of sections 259, 259.1 and 259.2 of the probate code, which impose conditions on the right of aliens who are not residents of the United States to take by will or succession under the laws of this state. The issue arose in a contest between the appellant, a first cousin of the decedent, and the respondent public administrator, over the right to administer the estate of Ignazio Bevilacqua. This decedent, a resident of San Francisco, died intestate on January 28, 1944, leaving an estate worth about $9000 in personal property. His next of kin are his widow and four adult children, all of whom are aliens and residents of Italy. The appellant's application for letters was based on the theory that the widow and children had been by these three sections cut off as heirs at law because they are Italian nationals resident in Italy, and that he, Pietro, a resident of California (and decedent's only relative in the United States) automatically became "The next of kin entitled to share in the estate" (subd. 6, sec. 422, Probate Code) and therefore qualified to administer it. The public administrator's application was based on the theory that the sections are invalid because they violate the constitution of the United States and therefore that the five aliens are *the* heirs at law (and hence that Pietro cannot inherit). The judge took the latter view, and made an order granting letters to the public administrator (subd. 8, sec. 422, Probate Code) and it was from that order that this appeal was taken.

The only evidence at the hearing in probate was that produced by the appellant. No evidence whatever was presented touching the important question whether or not reciprocal rights of inheritance existed by treaty or otherwise. It is brought to this court's notice by the briefs that at the time sections 259, 259.1 and 259.2 were adopted there was no treaty in existence between the United States and Italy on the subject of reciprocal inheritance, and that there is none now.

The case has been ably briefed and we have had the benefit of two amici curiae briefs filed by the United States on the side of the respondent and one by the Attorney General of California on the side of the appellant. In the last brief filed by the United States we are told that on January 19, 1945, the Alien Property Custodian "vested all right, title, interest and claim in and to this estate of the wife and children of the decedent, who are nationals of Italy" and that "at an appropriate time, a motion will be made * * * for leave to intervene." This would seem to place the Custodian, to all intents and purposes, in the shoes of the alien "heirs" in this litigation. That the Custodian has the power and authority to appear for foreigners who may turn out to be entitled to inherit is held in the recent case of Farmers & Merchants Nat. Bank v. Superior Court, 25 Cal.2d 842, 155 P.2d 823.

The three sections under attack read as follows:

Section 259: "The rights of aliens not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are inhabitants and citizens and upon the rights of citizens of the United States to receive by payment to them within the United States or its territories money originating from the estates of persons dying within such foreign countries."

Section 259.1: "The burden shall be upon such nonresident aliens to establish the fact of existence of the reciprocal rights set forth in Section 259."

Section 259.2: "If such reciprocal rights are not found to exist and if no heirs other than such aliens are found eligible to take such property, the property shall be disposed of as escheated property."

The appellant contends that these sections are constitutional for the reason that the inheritance of property within a state is a matter with which that state, in the proper exercise of its sovereign powers, is alone concerned. He contends, further, that the Trading with the Enemy Act, 50 U.S.C.A. Appendix § 1 et seq., does not pretend to, and cannot possibly, affect or control the laws of succession within a state, but that it is concerned chiefly, if not entirely, with the sequestering or "capturing" of property which belongs to, or has become vested in, alien enemies and which otherwise would get into their possession. The Attorney General concurs unreservedly in these views.

The respondent and the government take the position that this legislation impinges seriously, and to an alarming extent, upon the powers and functions of the federal government, indeed that it not only embarrasses, but actually hinders and impedes, the war effort.

[1, 2] In the first place, the five alien "heirs", before the enactment of sections 259, 259.1 and 259.2, had at most but a hope or expectancy of inheriting from this decedent. They had no vested right in any sense, and the authority which confers a right of inheritance may abolish it at any time or impose conditions on its existence.

[3] In Re Estate of Perkins, 21 Cal.2d 561, 569, 134 P.2d 231, 236, the court says: "Since the right of inheritance is not an inherent or natural right but one which exists only by statutory authority, the law of succession is entirely within the control of the Legislature. [Citing cases.] The designation of heirs and the proportions which they shall receive are subject to the legislative will, * * * and until the death of the ancestor, the right of inheritance is not a vested one but a mere expectancy [citing cases]." See also 9 Cal.Jur. 450, 451; 16 Am.Jur. 777–780; and 26 C.J.S., Descent and Distribution, §§ 2–6, pp. 996–1004. While the foregoing is a concise statement of the law of this state, as well as of the law generally, in view of the fact that the attack on this legislation is based on a claimed violation of the federal constitution, it is not inappropriate that inquiry should be directed as well into the federal authorities. The cases relied on by the appellant show that the Supreme Court of the United States has made unequivocal pronouncements which square with those of our own courts in favor of the exclusive right and power of the states to determine by their own legislation how property within their own boundaries shall descend by inheritance on the death of one of their own residents.

[4] Mager v. Grima et al., 49 U.S. 490, 503, 8 How. 490, 503, 12 L.Ed. 1168, one of the leading cases on this subject, is singularly apt because it involves the taxability of the legacy of an alien. There the state of Louisiana enacted a law imposing a tax of 10% on legacies, inheritances and gifts to aliens not residing in the United States. In upholding its constitutionality the court said (49 U.S. at pages 492, 493, 8 How. at pages 492, 493, 12 L.Ed. 1168): "Now the law in question is nothing more than an exercise of the power which every state and sovereignty possesses, of regulating the

manner and term[s] upon which property real or personal within its dominion may be transmitted by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it. Every state or nation may unquestionably refuse to allow an alien to take either real or personal property, situated within its limits, either as heir or legatee, and may, if it thinks proper, direct that property so descending or bequeathed shall belong to the state. In many of the States of this Union at this day, real property devised to an alien is liable to escheat. *And if a State may deny the privilege altogether, it follows that, when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy.*" (Emphasis ours.) That case, decided in 1850, has been consistently followed ever since. As recently as 1942, in Irving Trust Co. v. Day, 314 U.S. 556, 62 S.Ct. 398, 401, 86 L.Ed. 452, 137 A.L.R. 1093, the court said: "Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance. *Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction.* Mager v. Grima, 8 How. 490, 12 L.Ed. 1168; United States v. Fox, 94 U.S. 315, 24 L.Ed. 192; United States v. Perkins, 163 U.S. 625, 16 S.Ct. 1073, 41 L.Ed. 287; cf. Randall v. Kreiger, 23 Wall. 137, 148, 23 L.Ed. 124 [126]. Expectations or hopes of succession, whether testate or intestate, to the property of a living person, do not vest until the death of that person." (Emphasis ours.) In 1944 the court said in Demorest v. City Bank, etc., Co., 321 U.S. 36, 64 S.Ct. 384, 391, 88 L.Ed. 526: "Rights to succession by will are created by the state and may be limited, conditioned, or abolished by it." It is interesting to note that in United States v. Fox, supra, a devise of real property in New York to the United States was held invalid under the laws of that state. And in United States v. Perkins, supra, the state of New York had imposed an inheritance tax on a legacy to the United States. It was held that, under the laws of that state, the legacy was taxable, the court saying [163 U.S. 625, 16 S.Ct. 1075]: "The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, and *it is only upon this condition that the legislature assents to a bequest of it.*" (Emphasis ours.)

It is true, as the respondent observes, that most of these cases deal with inheritance taxes, but a glance at them shows that the rationale of each of them is the exclusive right and power of a state to *limit, condition, or even abolish* the right of inheritance. No authority running counter to these decisions has been forthcoming, and we are satisfied none is to be found.

[5-7] The respondent and the United States present many grounds upon which they contend this legislation is invalid. Perhaps the broadest ground urged by the respondent is that the three sections are not laws of succession at all. Counsel say: "Although incorporated in the Probate Code, the primary purpose of the sections in question is to control the transmission of estate funds and property between the United States and foreign countries" which purpose (they argue) is disclosed by the statement of the emergency whereby these sections went into immediate effect. Elsewhere, the respondent says: "Section 259 is therefore expressly declared to have been enacted as a limitation on the export of money and property to foreign countries, and by thus regulating foreign commerce, to protect the United States from 'a war that eventually may be directed against the Government of the United States.'" The United States makes the same contention as follows: "The declared considerations bringing the statute into effect [referring to the statement of the reasons for the urgency] and the considerations making it operative or inoperative to change the course of devolution of property upon the death of the owner are all matters relating to foreign affairs. The operation and effect of the statute is inextricably enmeshed in international affairs and matters of foreign policy. The statute does not work disinheritance of, or affect ownership of property in California by, any group or class, but on the contrary operates in fields exclusively for, and pre-empted by, the United States; namely, the control of the international transmission of property, funds, and credits, and the capture of enemy property. The statute is not an inheritance statute, but a statute of confiscation and retaliation." From this it is plain to be seen that counsel base their attack largely on the statement of urgency, Sec-

tion 2 of chapter 895, Statutes of 1941, which reads: "This act is hereby declared to be an urgency measure necessary for the immediate preservation of the public peace, health and safety within the meaning of Section 1 of Article IV of the Constitution of the State of California, and shall take effect immediately. The following is a statement of the facts constituting such necessity: A great number of foreign nations are either at war, preparing for war or under the control and domination of conquering nations with the result that money and property left to citizens of California is impounded in such foreign countries or taken by confiscatory taxes for war uses. Likewise money and property left to friends and relatives in such foreign countries by persons dying in California is often never received by such nonresident aliens but is seized by these foreign governments and used for war purposes. Because the foreign governments guilty of these practices constitute a direct threat to the Government of the United States, it is immediately necessary that the property and money of citizens dying in this country should remain in this country and not be sent to such foreign countries to be used for the purposes of waging a war that eventually may be directed against the Government of the United States."

This statement of course is not itself legislation. It is simply the explanation required by the state constitution why sections 259, 259.1 and 259.2 should become operative immediately rather than 90 days after the adjournment of the legislature. It is settled law in this state "that, in passing upon the constitutionality of a statute, the court must confine itself to a consideration of those matters which appear upon the face of the law, and those facts of which it can take judicial notice. If the law, when thus considered, does not appear to be unconstitutional, the court will not go behind it, and by a resort to evidence undertake to ascertain whether the legislature in its enactment observed the restrictions which the constitution imposed upon it as a duty to do, and to the performance of which its members were bound by their oaths of office. * * * This view * * * is in harmony with the central idea of the constitution in prescribing the independence and equality of the three great departments of the state." Stevenson v. Colgan, 91 Cal. 649, 652, 27 P. 1089, 1090, 14 L.R.A. 459, 25 Am.St.Rep. 230. In Davis v. County of Los Angeles, 12 Cal.2d 412, 420, 84 P.2d 1034, 1039, an attack was made upon the declaration of urgency, and the court held, following Stevenson v. Colgan, that "the law makers in the process of enacting laws must pass upon all questions of expediency, necessity and fact connected therewith." Hence, whatever reasons were before the legislature for the enactment of these three sections, or for putting them into operation immediately, were the legislature's own reasons, and they cannot be inquired into, questioned or reviewed by the courts. Conceding, of course, that the courts take judicial notice (see Stevenson v. Colgan) of the statement of urgency, still such statement cannot be used to impeach the substantive legislation to which it is but an appendage. Granting that it expresses the motives which impelled the legislature to enact the law, it is nevertheless settled law that those motives "cannot be made a subject of judicial inquiry for the purpose of invalidating or preventing the full operation of the law." Lukens v. Nye, 156 Cal. 498, 505, 105 P. 593, 596, 36 L.R.A., N.S., 244, 20 Ann.Cas. 158. In Plum v. State Board of Control, 51 Cal.App.2d 382, 385, 124 P.2d 891, 892, it is said: "When the legislature enacts a law, the courts must take it as it is passed. They cannot go behind it, inquire the motives which prompted it, or interpret it as those who voted it believed it to be. When a bill has been passed by the legislature and signed by the Governor, it becomes a law, and 'no evidence, nor the judgment of any court, can be allowed to modify or change its terms or effect, or prevent or impair its complete operative force.' Lukens v. Nye, 156 Cal. 498, 105 P. 593, 595, 36 L.R.A., N.S., 244, 20 Ann.Cas. 158."

[8] The language of the three sections shows the clear legislative intent to do that which the authorities cited earlier hold the legislature can rightfully do by way of "limiting" or "conditioning" inheritances. We find the contention that the sections are not laws of succession to be wholly without merit. The argument on the respondent's side is simply an invitation to the court to go out of its way to hold these sections unconstitutional *not because of what they say, but because of what the statement of urgency says.* The court's duty lies in the opposite direction. 5 Cal. Jur. 611; 5 McKinney's Dig. 144.

[9] *The commerce clause:* The respondent's contention that these sections

violate the commerce clause is within the general scope of the argument just discussed. The respondent argues that: "Succession cannot be made dependent on a compliance with conditions which operate as regulations of foreign commerce, or on any condition of an international character. The power to regulate foreign commerce is exclusively reserved to the Congress * * *. Section 259 was enacted for the express purpose of controlling the transmission of estate funds between foreign countries and the United States, i. e., to regulate foreign commerce arising from the estates of decedents, and to thereby prevent foreign countries from seizing estate funds to wage war on the United States. Such attempted regulation is invalid even if it is interwoven with, or made a part of a law of succession. Foreign commerce cannot be regulated by laws of succession or any other state laws." In developing this argument counsel devote many pages of their briefs and cite upwards of 35 cases on the general subject of interstate and foreign commerce, such cases dating all the way from 1824, Gibbons v. Ogden, 9 Wheat. 1, 6 L.Ed. 23 (a case dealing with navigation) down to the recent case of United States v. Southeastern Underwriters' Ass'n, 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (a case dealing with fire insurance). These cases discuss and decide what is, and what is not, "commerce" and deal with subjects as varied in range as the cases are numerous. Not one of them, however, holds that property passing by will or descent is commerce within the purview of the commerce clause, and nothing would be gained by reviewing them herein. On the other hand it has been held by the highest authority that property passing by will or descent to a beneficiary in a foreign country is *not* commerce within the meaning of the commerce clause. In Mager v. Grima et al., supra, the only points made by the plaintiff in error (see 49 U.S. 491, 492, 12 L.Ed. 1168) were that the Louisiana inheritance tax law was (1) an attempted regulation of foreign commerce (the legatee lived in France) and (2) a tax on exports. The court disposed of these contentions as follows: "We can see no objection to such a tax, whether imposed on citizens and aliens alike, or upon the latter exclusively. *It certainly has no concern with commerce, or with imports or exports.* It has been suggested, indeed, in the argument, that, as the legatee resided abroad, it would be necessary to transmit to her the proceeds of the portion of the estate to which she was entitled, and that the law was therefore a tax on exports. But if that argument was sound, no property would be liable to be taxed in a State, when the owner intended to convert it into money and send it abroad." (Emphasis ours.)

[10] *The respondent and the United States claim that this legislation invades the treaty-making powers of the United States.* The respondent says: "Section 259 violates Section 10 of Article I of the Federal Constitution forbidding states to enter into treaties, alliances or confederations, and necessarily prevents states from exacting reciprocal rights from foreign countries in exchange for concessions as to succession."

By this legislation California did not exact "reciprocal rights from foreign countries in exchange for concessions as to succession." Our legislature simply provided that if reciprocity existed foreign heirs could inherit under our laws, otherwise not. This, it is true, imposed a condition on inheritance under California laws, but the authorities already cited hold that this is permissible.

At the time when these three sections were enacted and at the time of decedent's death there was no treaty in effect between the United States and Italy touching on rights of inheritance. This is conceded by both sides. The appellant informs us that the earlier treaty terminated on December 15, 1937. The respondent adds that "a new treaty was in the course of preparation—one article having been agreed upon and ratified when war was declared." The instant case, therefore, is free from and uncomplicated by any treaty question.

In the brief of the United States we are told that at the time when these three sections became effective the United States had dealt specifically with reciprocal inheritance rights in treaties then in effect with 22 foreign nations, and that since then 4 other nations have been added. The list of these 26 foreign nations shows Germany and Japan among them, but not Italy.

[11] In the brief of the United States we are told that "So far as we are aware, on July 1, 1941, there was no civilized nation which did not grant to citizens of the United States the right to inherit from its nationals, with limitations, however, upon the inheritance of real property." If this

be true the apprehensions so frequently expressed on the side of the respondent should be greatly minimized if not entirely dissipated. In spite of this, counsel say "Though we are now at war, Chapter 895 is still a possible source of embarrassment to the United States with respect to neutral countries and our allies. With respect to our enemies, Chapter 895 is not a potential embarrassment, but rather a direct impediment to the United States in its prosecution of the war." Just how any embarrassment could arise in our country's dealings with a neutral country or an ally is not explained or developed by counsel. It is difficult to see how, if reciprocal rights of inheritance exist (as we are told they do), there can be any such embarrassment. And if such reciprocity does not exist, it is not easy to see how a neutral or allied nation could within reason expect more for its nationals than its laws give to ours. The statement that this legislation is "a direct impediment to the United States in its prosecution of the war" is even more difficult to understand. Without more of an explanation than has been vouchsafed, we are not convinced either on the count of "embarrassment" or on the count of outright "impediment".

[12, 13] If the important subject of reciprocal inheritance is one which can be covered only by treaty, then the sections in question present no procedural or other difficulty, for courts are bound to take judicial notice of the existence or non-existence of treaties. Code Civ. Proc. sec. 1875; United States v. Rauscher, 119 U.S. 407, 419, 7 S.Ct. 234, 30 L.Ed. 425. That being so, the rights of an heir living in a country with which the United States has a treaty can be easily and speedily established under section 1875 in any court where an estate is being administered. Presumably if this country and that in which the heir resides are at war, the Custodian would step into the shoes of the alien heir and sequester his inheritance. See Farmers & Merchants Nat. Bank v. Superior Court, 25 Cal.2d 842, 847, 155 P.2d 823 supra. That question, of course, is not before us. It is mentioned only to show the simplicity with which this legislation would operate in such circumstances. In the opening brief of the United States we are told that "at the appropriate stage of the proceedings herein, and if such proof should be necessary, it is expected that there will be offered in evidence on behalf of the widow and children of the decedent Article 16 of the Italian Civil Code of 1942, which grants foreigners the civil rights attributed to citizens on condition of reciprocity, including inheritance rights, and Article 312 of the Italian Law of War of 1938, which provides that no property may be transferred to an enemy in time of war except, inter alia, by inheritance."

The record on which the present case has to be decided is silent both as to treaty and as to Italian statute law. The question presented *on this record* is solely as to the constitutionality of sections 259, 259.1 and 259.2. If the two Italian statutory provisions can be proved "at the appropriate stage of the proceedings"—which we assume means on a petition to determine heirship or for distribution—such result will prove nothing one way or the other with respect to the constitutionality of these sections. If reciprocity of inheritance may be established in the absence of proof of a treaty (see Re Estate of Blak, 65 Cal. App.2d 232, 150 P.2d 567) the claimant would proceed to prove the foreign law as a fact under Code Civ. Proc. sections 1901-1904 the burden being on him. Sec. 259.1, Probate Code. If the court before which such evidence is offered is satisfied that the Italian statutes by themselves, and without benefit of treaty, afford reciprocity within the meaning of sec. 259, presumably the condition imposed by sec. 259 will have been met. That point is not before us and of course we do not pass upon it. We mention it only to emphasize that if the probate court should so hold, that would not mean that this legislation is bad; it would simply mean that it operates according to design.

The pending problem is not, who should *inherit* Ignazio Bevilacqua's estate? It is, who should *administer* his estate *on the present record?*

[14-16] *The respondent and the United States claim that this legislation invades the war powers of the United States.* The respondent says: "The sections violate Section 10 of Article I reserving to Congress the exclusive right to declare war, i. e., the control of moneys going to or coming from foreign countries to protect the United States from attack, constitutes engaging in a form of defensive warfare." Counsel for the United States say: "If construed so as to disinherit the widow and children of the decedent, the California statute is unconstitutional as an invasion of the exclusive powers of the federal government

over foreign affairs and to make captures of enemy property." They say further that "The United States had already fully occupied the fields which the California statute sought to enter" in that the Trading with the Enemy Act, 50 U.S.C.A.Appendix § 1 et seq., has "provided machinery for the capture of enemy property in times of war." This argument is elaborated and extended to show that "After the end of the war, the property so sequestered or captured will be available as a bargaining weapon at the peace conference, and as leverage to enforce compensation by or retribution upon the defeated enemy."

There can be no question that, as argued, "the war powers of the United States, like its powers over foreign affairs, are exclusive"; nor that, under the Trading with the Enemy Act, the powers of the President, and of any agency designated by him, are far-reaching. But those powers extend, of course, only to "property in which any foreign country or a national thereof has any interest"; the act does not pretend to go any further than that. If we adhere to the rule of Mager v. Grima, and the cases which follow it, first discussed herein, we must consistently hold that the probate court erred in determining *on the present record* that any interest passed to the five Italian nationals.

We therefore cannot accede to the proposition that "the United States has preempted the field of foreign relationships concerning inheritance rights, with its programs of control of foreign funds and of vesting of property of enemy nationals, * * *." If the contention of the United States and the respondent were to be followed it would mean that upon the entry of the United States into a war the normal powers of the states to enact legislation, admittedly within their powers in times of peace, would be automatically curtailed. That such is not the law is indicated by such cases as Ex parte Milligan, 4 Wall. 2, 120, 121, 71 U.S. 2, 120, 121, 18 L.Ed. 281, where it is said: "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances"; and State of South Carolina v. United States, 199 U.S. 437, 448, 449, 26 S.Ct. 110, 50 L.Ed. 261, 4 Ann.Cas. 737. We appreciate that the questions presented by these cases were far different from the question presented herein, but those cases announce the doctrine of the changeless nature of the constitution whether the nation be at war or enjoying peace-time and normal conditions. In the recent case of Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 425, 54 S. Ct. 231, 235, 78 L.Ed. 413, 422, 88 A.L.R. 1481, it is said: "Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the federal government and its limitations of the power of the States were determined in the light of emergency, and they are not altered by emergency."

[17-19] The respondent and the United States invoke the presumption that the law of an outside state or country is the same as the law of California, and hence that in the absence of any affirmative showing in this case Italian laws of inheritance must be held to be the same as ours. The legislature, in providing in section 259.1 that "The burden shall be upon such nonresident aliens to establish the fact of existence of the reciprocal rights * * *" showed clearly, in our opinion, its intent that said presumption should have no application in cases arising under section 259. Otherwise the provisions of section 259.1 are meaningless. It is settled law that statutes "which cast the burden of proof in an issue upon either party to the action, are within the constitutional power of the legislature." McDonald v. Conniff, 99 Cal. 386, 390, 34 P. 71, 73 (citing Cooley's Constitutional Limitations, 450); Clarke v. Mead, 102 Cal. 516, 519, 36 P. 862 (citing Marx v. Hanthorn, 148 U.S. 172, 181, 13 S.Ct. 508, 37 L.Ed. 410). In People v. Ellis, 206 Cal. 353, 357, 274 P. 353, 355, it is said: "When the law provides on whom shall rest the burden of proof, it establishes a rule as to which party shall first proceed and go forward with the evidence, or prove the issue, the presumption then being against the party having the burden of proof. 22 Corp.Jur. 83." And in Monterey County v. Cushing, 83 Cal. 507, 510, 23 P. 700, 701, the court stated the familiar rule that "If no direct evidence be introduced upon any issue, the finding should be against the party who had the burden of proof. [Citing cases]. To say that the burden of proof is upon a party is equivalent to saying that the presump-

tion is against him." In addition to what has been said, this court in Re Estate of Michaud, 53 Cal.App.2d 835, 128 P.2d 595, in a contest similar to that now presented, applied section 259.1 and held that before the public administratrix could show a right to administer the estate she must first show that the foreign "heirs" were entitled to inherit—that was her burden.

[20] What has just been said likewise, in our opinion, answers the argument advanced by the United States in its closing brief that this inheritance should vest in the five Italian nationals subject to a defeasance. Section 259.1 casts the burden in the first instance upon the foreign "heirs" of showing their right to inherit.

[21] With respect to the respondent's claim that the appellant's right to letters of administration was not established because he did not prove that the person under whom he claims was not an alien, or at least *was an alien entitled to inherit,* it is sufficient to say that these sections impose no such condition. When section 259.2 says "no heirs *other than such aliens*" it undoubtedly means "aliens not residing within the United States or its territories" for it is with the rights of only such aliens as these that section 259 deals. See also In re Estate of Michaud, supra. Section 259 does not pretend to limit the rights of resident aliens.

[22] We find no merit in the respondent's claim that these sections violate the fourteenth amendment.

Other points raised by the respondent are answered by the views already expressed that the rule of Mager v. Grima et al., and the cases following it, is decisive of this case.

In their opening brief counsel for the United States cite Crowley v. Allen, D. C., 52 F.Supp. 850, which held the sections in question to be unconstitutional. Since the brief was filed that case was reversed in Allen v. Markham, 9 Cir., 147 F.2d 136. On May 28, 1945, however, a petition for a writ of certiorari was granted (65 S.Ct. 1402, 89 L.Ed. 1969) so the subject is at large as far as the federal courts are concerned.

[23] In our opinion the court erred in holding that sections 259, 259.1 and 259.2 are unconstitutional, and that therefore the appellant was not entitled to letters of administration. On the present record the appellant appears to be an heir of the decedent "eligible to take such property" and "The next of kin entitled to share in the estate" subd. 6, sec. 422, Probate Code, and therefore entitled to administer it. In re Estate of Michaud, supra.

The order appealed from is reversed.

NOURSE, P. J., and DOOLING, Justice pro tem., concur.

In re KNUTZEN'S ESTATE.*

Civ. 7122; Sac. 5688.

District Court of Appeal, Third District,
California.

Sept. 5, 1945.

Hearing Granted Nov. 1, 1945.

1. Aliens 🔑10
Constitutional law 🔑278(1)
Treaties 🔑2
War 🔑2

The probate code sections, declaring nonresident aliens' rights to take property in state by succession or will dependent on United States citizens' reciprocal rights to take property in such aliens' countries on same terms as residents and citizens thereof, imposing burden on such aliens to establish such reciprocal rights, and providing for escheat of decedent's property, which no heirs except such aliens are eligible to take, in absence of such rights, are not unconstitutional as violative of provision respecting right of Congress to declare war, of provision that treaties shall be supreme law of land, or as denying due process. Probate Code, §§ 259–259.2; U.S.C.A. Const. art. 1, § 8, cl. 11, art. 6, cl. 2, and Amend. 14 § 1.

2. Evidence 🔑81

Nonresident alien claimants of deceased resident's property in state cannot rely on presumption that inheritance laws of such alien's country are same as those of state, but burden is on him to show such fact. Probate Code, §§ 259, 259.1.

3. Aliens 🔑9

In absence of proof that inheritance laws of nonresident aliens' country are same as those of state, no interest, defeasible or otherwise, in resident decedent's property in state passes to such aliens under state statutes. Probate Code, §§ 259–259.2.

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* Subsequent opinion 191 P.2d 747.

4. Aliens 🔑9
War 🔑12

German nationals, residing in Germany, acquired no right under state statutes to share in estate of their deceased brother residing in state, in absence of proof of pertinent German inheritance statutes giving American citizens reciprocal rights to take property in Germany so that Alien Property Custodian's order, vesting in him all such nationals' interests in decedent's estate under Trading with the Enemy Act, vested nothing in United States. Probate Code, §§ 259–259.2; Trading with the Enemy Act, 50 U.S.C.A.Appendix § 616 et seq.

5. Descent and distribution 🔑1

The Legislatures of various states have right to determine how property within their boundaries shall descend by inheritance.

6. Aliens 🔑13

The paragraph of treaty between United States and Germany, providing that where decedent's realty within one party's territories would descend to national of other party, by laws of country or will, were he not disqualified by laws of country where such property is situated, such national shall be allowed three years in which to sell property and withdraw proceeds without restraint or interference, does not supplant or limit either country's laws of succession. Treaty between the United States and Germany Oct. 14, 1925, art. 4, 44 Stat. 2135.

7. Aliens 🔑13

The treaty between United States and Germany, respecting right of inheritance of either party's national, does not secure to German nationals, residing in Germany, right to inherit property in United States without complying with local laws nor evidence broad purpose to remove impediment of alienage. Treaty between United States and Germany Oct. 14, 1925, art. 4, 44 Stat. 2135.

8. Treaties 🔑11

The language of treaty will be construed, wherever reasonably possible so as not to override state laws or impair rights arising thereunder, and intent to do so will not be imputed to federal government, unless plainly expressed in, or necessarily implied from, language of treaty.

9. Aliens 🔑13

The treaty between United States and Germany, respecting right of inheritance of either party's nationals, does not conflict with or override provisions of State Probate Code, declaring nonresident aliens' rights to take decedent's property in state dependent on American citizens' reciprocal rights to take property in such aliens' countries. Probate Code, §§ 259, 259.1; Treaty between the United States and Germany Oct. 14, 1925, art. 4, 44 Stat. 2135.

◆

Appeal from Superior Court, City and County of San Joaquin; C. W. Miller, Judge.

In the matter of the estate of Alfred Carl Knutzen, deceased. From a decree settling the account of Theodore J. Knutzen as administrator of the estate and ordering distribution to him of the entire estate to the exclusion of foreign heirs, the United States appeals.

Affirmed.

Frank J. Hennessy, U. S. Atty., of San Francisco, Emmet J. Seawell and Thomas O'Hara, Asst. U. S. Attys., both of Sacramento, Herbert Wechsler, Asst. Atty. Gen., and Harry LeRoy Jones, Chief, Wallace H. Walker, and Richard P. Lott, Attys., and John Ernest Roe, Gen. Counsel, Alien Property Litigation Unit, all of Washington, D. C., for appellant.

O. H. Speciale, of San Jose, Robert W. Kenny, Atty. Gen., and Everett A. Mattoon, Deputy Atty. Gen., for respondent.

ADAMS, Presiding Justice.

Alfred Carl Knutzen, a resident of San Joaquin County, California, died intestate January 24, 1943. He left surviving him one brother, Theodore J. Knutzen, living in Los Gatos, California, and one brother and two sisters living in Sylt, Schlesswig-Holstein, Germany, and no other heirs. Theodore J. Knutzen was appointed and qualified as administrator of the estate of said decedent, and after proceedings had, filed his first and final account and petition for distribution on or about February 19, 1944. On or about April 4, 1944, the Alien Property Custodian filed in the proceeding a document entitled "Vesting Order No.

3294," which recited that such custodian on investigation had found that in the said estate were property and interests "payable or deliverable to, or claimed by" nationals of Germany, to wit, the two sisters and the brother of decedent, and purported to vest in such custodian all the "right, title, interest and claim of any kind" of said German nationals in and to the estate of Alfred Carl Knutzen, deceased. No appearance was made by the German heirs.

On April 17, 1944, the probate court heard the petition of the administrator for settlement of his account and petition for distribution, and on May 1, 1944, made and entered a decree settling the account and ordering the distribution of the entire estate to Theodore J. Knutzen in accordance with sections 259, 259.1 and 259.2 of the Probate Code of the state of California, to the exclusion of the foreign heirs.

On May 10, 1944, the United States of America, by Frank J. Hennessy, United States Attorney, appearing "as successor in interest of Arthur Knutzen, Helen Ruge and [Irene] Knutzen, heirs at law" of said decedent, filed a notice of motion to vacate said decree, and a notice of intention to move for a new trial, the grounds therefor being that the decree violates the provisions of Article IV of the "Treaty of Friendship, Commerce and Consular Rights" between the United States and Germany, proclaimed October 14, 1925, 44 Stat. 2132; that it is based upon a construction of sections 259, 259.1 and 259.2 of the California Probate Code, which is inconsistent with and violates the provisions of Article I, section 8, clause 11, Article VI, clause 2, and section 1 of the Fourteenth Amendment of the Constitution of the United States; and that, as construed by the court in its decree, those statutes invade the field of international affairs and are therefore invalid.

These motions were heard by the court on June 12, 1944, and on June 30, 1944, the court amended its decree so as to include the following:

"The Court finds that but for the provisions of the Sections 259, 259.1 and 259.2 of the Probate Code of the State of California, the said Arthur Knutzen, Helen Knutzen Ruge and Irene Knutzen *all of whom are non resident aliens* would each take a one-fourth part of the estate of said deceased, but that no reciprocal rights referred to in said sections of the Probate Code exist between the United States and Germany, and hence the three last named persons are not entitle to inherit any part of said estate."

The provisions of the decree ordering distribution to Theodore J. Knutzen remained unchanged.

From such decree the United States of America has appealed, the record before us consisting solely of the files and records in the probate proceeding, and the only questions for our determination are those that appear upon the face of said record.

Sections 259, 259.1 and 259.2 read as follows:

"259. Aliens residing abroad: Dependence of rights upon reciprocity. The rights of aliens not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are inhabitants and citizens and upon the rights of citizens of the United States to receive by payment to them within the United States or its territories money originating from the estates of persons dying within such foreign countries.

"259.1. Same: Burden of establishing that rights are reciprocal. The burden shall be upon such nonresident aliens to establish the fact of existence of the reciprocal rights set forth in Section 259.

"259.2. Same: Disposition of property on finding of non-reciprocity. If such reciprocal rights are not found to exist and if no heirs other than such aliens are found eligible to take such property, the property shall be disposed of as escheated property."

[1-4] Appellant's argument before us is that the trial court erred in distributing the whole estate to Theodore J. Knutzen because (1) the California statute is not self-executing, and the aliens took at least defeasible interests in the estate which upon acquisition by the United States in some manner became indefeasible; (2) it is presumed that the laws of Germany are the same as the laws of California and reciprocal inheritance rights therefore exist under the German laws; (3) as construed and applied the statute contravenes the provisions

of the treaty with Germany; and (4) as construed and applied the statute is unconstitutional.

Points (1), (2) and (4) above set forth have but recently been before the District Court of Appeal, First Appellate District, Division Two, in the Matter of the Estate of Bevilacqua, — Cal.App.2d —, 161 P.2d 589, and decided contrary to appellant's contentions. It was there held that the aforesaid probate code sections are constitutional, that an alien claimant cannot rely upon a presumption that the laws of Germany respecting inheritance are the same as those of California but the burden is on him to show that such is the case; and that, in the absence of such proof, no interest passes to aliens not residing within the United States. We are in full accord with the reasoning and conclusions of that court, and take the liberty of adopting them as our own. Applying such conclusions to the case before us, we hold that since no proof whatever as to the pertinent statutes of Germany was adduced in this proceeding, the two sisters and the brother of decedent, who are nationals of Germany residing therein, never acquired any right to share in the estate of decedent, and, accordingly, appellant, which under the Trading with the Enemy Act, 50 U.S.C.A. Appendix § 616 et seq., was entitled to take and sought to take only such interests as were "payable or deliverable to, or claimed by" such heirs, became vested with nothing by virtue of the Vesting Order filed in the probate court.

We have left for consideration then the contention of appellant that the treaty with Germany secures to the German sisters and brother of decedent, rights to inherit proportionate shares of the estate of decedent. In considering this question we shall assume, without deciding, that the treaty was not abrogated by the declaration of war between the United States and Germany, and that, if in conflict therewith, it supersedes the statutes of the state regarding succession. Cf. United States v. Fox, 94 U.S. 315, 24 L.Ed. 192; and "Limitations on the Treaty Making Power" by Henry St. George Tucker, ch. VI.

Article IV of that treaty provides:

"Where, on the death of any person holding real or other immovable property or interests therein within the territories of one High Contracting Party, such property or interests therein would, *by the laws of the country* or by a testamentary disposition, descend or pass to a national of the other High Contracting Party, whether resident or nonresident, *were he not disqualified by the laws of the country where such property or interests therein is or are situated,* such national shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and withdraw the proceeds thereof, without restraint or interference, and exempt from any succession, probate or administrative duties or charges other than those which may be imposed in like cases upon the nationals of the country from which such proceeds may be drawn.

"Nationals of either High Contracting Party may have full power to *dispose* of their personal property of every kind within the territories of the other, by testament, donation, or otherwise, and their heirs, legatees and donees, of whatsoever nationality, whether resident or non-resident, shall succeed to such personal property, and may take possession thereof, either by themselves or by others acting for them, and retain or dispose of the same at their pleasure subject to the payment of such duties or charges only as the nationals of the High Contracting Party within whose territories such property may be or belong shall be liable to pay in like cases." (Italics ours.)

[5] Before attempting an analysis of these treaty provisions reference may properly be made to the principle set forth in the opinion in Estate of Bevilacqua, supra, and cases there cited, that the right to determine how property within their own boundaries shall descend by inheritance is matter for the legislatures of the various states. See particularly In re Estate of Perkins, 21 Cal.2d 561, 569, 134 P.2d 231; Farmers, etc., National Bank v. Superior Court, 25 Cal.2d 842, 155 P.2d 823; Irving Trust Co. v. Day, 314 U.S. 556, 62 S.Ct. 398, 86 L.Ed. 452, 137 A.L.R. 1093. Therefore unless it can be said that by reason of the provisions of the treaty with Germany above set forth the rights of California to provide how the property involved in the proceeding before us should descend, the provisions of the Probate Code above set forth must be held to govern.

Also it may be well to consider what is and what is not involved in this proceeding. Strictly speaking, all that is involved is the right of the brother and sisters of decedent, who are aliens residing in Germany, to inherit the respective shares of the estate of their deceased brother, in the absence of proof of reciprocal rights under the laws of Germany, proof of which is required by sections 259 and 259.1 of the Probate Code. Neither the right of German nationals *to hold real property* within this state, nor the right of German nationals to *dispose of their personal property* within this state is involved. It is not contended that decedent was a German national, and the record discloses no attempt by any German national to dispose of his personal property within this state. Decedent, it is conceded, died intestate, and the property remaining for distribution consists solely of cash.

[6] An analysis of the first paragraph of Article IV of the treaty shows, first, that it purports to deal only with *real property* or interests therein. Second, it purports to provide only that where a national of either country may, either by descent or testamentary disposition, *acquire real property* situated within the boundaries of the other, such national may have three years within which to sell same—or longer if circumstances render it necessary—and withdraw the proceeds without interference and exempt from any charges other than those that may be imposed in like cases upon the nationals of the country from which such proceeds may be drawn; and, third, it specifically applies only to such real property or interests therein as *would pass or descend* to the nationals of the other, "by the laws of the country or by a testamentary disposition," were the party taking "not disqualified by the laws of the country where such property or interests therein is or are situated." It is, we think, apparent that the said provision does not purport to supplant or limit the laws of succession of either of the contracting countries. The use of the above quoted language evidences, on the contrary, a recognition that real property and interests therein may not, because of the laws of the various states in the United States and of Germany, pass to the nationals of the other, and that the nationals of either may, by the laws of the other, be disqualified from taking or holding title to real property located within its boundaries.

An analysis of the second paragraph of the article shows that it purports to provide only for the rights of the *nationals* of the one residing in the other, to *dispose* of their personal property, and the rights of those who may acquire personal property *so disposed of* by such nationals to succeed to same, take possession thereof, and retain or dispose of same without paying any duties or charges other than the nationals of the country within whose territory the property may be would be liable to pay in like cases. No right of any German national to dispose of his property is involved in this proceeding, nor is the right of any person to whom any national has conveyed or from whom the property of any national has descended, to dispose of same involved. The right here involved is the right of German nationals not residents of the United States to acquire rights under the succession laws of California, without proving that an American citizen not residing in Germany would have the right to inherit from a German national residing in Germany, property located in Germany.

[7] Appellant states in its brief that "Both provisions of Article IV evidence a broad purpose to remove the impediment of alienage and thereby secure to nationals of either country the right to *dispose of property* located in the other, and passing to them by will or by the laws of succession of that country. Thus the treaty secures to the German legatees involved herein the right to inherit property located in the United States and left to them *under the will of the testatrix.*" (Italics added.)

While it may be conceded that the provisions of Article IV evidence a purpose to secure to the nationals of either country the right to *dispose* of their property located in the other, it does not follow that the treaty therefore secures to the German nationals in this case, or in any case, the right to *inherit* property located in the United States without complying with the provisions of local law; and in this case no property was left by will. Nor can it be said that the provisions of the treaty "evidence a broad purpose to remove the impediment of alienage." On the contrary the phrases "Where * * * such property or interests therein would, by the laws of the country * * * descend or pass to a national of the other," and "were he not disqualified by the laws of the country where such property or interests therein is or are situated" give specific recognition to the fact that rights of inheritance and the right to hold real property within their borders are matters within the control of the respective countries. Throughout this treaty recognition of the force and effect of local laws is given. See Articles I, XII, XIII and XXIV. In the latter article, which deals with the rights of consular officers to deal with the estates of the nationals of their country who may die within the territory of the other, the phrases "so far as the laws of the country permit," and "provided the laws of the place where the estate is administered so permit," are used in defining the rights of such consular officers.

The effect of such phrases in treaties has been considered in numerous decisions of our courts. In Re Estate of Ghio, 157 Cal. 552, 108 P. 552, 37 L.R.A.,N.S., 549, 137 Am. St.Rep. 145, affirmed in Rocca v. Thompson, 223 U.S. 317, 32 S.Ct. 207, 56 L.Ed. 453, a provision of the treaty with Argentina was relied upon by the consul of Italy—under the most favored nation clause in the treaty with Italy—which gave consuls the right to intervene in the possession, administration, and judicial liquidation of the estate of a deceased *conformably with the laws of the country,* for the benefit of the creditors and legal heirs. And it was contended that this gave consuls the right to administer property left by a foreigner within the jurisdiction of California. But it was held that in this country the right to administer such property is primarily committed to state law, that it is so regulated in California, and that the treaty was not to be construed to give the consul the right to administer and thus supersede the local law. Also see In re Estate of Servas, 169 Cal. 240, 146 P. 651, Ann.Cas.1916D, 233.

In Santovincenzo v. Egan, 284 U.S. 30, 52 S.Ct. 81, 82, 76 L.Ed. 151, the consul for Italy in New York claimed the right to receive the net assets of a deceased native of Italy for distribution to the Kingdom of Italy. He relied upon a provision in a treaty with Persia, under the most favored nation clause in a consular convention with Italy. The provision relied upon read:

> "In case of a citizen or subject of either of the contracting parties dying within the territories of the other, his effects shall be delivered up integrally to the family or partners in business of the deceased; and in case he has no relations or partners, his effects in either country shall be delivered up to the consul or agent of the nation of which the deceased was a subject or citizen, so that he may dispose of them in accordance with the laws of his country."

The court upheld the contentions of Santovincenzo in that case, but it was stated, 284 U.S. at page 36, 52 S.Ct. at page 83, 76 L.Ed. 153:

> "The provision of article VI of the Treaty with Persia does not contain the qualifying words 'conformably with the laws of the country' (where the death occurred) as in the case of the Treaty between the United States and the Argentine Confederation of [July 10] 1853 (article IX, 10 Stat. 1001, 1009; Rocca v. Thompson, 223 U.S. 317, 326, 330, 332, 32 S.Ct. 207, 56 L.Ed. 453 [456-458]); or the phrase 'so far as the laws of each country will permit,' as in the Consular Convention between the United States and Sweden of [June 1] 1910 (article XIV, 37 Stat. 1479, 1487, 1488; Rocca v. Thompson, supra; In re D'Adamo's Estate, 212 N.Y. 214, 222, 223, 106 N.E. 81, L.R.A.1915D, 373). The omission from article VI of the Treaty with Persia of a clause of this sort, so frequently found in treaties of this class, must be regarded as deliberate. In the circumstances shown, it is plain that effect must be given to the requirement that the property of the decedent 'shall be delivered up to the consul or agent of the nation of which the deceased was a subject or citizen, so that he may dispose of them in accordance with the laws of his country,' unless a different rule is to apply simply because the decedent was domiciled in the United States."

That opinion was written by Mr. Chief Justice Hughes, who, it should be noted, was the United States plenipotentiary who signed the treaty with Germany here under consideration; and it clearly indicates that where such language as is quoted above, and as appears in Article IV of the treaty with Germany, is used, it is not to be disregarded or its use said to be inadvertent.

In Re D'Adamo's Estate, 212 N.Y. 214, 106 N.E. 81, 83, L.R.A.1915D, 373, cited in the foregoing quotation, the right of a consul of Italy to administer the estate of an Italian national who died in New York was in question. The decedent left a wife and child in Italy who were his sole heirs; but he left a brother in New York who claimed the right, under the New York statutes to administer the estate, and who was held to have such right unless some treaty provision prevented. Under a most favored nation clause the consul relied upon a provision in a consular convention with Sweden (and not that of the treaty with

Argentina as in Rocca v. Thompson, supra), which provided that in the event of the death, intestate, of any citizen of either of the contracting parties within the territory of the other the consul of the nation to which the deceased belonged should "so far as the laws of each country will permit and pending the appointment of an administrator, * * * take charge of the property left by the deceased for the benefit of his lawful heirs and creditors, and, moreover, have the right to be appointed as administrator of such estate." This language, it was contended, superseded the local law and gave the consul a paramount and conclusive right to administer the estate of decedent. But the court, in an opinion by Mr. Justice Cardozo, held that the phrase, "so far as the laws of each country will permit," qualified the whole sentence of the treaty; and that such phrase is equivalent to the phrase "conformably with the laws of the country," construed in Rocca v. Thompson, supra, and that "it maintains the continuity of the purpose, revealed repeatedly in conventions and treaties throughout our history, to subject the rights of consuls to the requirements of local law." That opinion also set forth certain incidents in our diplomatic history disclosing a disinclination of the federal government by treaty to trench upon the rights of the states to administer the estates of those dying within their territorial limits.

Re D'Adamo is cited and followed in numerous later decisions. See Lely v. Kalinoglu, 64 App.D.C. 213, 76 F.2d 983, 100 A.L.R. 1523, certiorari denied, 295 U.S. 765, 55 S.Ct. 925, 79 L.Ed. 1707, Schneider v. Hawkins, 179 Md. 21, 16 A.2d 861, and cases cited in note in 100 A.L.R. 1527–1537.

In Wyers v. Arnold, 347 Mo. 413, 147 S.W.2d 644, 134 A.L.R. 876, Babette Orth, a German national resident in Germany died, leaving, as the only assets of her estate, an interest in the estate of a brother, Carl Orth, who had died in Missouri. After the estate of Carl Orth was fully administered the portion thereof payable to the estate of Babette Orth was paid to her administrator. More than three years after the administration of Carl Orth's estate was begun, a copy of a purported will of Babette Orth was presented to the Missouri probate court, with a petition that her estate be paid over to the legatees named in that will, who were nationals and residents of Germany. The will was admitted to probate, whereupon a proceeding was begun by a nephew and heir at law of Babette Orth, not mentioned in the will, to prohibit the Missouri court from distributing the estate to the named legatees, on the ground that under the law of Missouri the probate court had no authority to admit the will to probate after the lapse of the time provided by Missouri law for the admission of a will to probate. It was contended, in opposition to the writ, that under Article IV of the treaty with Germany the court was bound to admit the will to probate regardless of the local law. The court held that the provisions of the treaty did not override the state statute. Todok v. Union State Bank, 281 U.S. 449, 50 S.Ct. 363, 74 L.Ed. 956, was cited, in which case it was held that a provision in a treaty with Sweden, that the subjects of the contracting parties might freely dispose of their goods and effects in favor of such persons as they thought proper, did not supersede a statute of the state of Nebraska providing that a homestead could not be conveyed unless both husband and wife joined in the conveyance; and that the husband, though a national of Sweden, was powerless to dispose of homestead property without the consent of his wife. Certiorari was denied by the United States Supreme Court, Arnold v. Wyers, 313 U.S. 589, 61 S.Ct. 1112, 85 L.Ed. 1544.

In an interesting note in 57 Harvard Law Review, 730, 731, it is said that "since the treaty of 1923 [with Germany] gives only a right of sale to aliens who are disqualified from taking property by the law of the situs, it contemplates that there shall be state laws on the subject." Reference is there made to Gibson, Aliens and the Law, in which work it is stated at pages 37, 38:

"The treaties still leave it to the state governments to decide whether aliens may or may not continue in possession of real property acquired by inheritance. If the state government permits this, then there are treaties requiring national treatment, thereby preventing the state, at least as far as the nationals of the contracting parties are concerned, from discriminating against them. But on the other hand, if the state governments decide that aliens shall not acquire real property by inheritance, the only provision to be found in the treaties is that aliens, nationals of the other contracting party, inheriting real property in such states shall have the right not of holding the property, but merely of liquidating it and removing the proceeds. All of which seems to indicate clearly that 'the Government of the United States has exhibited restraint in generally refraining from attempts to hinder the several States of the Union from shaping their own policies with regard to lands within their respective territorial limits.'"

Also at pages 49, 50:

"Treaty provisions relative to aliens' acquisition of real property by descent do not in most instances permit aliens to receive property upon the same basis as citizens. For the most part, the state governments determine one's right to real property and prescribe the manner in which such property is to be enjoyed in the United States. It is a principle of American constitutional law that a treaty takes precedence over a conflicting state constitution or legislation. However, the federal government has used the treaty-making power in this connection cautiously. Most of the provisions do not give the alien the right to obtain real property ab intestato in the fullest sense. What these provisions do grant is the right to dispose of the real property inherited and to remove the proceeds of such disposal. This arrangement assures to the alien the market value of the property and leaves the state governments free to keep the real estate situated in their jurisdictions out of alien hands should they so desire. The provisions do not deny the state the power to determine who shall own real property within its jurisdiction. In fact they specifically recognize this power by the phrase, 'were he not disqualified by being an alien.' Therefore, in most of the provisions concerned with descent of real property to aliens, all that is granted is that when 'such real estate would by the laws of the land [in the United States this means state laws] descend on a citizen or subject of the other, such citizen or subject shall be allowed,' not to enter into full and complete enjoyment and possession thereof, but to have a specified time or a reasonable time 'to sell the same and to withdraw the proceeds.' The treaty-making power has been used to modify the common law to the benefit of alien heirs. By virtue of these provisions, aliens have been extended national treatment in that they receive distributive shares in cases of intestacy the same as citizens. They further grant aliens the right to sell that which they obtain by operation of law. But here the provisions stop. They do not grant aliens the right to enter into unconditional possession."

Appellant argues that treaties are to be liberally construed, and that if there is any doubt as to their meaning the more liberal construction is to be adopted—which in this case should be a construction in favor of the United States as claimant of the rights of the German nationals. But we find nothing ambiguous or uncertain in the provisions of Article IV. As we read it, the first paragraph merely means that in the event that the national of the one country should, by the laws of descent of the other or by testamentary disposition, become entitled to real property, which, under the laws of that country, he was not, because of alienage, entitled to hold, he should have three years or more within which to dispose of same exempt from any charges which would not be imposed on the nationals of the country in which said property was located. And the second paragraph merely gives a national of one country residing in the other the right to *dispose* of his personal property in that territory, and any persons who may acquire such property from such national the right to dispose of same without the imposition of charges not imposed upon nationals of the country where the property is situated.

Treaties are not formulated by illiterate amateurs. In Rocca v. Thompson, supra, the court said, 223 U.S. at page 332, 32 S. Ct. at page 210, 56 L.Ed. 458:

"It is further to be observed that treaties are the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning, and to choose apt words in which to embody the purposes of the high contracting parties. Had it been the intention to commit the administration of estates of citizens of one country, dying in another, exclusively to the consul of the foreign nation, it would have been very easy to have declared that purpose in unmistakable terms."

Similarly, if the parties to this treaty intended it should have the meaning attributed to it by appellant, no reason appears why they should not have said so in so many words.

Such statutes as sections 259 and 259.1, supra, are not peculiar to California. Similar provisions are found in the statutes of other states. See Oregon Compiled Laws, Annotated, Vol. 5, pp. 4, 5, section 61-107, and Chapter 104 of the 1939 Laws of Montana, sections 2–5. To hold that the language of the treaty with Germany supersedes the statutes of the state of California regarding the rights of succession by nonresident German aliens, would have the effect of nullifying the statutes of those states and every other state on the same subject; and since most treaties contain a "most favored nation" clause, such as was relied upon in Rocca v. Thompson; In re D'Adamo; and Santovincenzo v. Egan, supra, it would have the effect of holding that all other countries whose treaties have such "most favored nation" clauses would enjoy the same rights.

[8] No purpose to so limit or restrict the recognized rights of states to regulate through their legislatures the manner and terms upon which property within their dominion may pass by succession, should be lightly assumed; rather the contrary. The language of a treaty wherever reasonably possible will be construed so as not to override state laws or to impair rights arising under them. Guaranty Trust Co. v. United States, 304 U.S. 126, 143, 58 S.Ct. 785, 82 L.Ed. 1224, 1234. As was said by our Supreme Court in Re Estate of Ghio, 157 Cal. 552, 557, 108 P. 516, 523, 37 L.R.A., N.S., 549, 137 Am.St.Rep. 145, affirmed in Rocca v. Thompson, supra, "such intent is not to be lightly imputed to the federal government, and that it cannot be allowed to exist except where the language used in a treaty plainly expresses it, or necessarily implies it." Also it was there said, 157 Cal. at page 560, 108 P. at page 525, 37 L.R.A.,N.S., 549, 137 Am.St.Rep. 145, that it was not probable "that the words of the treaty under consideration were chosen with the intent to have the international agreement become a part of, and in part supplant, the laws of the states of the United States, or of the provinces of Argentina, in matters committed solely to the states or provinces." And in Chryssikos v. Demarco, 134 Md. 533, 107 A. 358, 360, it was said: "It would not be just to assume that in making a treaty with a foreign country laws of the different states were intended to be repealed or ignored, in the absence of express language or clear implication showing such intent, especially such as testamentary laws, which are necessary and exist in every state, although they differ in some particulars."

[9] We therefore conclude that the treaty with Germany does not conflict with or override the provisions of sections 259 and 259.1 of the Probate Code of California. This conclusion renders it unnecessary to determine whether or not the said treaty was abrogated by the declaration of war between the United States and Germany.

The judgment is affirmed.

PEEK, J., concurs.

THOMPSON, Justice (concurring).

I concur in the conclusion. The chief question is whether the court erred in distributing the entire estate to a resident brother of the deceased to the exclusion of another brother and two sisters residing in Germany. If the German relatives were heirs under sections 259, 259.1 and 259.2 of the Probate Code, they were entitled to inherit equal one-fourth shares, subject to the claim of the Federal Alien Property Custodian. Section 259.1 places the burden on the claimants to affirmatively prove the country in which they live confers similar reciprocal rights of inheritance. In other language section 259 authorizes nonresident aliens to inherit property from the estate of a resident intestate deceased person, conditioned upon their proof of the existence of law in their country conferring similar reciprocal rights upon our residents. On distribution, no affirmative proof of the existence of a similar statute in Germany was offered. The court did, however, consider the treaty of 1925 between the United States and Germany which contains provisions with respect to reciprocal rights of inheritance by nonresident aliens of the respective nations. The court was bound to take notice of the provisions of that treaty since it is considered the supreme law of our land.

It has been held that courts will take judicial notice of treaties with foreign countries. United States v. Rauscher, 119 U.S. 407, 419, 7 S.Ct. 234, 30 L.Ed. 425; San Lorenzo Title & Imp. Co. v. Caples, Tex. Civ.App., 48 S.W.2d 329. Treaties become the supreme law of the land (U.S.Const., Art. VI, cl. 2) and upon subjects which are self-executing they take precedence over state statutes in conflict therewith. In re Terui, 187 Cal. 20, 24, 200 P. 954, 17 A.L.R. 630; 24 Cal.Jur. 650, sec. 5; 52 Am.Jur. 815, secs. 17, 18; 134 A.L.R. 886, note. It is contended that the treaty of Germany was self-executing with respect to reciprocal rights of nonresidents to inherit property by will or by succession; that no subsequent enactment of a statute was required. Provisions in treaties with respect to the rights of individuals should be construed exactly as Federal statutes are interpreted. Edye v. Robertson, 112 U.S. 580, 5 S.Ct. 247, 254, 28 L.Ed. 798; 52 Am.Jur. 815, secs. 17, 18. Courts take judicial notice of the acts of Congress. Code Civ.Proc. sec. 1875, subd. 3; Young v. Boy Scouts of America, 9 Cal. App.2d 760, 764, 51 P.2d 191; Sheehan v. Vedder, 108 Cal.App. 419, 292 P. 175; 31 C.J.S., Evidence, § 16.

Treaties should receive a liberal construction to ascertain and carry out the intentions of the contracting nations. De Geofroy v. Riggs, 133 U.S. 258, 10 S.Ct. 295, 33 L.Ed. 642; Nielsen v. Johnson, 279 U.S. 47, 49 S.Ct. 223, 75 L.Ed. 607; In re Estate of Romaris, 191 Cal. 740, 218 P. 421; 52 Am.Jur. 825, sec. 34.

If the treaty with Germany conferred unconditional reciprocal rights of inheritance conforming to the requirement of section 259, then the burden of proof was sustained and the German heirs acquired title to their respective interests, unless those inheritable rights were abrogated by the subsequent declaration of war between the United States and Germany in 1941, which was prior to the death of Knutzen.

I am of the opinion that the covenants in the treaty providing for reciprocal rights of inheritance were neither abrogated nor suspended by the subsequent declaration of war. Modern authorities assert that the provisions of treaties fixing what are deemed to be permanent rights of nations, like state lines, and covenants purporting to establish permanent personal rights of individuals, like the rights of nonresident aliens to inherit property, are neither abrogated nor suspended by a subsequent declaration of war, unless the language of the treaty specifically so provides. Techt v. Hughes, 229 N.Y. 222, 128 N.E. 185, 11 A.L.R. 166, certiorari denied; State ex rel. Miner v. Reardon, 120 Kan. 614, 245 P. 158, 47 A.L.R. 452; Goos v. Brocks, 117 Neb. 750, 223 N.W. 13; Rickmers, etc., v. United States, D.C., 45 F.2d 413, 418; Society, etc., v. New Haven, 21 U.S. 464, 5 L.Ed. 662; 1929 Supp. Thompson on Real Property, 767, sec. 2352; 63 C.J. 833, sec. 13; 3 C.J.S., Aliens § 7f; 52 Am.Jur. 813, sec. 15; 11 A.L.R. 180, elaborate note. No intention to abrogate individual reciprocal rights of inheritance by the subsequent declaration of war is suggested by the treaty. The leading cases on that subject are the Techt and the Miner decisions above cited.

No one has the natural inherent right to inherit property from the estates of deceased persons. That right exists only by grace of legislative authority. In re Estate of Perkins, 21 Cal.2d 561, 569, 134 P.2d 231; McCaughey v. Lyall, 152 Cal. 615, 93 P. 681; Childs v. Gross, 41 Cal.App.2d 680, 689, 107 P.2d 424; 9 Cal.Jur. 450, sec. 4; 16 Am.Jur. 777, sec. 12; 2 Am.Jur. 484, sec. 42; 26 C.J.S., Descent and Distribution, § 2. Since the burden was cast by section 259.1 of the Probate Code upon the nonresident relatives of the deceased to prove that a German statute existed, as distinguished from the treaty provisions, conferring reciprocal inheritable rights, and no proof was offered in that regard, there is no presumption, under the circumstances of this case, that such statute existed. Ordinarily, according to California authorities, the presumption is indulged, in the absence of proof to the contrary, that the law of a foreign country is the same as the law of our own state. Murphy v. Murphy, 145 Cal. 482, 78 P. 1053; Nesbit v. MacDonald, 203 Cal. 219, 224, 263 P. 1007; Wickersham v. Johnston, 104 Cal. 407, 411, 38 P. 89, 43 Am. St.Rep. 118; Christ v. Superior Court, 211 Cal. 593, 598, 296 P. 612; Marsters v. Lash, 61 Cal. 622, although a different rule may exist in some other jurisdictions. 31 C.J.S., Evidence, § 21. But when the statute definitely casts the burden upon a litigant to affirmatively prove the fact, the presumption of the similarity of the laws may not be indulged or relied upon as proof. Under such statute there is no presumption that the law of a foreign country is the same as our own statute, or at least the presumption is against the party upon whom the burden is cast. 31 C.J.S., Evidence, § 114. In the text last cited it is said:

"It has also been considered that a presumption is generally only a rule of law as to which party shall first proceed and go forward with the evidence, to prove an issue, the presumption being against the party having the burden of proof."

I am convinced sections 259, 259.1 and 259.2 of the Probate Code, which were adopted in 1941, are constitutional. Estate of Bevilacqua, — Cal.App.2d —, 161 P.2d 589; In re Estate of Blak, 65 Cal.App.2d 232, 150 P.2d 567; In re Estate of Michaud, 53 Cal.App.2d 835, 128 P.2d 595. The Estate of Bevilacqua, supra, does not involve the construction of a treaty. Even though the German residents in this case failed to sustain the burden cast upon them by our code they would nevertheless be entitled to inherit provided the treaty conferred unqualified reciprocal rights to do so independently of the statute since the treaty is the supreme law of the land and would be controlling in that regard. I believe the covenants of a treaty providing unqualified reciprocal rights of inheritance are not abrogated by a subsequent declaration of war between the contracting nations.

The serious question to be determined in this case depends upon the construction of the language of the treaty with respect to reciprocal rights of inheritance of real and personal property. This case definitely involves the right of nonresident aliens to inherit *real estate*, and a construction of paragraph one of the treaty applying to real property is therefore necessary. The chief value of the estate consisted of real property. The deceased died possessed of real property which was subsequently sold to pay debts and expenses of administration. There was but $338 in cash. If the German heirs were entitled to inherit a share of the estate, the title to their proportion vested immediately upon the death of Alfred Knutzen, which occurred January 24, 1943, before the real property was sold. Prob. Code, sec. 300; 26 C.J.S., Descent and Distribution, § 65; 16 Am.Jur. 786, sec. 20. The right of the administrator to sell the real property to pay debts and expenses of administration did not alter the character of the property to which title had then actually passed. I am convinced the construction of the first paragraph of the treaty is necessarily involved and that it is the important portion of the treaty to construe and apply to the issue as to whether reciprocal rights of inheritance are provided for by German law.

Mindful of the rule that statutes and treaties should be liberally construed to carry out the intentions of the contracting parties, and to preserve individual rights of the citizens of both countries, I am disposed to concede that the language of the treaty fails to absolutely confer unqualified reciprocal rights of inheritance. On the contrary, paragraph one appears to confer such rights *conditionally* upon proof that "Where, * * * *by the laws of the country*" such property would "descend or pass to a national of the other High Contracting Party." Of course a treaty is the law of both countries. Indeed it is the highest law of both nations. But the language quoted quite evidently requires proof of the existence of some statute or law, independent of the treaty, authorizing such reciprocal rights of inheritance. That paragraph of the treaty provides, in part, that:

"Where, on the death of *any person* holding real * * * property * * * within the territories of one High Contracting Party, *such property* or interests therein would, *by the laws of the country*, * * * descend or pass to a national of the other High Contracting Party," etc., he shall be allowed three years in which to sell or dispose of it. (Italics added.)

If that language is construed to mean that where a deceased person holds real property in either country, and the laws of *that* country in which he holds the property provides that it shall "descend or pass to the national of the other High Contracting Party," it would be an absolute binding provision entitling the German heirs to inherit, provided the California statute contained such an *unqualified* right of inheritance. But it does not so provide unconditionally. It authorizes them to inherit only conditioned upon their first affirmatively proving that Germany had a statute conferring similar reciprocal rights. That they failed to do. I am therefore persuaded that the provisions of the treaty, standing alone, do not furnish proof of reciprocal rights of inheritance sufficient to comply with the requirements of our sections of the Probate Code.

The second paragraph of the treaty, pertaining to personal property, provides that:

"*Nationals* of either High Contracting Party *may have full power to dispose of their personal property* * * * within the territories of the other, by testament, donation, or otherwise, *and their heirs,*

* * * of whatsoever nationality, whether resident or nonresident, *shall succeed to such personal property,*" etc. (Italics added.)

The word "national," as it is used in the treaty, means one who owes allegiance to a particular country or nation. Applying the foregoing language to the facts of this case, I assume it means that if the brother and two sisters of the deceased who live in Germany, own personal property in this country, they have "full power" *to dispose of it* by will, deed or otherwise, and that their heirs "shall succeed to *such* property." But the real issue is whether they actually owned interests in the property of the estate. The deceased did not *dispose* of the property. He died intestate. The language of the treaty that "their heirs * * * shall succeed to *such* personal property" does not directly authorize nonresident aliens to inherit it unconditionally. It does not constitute them heirs of their deceased California brother independently of a statute of Germany providing for reciprocal rights to do so. I construe it to mean that *if the German residents are heirs entitled to inherit,* they may "succeed" to the title to such property. In other words, the treaty appears to contemplate the necessity of an independent statute providing for reciprocal rights of inheritance. The burden was on them to prove that fact. They failed to do so and they may therefore not be deemed to be heirs who are entitled to inherit any part of the estate. The trial court therefore properly distributed the entire estate to the resident brother of the deceased. Orr v. Hodgson, 17 U.S. 453, 4 L.Ed. 613; Connolly v. Probate Court, 25 Idaho 35, 136 P. 205; 19 Am.Jur. 388, sec. 15.

Since I am unable to satisfactorily construe the language of the treaty so as to independently create reciprocal rights of inheritance under the circumstances of this case, and the claimants failed to affirmatively prove that Germany had such a statute, I conclude, as the majority opinion determines, that the trial court properly distributed the entire residue of the estate to the resident brother of the deceased. There was no title in the brother and two sisters of the deceased residing in Germany, upon which the Alien Property Custodian could fasten his claim in behalf of the United States government.

The judgment should be affirmed.

Ex parte McVICKERS.*

Cr. 1931.

District Court of Appeal, Third District, California.

Sept. 7, 1945.

Hearing Granted Oct. 1, 1945.

1. **Criminal law** ⚿=1202(3)

Where it was shown that defendant was convicted in 1924 in Utah for theft of automobile of value exceeding $50, but value of automobile was not established, conviction was improperly considered as a prior conviction in adjudging defendant an habitual criminal, since in 1924 theft of automobile was grand larceny in California only if its value exceeded $200. Pen.Code, §§ 487, 644, 668.

2. **Criminal law** ⚿=1201, 1202(1)

Conviction in federal court of forging and altering postal money orders committed in 1928 was improperly considered as a prior conviction in adjudging defendant an habitual criminal, since forgery was not included prior to 1938 among offenses enumerated in Penal Code section relating to punishment of habitual criminals, and for further reason that such act did not constitute forgery within California Penal Code. Cr.Code § 218, 18 U.S.C.A. § 347; Pen.Code Cal. §§ 470, 644.

3. **Habeas corpus** ⚿=28

Petitioner who had been convicted of violating the Narcotics Act and for being an habitual criminal, and who had served in excess of maximum sentence that could be imposed upon him for the primary offense, was required to be discharged where court on habeas corpus held that prior convictions were improperly made the basis of petitioners' conviction for being an habitual criminal. Pen.Code, § 644; St. 1929, p. 380.

Proceeding in the matter of the application of John Francis McVickers against Robert A. Heinze, Warden of the California State Prison at Folsom for a writ of habeas corpus.

Application granted and petitioner ordered discharged.

John Francis McVickers, in pro. per., for petitioner.

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* Subsequent opinion 176 P.2d 40.

Robt. W. Kenny, Atty. Gen., Jess Hession, Asst. Atty. Gen., and James O. Reavis, Deputy Atty. Gen., for respondent.

ADAMS, Presiding Justice.

In an information filed in Marin County, California, on January 6, 1938, petitioner was charged in three counts with violations of the narcotic laws of California, Stats. 1929, ch. 216, p. 380. The information further charged that on June 24, 1924, defendant had been convicted in Utah of the crime of "Grand Larceny" and had served a term of imprisonment therefor in the state prison; that on October 22, 1925, defendant had been convicted in Nevada of the crime of burglary, first degree, and had served a term of imprisonment therefor in the state prison; and that on April 5, 1928, he had been convicted in the United States District Court for the Northern District of California, in nine counts of violation of section 218 of the United States Criminal Code, 18 U.S.C.A. § 347, and served a term of imprisonment therefor in a federal prison. Defendant entered his plea of not guilty to each count and admitted the prior convictions as alleged in the information. Later, he withdrew his plea of not guilty to count three and entered his plea of guilty thereto. He went to trial before the court without a jury, on counts one and two, and the court found him guilty on both counts. He was adjudged an habitual criminal and sentenced to be imprisoned at San Quentin for the term prescribed by law. He thereafter moved to modify or vacate said judgment on the ground that two of the prior convictions did not constitute prior felony convictions within the meaning of sections 644 and 668 of the Penal Code, in that the conviction in Utah was for larceny of property of a value less than $200, and that offenses under section 218 of the United States Criminal Code, 18 U.S.C.A. § 347, were not enumerated in sections 644 and 668, supra. His motion having been denied he appealed, People v. McVicker, 37 Cal. App.2d 470, 99 P.2d 1110, but the appellate court held that these questions could not be reviewed upon their merits in that proceeding and that the proper course for appellant to pursue was to await the arrival of the time when he would be entitled to release from confinement for the primary offenses, and then test the legality of his further confinement on habeas corpus.

Petitioner has pursued the course suggested by the appellate court, and it is here conceded that if he was improperly adjudicated an habitual criminal he is entitled to his release. In support of the petition filed herein we have before us the information filed in the state of Utah which charges that defendant (with another), on May 27, 1924, "wilfully, unlawfully and feloniously took, stole and drove away a certain Light Six Studebaker automobile * * * belonging to E. Rosenberg, the same having a value in excess of $50.00."

In 1924 our Penal Code, sec. 487, which now provides that the theft of an automobile is grand theft, did not so provide. In order to constitute grand larceny under said section as it then read it was necessary that the property stolen have a value in excess of $200, or be taken from the person of another or consist of the specific kinds of property enumerated. The value of the automobile alleged to have been taken by petitioner does not appear, nor was it shown at the trial on the primary charges. Also, in 1924, section 644 of the Penal Code did not include grand larceny among the felonies enumerated.

In People v. Hayes, 3 Cal.App.2d 59, 63, 39 P.2d 213, 214, where one of the priors charged against Hayes in the information was larceny committed in Illinois, the court said:

"Larceny in Illinois is grand larceny if the property stolen exceeds the value of $15, or if the property is stolen from the person of another. But the California law is different in this, that in California the value test is that the property, in order to make the offense grand theft, must be of a value to exceed $200. Penal Code, § 487. The mere proof that a person in the state of Illinois was convicted of larceny is not proof that the value of the property stolen was more than $200, nor is it proof that there was any larceny by taking from the person of another. Therefore in this case there is no evidence that there was any conviction of the defendant of the crime of grand theft committed in Illinois, so as to bring the present case within the provisions of sections 668 and 644 of the Penal Code of California."

And in People v. McChesney, 39 Cal.App. 2d 36, 41, 102 P.2d 455, 458, the court said regarding the charge of a prior conviction in Louisiana of "Breaking and entering a building in the night time," that such charge is not comparable with section 459 of our Penal Code, which provides that the entry must be "with intent to commit grand or petit larceny or any felony"; that "Under language set forth in the Louisiana conviction, we must assume that defendant was convicted of the least degree of offense enumerated in the Louisiana statute, that is, an unidentified misdemeanor." And it was held that the Louisiana conviction did not constitute a "prior" under section 644 of our Penal Code.

A recent opinion of the Attorney General of this state, N.S. #5371, reported in Vol. 3 of Opinions of Attorney General, p. 198, is to the same effect. There one of the priors charged was larceny in 1925 of an automobile of the value of over $50, and there was no evidence that the automobile was of the value of more than $200. The prior conviction was held not to be one within the provisions of sections 644 and 668 of the Penal Code, citing People v. Hayes, and People v. McChesney, supra.

[1] The record in the Marin County proceeding which has been introduced in evidence in the proceeding before us reveals that there was no showing in the trial court as to the value of the automobile stolen in Utah, and we are therefore of the opinion that the conviction in that state was improperly considered as a prior conviction upon which to base an adjudication that petitioner was an habitual criminal.

[2] As for petitioner's contention that his conviction of violations of section 218 of the United States Criminal Code, 18 U.S.C.A. § 347, was improperly considered as a prior, we have been furnished with a copy of the indictment in that case, and a copy of the judgment. They show that defendant was convicted of forging and uttering, on different dates in January, 1928, United States Postal Money Orders. Respondent asserts, without furnishing any authorities on the subject, that the crimes constituted forgery. But in 1928, when the foregoing offenses were committed, forgery was not included among the offenses enumerated in section 644 of our Penal Code, though it was so enumerated in 1938. Therefore, upon the authority of People v. McConnell, 20 Cal.App.2d 196, 66 P.2d 720, the conviction in the federal court was improperly considered as a prior, in adjudging petitioner an habitual criminal. However, the decision in this case need not rest upon that basis alone, since we are satisfied that the forging of a United States Postal Money Order is not, and was not, either in 1928 or in 1938, a violation of section 470 of the California Penal Code, defining forgery. While the latter section goes to considerable length in enumerating the instruments the forgery of which constitutes the offense defined, neither United States Post Money Orders nor any other instruments issued by the United States or under its authority are included. And in view of the scope of that which is included, it may fairly be assumed that the legislature intended to and did enumerate all instruments whose falsification it intended should constitute forgery.

Section 218 of the United States Criminal Code is found in a chapter entitled "Offenses against the Postal Service," and the section itself is headed "Counterfeiting money orders." Our California Penal Code does not purport to define any crimes against the postal service, and the only counterfeiting section in it is section 477 which applies only to the counterfeiting of coin, bullion, etc. Furthermore, the crime there defined is not one enumerated in section 644 of the Penal Code.

While the exact question before us apparently has not been before the courts of this state previously, a similar one was raised in People v. Fury, 279 N.Y. 433, 18 N.E.2d 650, where the conviction in a federal court of the uttering of a counterfeited federal reserve bank note was relied upon as a prior offense justifying an increased penalty after conviction in the state court of the crime of burglary. The court considered the state statutes, one of which made the uttering of certain instruments a felony. Among those instruments were enumerated "a certificate, bond, paper writing, or other public security, issued or purporting to have been issued by or under the authority of this state, or of the United States * * *." Also: "A * * * bank note * * * or other obligation or evidence of debt, issued or purporting to be issued by any bank, banking association or body corporate existing under the laws of this state, or of the United States * * *." Penal Law, § 884. For that reason the court held that the uttering of a Federal Reserve bank note constituted a violation of the penal laws of the state. But the inference from that case is that had there been no such state statute, the conviction would not have been considered as a prior justifying an increased penalty. And the decision in that case was subsequently distinguished on that basis, in People ex rel. Marks v. Brophy, 293 N.Y. 469, 58 N.E.2d 497. In that case Marks, while on parole from the state prison, was declared delinquent because of his conviction, after his parole, of the crime of using the United States mails in a scheme to defraud, and a conspiracy to so use the mails. In holding that these federal convictions could not deprive Marks of his credits because they were not for felonies under New York law, the court said, 58 N.E.2d at page 500:

"The State says, however, and the lower courts have held in this case, that People v. Fury, 279 N.Y. 433, 18 N.E.2d 650, is, somehow, authority to the contrary. We do not agree. People v. Fury, unlike People v. Gutterson, supra [244 N.Y. 243, 155 N.E. 113], involved a prior conviction where the same offense (uttering a counterfeit Federal Reserve bank note) was a felony both under the Federal Criminal Code and under our Penal Law. Fury was held to be a second offender not on the basis of a previous conviction of a crime *described only in the laws of another jurisdiction but because he had been previously convicted in another jurisdiction of a crime declared to be a felony in our own statutes.*" (Italics added.)

In People v. Gutterson, 244 N.Y. 243, 155 N.E. 113, above mentioned, in fixing punishment the trial court considered a prior federal conviction for "using the mail to defraud." In reversing the judgment the court said, 155 N.E. at page 115:

"Here the offense is one which is cognizable only by the laws of the United States. While the citizens and residents of this state are subject to those laws, the Legislature of this state has not defined the crime or fixed penalty for its commission. * * * It rests with the Legislature to fix a standard for the crimes to which upon proof of prior conviction section 2189 of the Penal Law has attached new consequences. The Legislature has fixed a standard which can reasonably include only crimes which are punishable under the law of this state. Doubtless other reasonable standards might be used which would include the crime of using the mails to defraud. The Legislature has not seen fit to apply such standards."

In People v. Knox, 223 App.Div. 123, 227 N.Y.S. 417, in refusing to affirm a judgment including a prior, the court held that where the information and proof in a prosecution for robbery merely showed that the defendant had been formerly convicted of a violation of the Federal Law, i. e., of car burglary under the Carlin Act, and did not establish facts sufficient to show that the former conviction was for an offense which would be a felony under the laws of the state of New York if committed in that state, the trial court's sentence as a second offender, under sec. 1943 as amended, was unauthorized and erroneous.

In People v. Lohr, 28 Cal.App.2d 397, 82 P.2d 615, it was held that in order to justify the trial court in adjudging the defendant an habitual criminal, it was necessary for the prosecution to charge and prove that the prior convictions were among those set forth in section 644 of the Penal Code; and where it merely appeared that defendant was convicted of violations of the Dyer Act, 18 U.S.C.A. § 408, in transporting a vehicle in interstate commerce with knowledge that the same was stolen, which offense is substantially the same as the offense denounced in section 503 of the Vehicle Code of this state, St.1935, p. 174, but is not one of those enumerated in said section 644, the court was not justified in adjudging him to be an habitual criminal. Also see People v. Rios, 175 Misc. 794, 24 N.Y.S.2d 411; Garcia v. State, 140 Tex. Cr.R. 340, 145 S.W.2d 180; People v. McGee, 24 Cal.App.2d 391, 75 P.2d 533.

[3] It is conceded by respondent that with credits earned, granted and not forfeited, petitioner has already served in excess of the maximum sentence that could be imposed upon him for the primary offense of which he stands convicted; and since we are satisfied that the offense of which he was convicted in Utah and the federal offenses above referred to did not constitute crimes within section 644 of the Penal Code, he is now entitled to his discharge; and it is so ordered.

PEEK and THOMPSON, JJ., concur.

NORTH SIDE PROPERTY OWNERS' ASS'N et al. v. LOS ANGELES COUNTY et al.

Civ. 14795.

District Court of Appeal, Second District, Division 1, California.

Aug. 30, 1945.

Rehearing Denied Sept. 25, 1945.

Hearing Denied Oct. 25, 1945.

1. Cemeteries 🔑9

Trial court's finding that required notices of public hearing on application for cemetery permit were duly posted, published, and mailed in compliance with Los Angeles county ordinance was supported by competent evidence, consisting of land use engineer's written report to county regional planning commission specifically setting forth the notices given and the manner in which they were posted, published, and mailed and affidavits of posting, mailing, and publication.

2. Cemeteries 🔑9

Requirements of Los Angeles county ordinance with respect to notice of public hearing on application for cemetery permit were complied with when notices stating manner and type of hearing to be held and date thereof were posted, published, and mailed in the manner provided by ordinance and fact that notices stated that at such hearing property owners would be heard did not render notices misleading so as to deprive county board of supervisors of jurisdiction to hear application and grant permit.

3. Constitutional law 🔑296(2)

Notice to others than owners of property in vicinity of proposed site of cemetery of public hearing on application for cemetery permit was not a prerequisite to due process of law, in absence of showing of what property rights or other legal rights of a non-owner could be impaired by establishment of the cemetery.

4. Cemeteries 🔑3

The policy of the law with reference to ordinances relating to establishment of cemeteries is to assure that the matter of establishing a cemetery in a community shall be fully and fairly considered, and is not inimical to the public interest.

5. Cemeteries 🔑9

The Los Angeles county board of supervisors acquired jurisdiction to act upon application for a cemetery permit when the notice required by county ordinance was given, and requirements of ordinance were met, insofar as the hearing on application was concerned, when county regional planning commission, in the manner required by law, gave notice that a public hearing would be held and the date thereof.

6. Cemeteries 🔑9

Lack of jurisdiction of county board of supervisors to grant cemetery permit could not be predicated on land use engineer's statement that in mailing notices of hearing names and addresses of property owners were taken from records of county assessor and tax collector, where record contained affidavit of acting chief engineer that he caused postcard notices to be mailed to all property owners using last known name and address as shown upon records of county assessor's office, though affidavit was not verified until after completion of proceedings. St.1939, pp. 1274 et seq., 1286, 1287, §§ 1 et seq., 441–444.

7. Process 🔑68, 150, 164(1)

The fact of service of process confers jurisdiction and, when proof of such service is absent or defective, it may be amended or supplied.

8. Cemeteries 🔑9

Requirements of Los Angeles county ordinance, requiring statement showing financial ability of applicant to maintain cemetery so as not to become a public nuisance to be attached to or made a part of application for cemetery permit, were fulfilled by filing of personal financial statements by sole stockholders of applicant corporation together with stipulation that applicant corporation had been formed solely for purpose of operating proposed cemetery and except for issuance of stock had not functioned to date of filing application and that proposed cemetery would be established as a perpetual care cemetery. St. 1939, p. 699, § 8252.

9. Cemeteries 🔑9

Written report of land use engineer to county regional planning commission and reporter's transcript of hearing before commission justified finding that a map of proposed cemetery site and surrounding territory was filed in due compliance with county ordinance requiring such map to be attached to application for cemetery permit, though map was not included in return to writ of review.

10. Certiorari ⚷53

The petitioner seeking a writ of review has the burden of seeing to it that the return is filed and that a complete record is made.

11. Cemeteries ⚷9

Petitioner for writ to review order of county board of supervisors granting cemetery permit, having failed to see to it that map of proposed cemetery site and surrounding territory was included in return to the writ of review, could not attack permit on ground that map did not contain required information in view of showing made in trial court that a map was filed with regional planning commission in conformity with ordinance and was utilized at the hearings before commission and board.

12. Cemeteries ⚷9

In proceeding to review order of county board of supervisors granting cemetery permit, evidence sustained findings approving procedural steps taken by regional planning commission and board of supervisors.

13. Cemeteries ⚷9

Parties objecting to application for permit to establish a cemetery in Los Angeles county had burden of proving that operation of cemetery in proposed location would jeopardize or adversely affect the health, safety, comfort, or welfare of the public.

14. Cemeteries ⚷9

The action taken by county board of supervisors in granting a cemetery permit raised the presumption that the existence of the necessary facts had been ascertained and found.

◆

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Petition by North Side Property Owners' Association, a nonprofit corporation, and another, against County of Los Angeles, a body corporate and politic, and others to review the proceedings and order of the Board of Supervisors of Los Angeles County granting a permit to Hillside Memorial Park, a corporation, to establish, maintain, and operate a private cemetery. From a judgment affirming the action of the board in granting the permit, the petitioners appeal.

Judgment affirmed.

Vernon P. Spencer, of Inglewood, for appellant North Side Property Owners' Ass'n.

Howard P. Hall, of Hollywood, for appellant Hughes Tool Co.

O'Melveny & Myers and Jackson W. Chance, all of Los Angeles, for respondents Hillside Memorial Park, Harry Groman, and Robert S. Groman.

J. H. O'Connor, Co. Counsel, and Edward H. Gaylord, Deputy Co. Counsel, both of Los Angeles, for respondents Los Angeles County et al.

WHITE, Justice.

A writ was issued in the trial court for the purpose of reviewing the proceedings and order of the Board of Supervisors of Los Angeles County, hereinafter referred to as "the Board," granting and issuing a permit to respondent Hillside Memorial Park, a corporation, on the 27th day of July, 1943, to establish, maintain and operate a private cemetery. After a hearing on the matter, a judgment was entered affirming the action of the Board in granting the aforesaid permit. The petitioners named in the petition for the writ of review have appealed from such judgment.

The main attack upon the judgment is founded upon the contention that the trial court erred in not holding that the County Regional Planning Commission, hereinafter referred to as "the Commission," and the Board acted without jurisdiction, when the former recommended to the latter that the permit applied for be granted, and when the Board made its order granting the permit, in that:

(a) The notices of the hearing before the Planning Commission were not given as required by the law and were so given as to be misleading and to defeat their purpose;

(b) The information and material required by law was not made a part of the application for permit or in any way brought before the Planning Commission or Board of Supervisors; and

(c) There was no evidence to support several findings of the trial court, which will be hereinafter referred to.

The Cemetery Ordinance is No. 2854 (New Series) of the County of Los Angeles, as amended by Ordinance No. 2919 (New Series), hereinafter referred to as "the ordinance," and which was enacted pursuant to Section 10 of the Planning Act of 1929, Deerings General Laws, Act 5211b, which authorizes the Board to refer certain matters to the Regional Planning Commission before action is taken thereon by such board.

The main question to be here decided is whether the form of notices given pursuant to the ordinance was so inadequate and misleading that the Board never acquired jurisdiction to grant the challenged permit. In this connection, the ordinance provides that, when an application to establish or maintain a cemetery is filed with the Chief Engineer of the Commission, it shall by him be referred to the Commission, which shall fix the time and place for public hearing to be held not less than 30 days nor more than 60 days from the date when such application is filed; that said Engineer shall cause a copy of the notice of hearing on such application to be published in a newspaper of general circulation, and that said Engineer shall also cause notices of said hearing to be conspicuously posted at the exterior boundary line of the proposed cemetery, not more than 300 feet apart, and at each change of direction of said boundary line, and also in the same manner along both sides of all public streets within one and one-half miles of the exterior boundaries of the proposed cemetery, in such manner as would "reasonably give notice to passers-by of the matters contained in said notice." It is also provided that where there are 50 or more buildings, used either for residential or business purposes, within a distance of one and one-half miles from the exterior boundaries of said proposed cemetery, said Engineer shall cause a postcard notice of said hearing to be mailed to all property owners within said distance at least 15 days prior to said hearing, using for this purpose the last known name and address of such owners, as shown upon the records of the Assessor of Los Angeles County.

[1] The trial court found that the required notices were duly posted, published and mailed in compliance with the ordinance. Appellants contend there was no evidence to support such finding. This claim is without merit. There was before the trial court a record of proceedings had before the Commission, from which it appeared that Tyler Suess, Land Use Engineer of the Commission, made a written report, wherein he specifically set forth the notices given, the manner in which the same were posted, and the postcard notices mailed. The report also contained a statement of the newspaper notices given, the manner of publication, the newspaper in which publication was had, as well as the number of publications and the dates between which such publication was made. The affidavits referred to in the report of the Land Use Engineer were presented to the Commission and were also received in evidence by the court. The affidavit of posting notices states that the affiant conspicuously posted the notice of hearing "on both sides of all streets within a one and one-half mile radius, and at all intersections, and at 300 foot intervals around the border of the proposed cemetery." Attached to the affidavit was an exact copy of the notice. The affidavits of publication in the newspaper, as well as the affidavit of mailing postcard notices, show equally exact compliance with the ordinance. The findings of the trial court that due and proper notice of public hearing was given therefore was supported by competent evidence. Contrary to appellants' contention there is no inconsistency in the affidavits of publication with reference to dates thereof, because one affidavit has reference to publication in a daily newspaper, while the other refers to publication in a weekly newspaper; both, however, in exact compliance with section 3 of the ordinance.

[2-5] Appellants challenge the legality of the notice given because it was therein stated that at the public hearing *"property owners* who wish to present testimony pertinent to the proposed establishment of said cemetery will be heard" (emphasis added). Appellants complain that the notice was given only to property owners and that this contravenes the statute, because the proceedings in connection with the establishment of a cemetery concerns the general public, and that the restriction of the form of the notice to property owners defeats the main purpose of the notice. However, all that is required by the ordinance is that the Commission fix a time and place for a "public hearing" and that the Chief Engineer shall cause notices "of hearing" and "of said hearing" to be published, posted and mailed. With these requirements there was compliance in the instant case because the given notices did advise the public or, as stated in the ordinance, "the passers-by" that a "public hearing" would be held. Appellants do not suggest who, other than "property owners" situated in the mile and a half radius of the proposed cemetery site, would be interested in the hearing, nor is it

suggested that any persons other than property owners desired or asked to be heard. What property rights, or other legal rights of a non-owner could be impaired is not called to our attention by appellants; and such being the case, notice to such non-owner is not required as a prerequisite to due process of law. The policy of the law with reference to ordinances, such as the one with which we are here concerned, is to assure that the matter of establishing a cemetery in a community shall be fully and fairly considered, and is not inimical to the public interests. This design was accomplished when due notice was given of a "public hearing" and when, as here, such a hearing was had, not only before the Commission, but later before the Board. When, as reflected by the record herein, no one was misled by the notices as to the manner and type of hearing that would be held and the date thereof, it follows that the requirements of the ordinance were complied with. Manifestly, appellants were not mislead or deceived by the notices, because both appeared and were heard not only before the Commission, but as well before the Board. And the petition for a writ herein alleges that appellant North Side Property Owners' Association is "a non-profit corporation existing under the laws of the State of California and that its members are residents and property owners" in the section closest to the property to be utilized for a cemetery site. Furthermore, neither appellant herein claims it was misled or prejudiced in any way by the form of the notices or the manner in which the same were published and posted. Having appeared, together with some 60 other people and corporate bodies, at the hearing in opposition to the application for a cemetery permit, it seems questionable that appellants should now be in a position to claim that they did not receive legal notice or that the notice which prompted their appearance at the public hearing was legally faulty. The Board, in the instant case, acquired jurisdiction to act upon the application for a cemetery permit when the notice required by the ordinance was given. The requirements of the ordinance were met, in so far as the hearing on the application was concerned, when the Commission, in the manner required by law, gave notice that a "public hearing" would be held and the date thereof.

[6, 7] Appellant Tool Company's contention that the postcard notices were improperly mailed, because the names and addresses were taken from the records of the County Assessor and Tax Collector instead of from the records of the County Assessor alone as provided in the ordinance, cannot be sustained. It is true that there is in the record a statement by Land Use Engineer Suess that postcard notices were mailed to property owners at the "last known name and address of such owners as shown in the records of the County Assessor and Tax Collector * * *." The record, however, contains an affidavit by the Acting Chief Engineer that he "* * * caused a postcard notice of public hearing * * * to be mailed to all property owners * * * using for this purpose the last known name and address of such owners as shown upon the records of the Assessor's office of Los Angeles County." True, as contended by appellant Tool Company, this affidavit was not verified until February 14, 1944, some time after the proceedings before the Commission and Board were completed, but, as was said in Herman v. Santee, 103 Cal. 519, 524, 37 P. 509, 510, 42 Am.St.Rep. 145, quoting with approval from a note in American State Reports, volume 21, page 52, "'* * * It is the fact of service of process which confers jurisdiction, and it is a familiar practice in California, as well as elsewhere, when the proof of such service is absent or defective, to permit it to be amended or supplied.'"

Furthermore, there is no provision in the Revenue and Taxation Code, St.1939, p. 1274 et seq., or elsewhere, for a Tax Collector's list different from the Assessor's. On the contrary, sections 441 to 444 inclusive, of the Revenue and Taxation Code, St.1939, pp. 1286, 1287, provide for such lists and both the Assessor and Tax Collector use the same.

[8] Appellants' next attack upon the legality of the permit issued is founded on the claim that the corporate respondent Hillside Memorial Park failed to meet the requirements of subdivision (d) of section 4 of the ordinance, which provides that there shall be attached to the application, or made a part thereof, "a financial statement of applicant showing the financial ability of applicant to establish, care for, and maintain the cemetery in such a manner as to prevent the same from becoming a public nuisance." The trial court expressly found that the applicants for the permit fully complied with the mandate of the ordinance in so far as the filing of a financial statement was concerned. Section 8252 of the Health

and Safety Code, St.1939, p. 699, makes it unlawful for any corporation, co-partnership, firm, trust association, or individual to engage in the business of operating or maintaining a cemetery, except by means of a corporation duly organized for that purpose. In so far as the filing of a financial statement in the instant proceeding is concerned, the record reflects that, while no such statement was filed by the corporation itself, the individual respondents filed their personal financial statements with the application; that respondent corporation had been formed solely for the purpose of operating the proposed cemetery and, except for issuing 160 shares of stock to the two individual respondents, had not functioned up to the date when the application for the permit was filed.

The literal requirements of the ordinance were satisfied by the statement that the corporation had no assets, and we are impressed that the spirit of the law was observed when the two and only stockholders of the corporation presented evidence as to what assets would be available should the permit be granted, thus enabling the Commission to "* * * consider whether or not * * * applicant can demonstrate adequate financial ability to establish and maintain said proposed cemetery in such a manner as to prevent the proposed cemetery from becoming a public nuisance" (Sec. 6 of the ordinance). Furthermore, section 6 of the ordinance provides that "The Regional Planning Commission shall also have power to consider whether or not, through a perpetual care fund, or otherwise, applicant can demonstrate adequate financial ability to establish and maintain such proposed cemetery in a manner so as to prevent the proposed cemetery from becoming a public nuisance." At the time respondents filed their application with the Commission, they stipulated that the proposed cemetery would be established as a "perpetual care cemetery," for which a Perpetual Care Fund should be established by setting aside in a trust a given amount of cash or a percentage of the sales price of each interment space sold in the cemetery. Based on the individual financial statements, as well as the proposed Perpetual Care Fund, the Commission determined as follows:

"3. Financial Statement and Perpetual Care Fund. With the cooperation of the County Auditor and County Counsel, the Commission has thoroughly reviewed and examined from all standpoints the financial and Perpetual Care Fund statements filed with the application, and it is the opinion of the Commission that the Applicants are financially able to establish, operate, and maintain the cemetery so as not to become a public nuisance."

A further answer to appellants' contentions of insufficiency of the financial statements is the fact that 100 per cent of the outstanding stock of respondent corporation was owned by the two individual respondents who made financial statements and who were joint applicants for the permit with the corporation. The identity of the corporation with its two and only stockholders, directors and officers who did file their financial statements, coupled with the Perpetual Care Fund, substantially complies with the requirements of the ordinance and its purposes and intent as heretofore indicated. The permit as issued, subject to the provisions recommended by the Commission, requires the corporation to establish and maintain a full and statutory Perpetual Care Fund, thereby supporting the finding of the Commission that the cemetery would not become a public nuisance, and that is what section 6 of the ordinance seeks to guard against.

[9-11] Appellants next assert that the provision of section 4(c) of the ordinance, which requires that there must be attached to the application a map containing certain data such as the location, boundaries and description of the property, location of buildings within a mile and a half radius, etc., was not met. Appellants' contention in this regard cannot be upheld. The trial court found that a map was filed in due compliance with the ordinance. This finding was justified, because, in his written report presented at the hearing before the Commission, the latter's Land Use Engineer, after detailing all of the requirements of the ordinance with reference to the map, stated: "10. Map marked Ex. A on file with the case shows in detail the conditions heretofore described". And the Reporter's Transcript of the hearing before the Commission on July 7, 1943, shows that "Mr. Suess, Land Use Engineer of the Regional Planning Commission, presented the report on factual data concerning this case, and *displayed maps* showing the location of the proposed use and the adjacent land uses." (Emphasis added.) The map was not included in the return to the writ of review and was, therefore, not before the trial

court. Had appellants desired to present the map to the trial court to contradict the hereinbefore mentioned report of the Land Use Engineer, it was their duty to see that the same was included in the return. Upon a petitioner seeking a writ of review rests the burden of seeing to it that the return is filed and that a complete record is made. Goodrich v. Superior Court, 92 Cal.App. 695, 696, 268 P. 669. Since appellants were the parties interested in having the action of the Board reviewed, the duty devolved upon them to see that the record was complete. When they did not see fit to bring the map into the record, their attack upon it is futile, in view of the aforesaid showing made in the trial court that a map was filed with the Commission in conformity with the ordinance and was utilized at the hearings before both the Commission and the Board.

[12-14] Finally, appellants attack the sufficiency of the evidence to support certain findings of the trial court, other than those to which reference has hereinbefore been made. In the main, appellants' complaint has to do with procedural steps taken by the Commission and the Board. We do not, therefore, deem it necessary to narrate in detail the specific objections made to these findings. Suffice it to say that a reading of the record convinces us that the findings are supported by substantial evidence; that a full and fair hearing was had before the Commission and the Board. More than 60 protestants appeared before the Commission to oppose the granting of the permit and included therein were both of the appellants in the instant proceeding. When the matter came on for hearing before the Board, the entire record of proceedings had before the Commission was before the Board and, at that time, counsel for both appellants were again heard in opposition to the granting of the permit. Section 2 of the ordinance provides that the permit here in question *must be granted* unless it shall *affirmatively* appear on the hearing and be found as a fact by the Board that the operation of the cemetery in the location proposed would "jeopardize or adversely affect the health, safety, comfort or welfare of the public". The burden of proof, therefore, rested upon appellants and other protestants. Furthermore, the action taken by such Board raises the presumption that the existence of the necessary facts had been ascertained and found. Lindell Co. v. Board of Permit Appeals, 23 Cal.2d 303, 323, 144 P.2d 4; Bartholomae Oil Corporation v. Seager, 35 Cal.App.2d 77, 80, 94 P.2d 614. The evidence supports the findings, the findings support the judgment, and we find no prejudicial error in the record. The permit was granted after due notice and a full and fair hearing before the proper administrative bodies, at which both appellants appeared and were heard.

For the foregoing reasons, the judgment is affirmed.

YORK, P. J., and DORAN, J., concur.

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70 Cal.App.2d 609

NORTH SIDE PROPERTY OWNERS' ASS'N v. HILLSIDE MEMORIAL PARK et al. (HUGHES TOOL CO., Intervener).

Civ. 14810.

District Court of Appeal, Second District, Division 1, California.

Aug. 30, 1945.

Rehearing Denied Sept. 25, 1945.

Hearing Denied Oct. 25, 1945.

1. Appeal and error 🔑863

Where judgment has been rendered for defendant on the pleadings, the sole question presented on appeal is whether the complaint states a cause of action.

2. Pleading 🔑350(3)

In passing on motion by defendant for judgment on the pleadings, only the complaint itself may be considered, the truth of allegations contained in complaint must be assumed, and, if it alleges ultimate facts which indicate existence of a cause of action in favor of plaintiff, the motion must be denied.

3. Stipulations 🔑14(11)

Where defendant's motion for judgment on the pleadings in action to enjoin maintenance of a cemetery pursuant to permit granted by Los Angeles county board of supervisors was submitted upon stipulation of parties authorizing court to review proceedings had and evidence taken by regional planning commission and board in granting the permit, rule governing motions for judgment on the pleadings limiting court's consideration to complaint alone was inapplicable.

4. Injunction 🔑7

One having an adequate remedy at law may not resort to equity for injunctive relief.

5. Nuisance 🔑18

Parties opposing maintenance of a cemetery on certain land had a plain, speedy, and adequate remedy at law by writ to review legality of action of county board of supervisors in granting cemetery permit and, having pursued such remedy, they could not maintain action in equity to enjoin as a public nuisance maintenance of the cemetery on the same grounds as were urged in review proceeding.

6. Cemeteries 🔑9

In hearing and passing upon application for a cemetery permit under ordinance of Los Angeles county, county board of supervisors functioned in a judicial or quasi judicial capacity.

7. Cemeteries 🔑9

The operation of a cemetery was a "commercial use" within statute permitting such use unless unnecessary and injurious methods of operation are employed, and use of land for cemetery purposes was therefore properly confined to zone wherein county ordinance permitted unlimited use of land except that a permit must be obtained from county supervisors to operate a cemetery. Code Civ.Proc. § 731a; St.1939, pp. 671, 699, §§ 7020, 8275.

See Words and Phrases, Permanent Edition, for all other definitions of "Commercial Use".

8. Nuisance 🔑32

Operation of a cemetery pursuant to permit from county board of supervisors in zone wherein county ordinance permitted unlimited use of land could not be enjoined as a nuisance, in absence of allegations of proposed operation of cemetery in any other than a reasonable and necessary manner or of the threatened use of unnecessary or injurious methods in operation of the cemetery. Code Civ.Proc. § 731a.

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action by North Side Property Owners' Association, a corporation, against Hillside Memorial Park, a corporation, and others to enjoin defendants from establishing and maintaining a cemetery on certain described land under a permit granted by board of supervisors of Los Angeles county, wherein Hughes Tool Company filed its complaint in intervention. From a judgment on the pleadings in favor of defendants, plaintiff and intervener appeal.

Judgment affirmed.

Vernon P. Spencer, of Inglewood, for appellant North Side Property Owners' Ass'n.

Howard P. Hall, of Hollywood, and Burr & Smith, of Los Angeles, for appellant, Hughes Tool Co.

O'Melveny & Myers and Jackson W. Chance, all of Los Angeles, for respondents.

J. H. O'Connor, Co. Counsel, and Edward H. Gaylord, Deputy Co. Counsel, both of Los Angeles, for amici curiæ in support of respondents.

WHITE, Justice.

Plaintiff, North Side Property Owners' Association (hereinafter referred to as the "Association"), a non-profit corporation composed of property owners and home owners owning land in the north west portion of the City of Inglewood, in Los Angeles County, instituted this action to enjoin defendants from establishing and maintaining a cemetery on certain described land, under a permit granted and issued by the Board of Supervisors of Los Angeles County (hereinafter referred to as the "Board"), pursuant to the provisions of Ordinance No. 2854 (N.S.) of said County, as amended by Ordinance No. 2919 (N.S.). Subsequent to the filing of said action, plaintiff Hughes Tool Company, a corporation (hereinafter referred to as the "Tool Company") engaged in the manufacture of essential war materials upon lands situate within one-half mile of the proposed cemetery site, and employing 2500 men and women, filed its complaint in intervention. Following the filing of answers to the complaint and complaint in intervention, defendants moved for judgment on the pleadings, which motion was granted. From the judgment entered thereon, both plaintiff and intervenor prosecute this appeal.

The instant proceeding is a companion case to the one numbered in this court 14,795, entitled North Side Property Owners' Association and Hughes Tool Company, a corporation, v. County of Los Angeles and the Board of Supervisors thereof, wherein plaintiff and intervenor herein sought a writ for the purpose of reviewing the proceedings and order of the Board granting to defendants herein the permit to establish, maintain and operate the private cemetery here in question, and which case was this day decided. 70 Cal.App.2d 598, 161 P.2d 613.

In general, plaintiff's complaint and the complaint in intervention contained the identical allegations set forth in their aforesaid petition for writ of review. In short, it was alleged that defendants herein filed their application with the Regional Planning Commission of Los Angeles County (hereinafter referred to as the "Commission") for a permit to establish and maintain a private cemetery; and, after a hearing before said Commission and later before the Board, the latter made its order pursuant to the terms of the foregoing ordinance granting such permit. After challenging the jurisdiction of the Board to grant such permit on the ground that the procedural requirements of the ordinance were not complied with, it was alleged that, if defendants are permitted to establish and maintain a cemetery on lands described, the waters which drain from said cemetery land would drain into the water supply underlying the lands of members of plaintiff Association and of the Intervenor; that such water supply would be polluted and contaminated by the waters draining from the cemetery lands, thereby menacing and endangering the health of a substantial number of the members of plaintiff Association and of the employees of Intervenor, thereby interfering with the pursuit of its business by said Intervenor. It was also alleged that the operation and maintenance of said cemetery would become an obstacle to the free use of surrounding property so as to "interfere with the comfortable enjoyment of life or property", and that the proposed cemetery would obstruct or impede the free passage on or use in the customary manner of the public streets and highways leading to and surrounding the cemetery property.

[1,2] It requires no citation of authority for the statement that where judgment has been rendered for defendants on the pleadings, the sole question is whether the complaint states a cause of action; that in passing upon such motion for judgment on the pleadings nothing may be considered but the complaint itself. Nothing de hors the complaint, nor any defense thereto set up in the answer, can be taken into account in disposing of such a motion. The truth of the allegations contained in the complaint must be assumed and, if the pleading alleges ultimate facts which disclose the existence of a cause of action in favor of plaintiff, then the motion for judgment on the pleadings must be denied.

It is the contention of appellants herein that the trial court erred in granting the motion of respondents for judgment on the pleadings, for the reason that the plaintiff's complaint and the complaint in intervention alleged ultimate facts which disclose that:

(a) The Board of Supervisors did not have jurisdiction to grant the cemetery permit sought by respondents; and

(b) The establishment and maintenance of the cemetery in question constitutes a private nuisance, which appellants are entitled to enjoin.

[3] However, in the instant action appellants cannot invoke, nor rely upon, the foregoing and well recognized rule governing motions for judgment on the pleadings. This, for the reason that in the case with which we are here concerned, when the motion for judgment on the pleadings was submitted, it was stipulated between the respective parties that, in passing upon said motion, the trial court might consider all proceedings before and all evidence taken by the Regional Planning Commission and the Board of Supervisors contained in the reporter's transcripts of both hearings, all applicable County Ordinances, the jurisdictional notices actually given and pursuant to which the aforesaid Commission and Board hearings were held; the report of the Planning Commission recommending to the Board that the cemetery permit be granted, the permit granted by the Board, the fact that counsel and representatives of both appellants appeared before and were heard by the Commission and the Board in opposition to the granting of the cemetery permit at their respective hearings, and as a result of which hearings the Board issued the cemetery permit involved in this action. Thus, we see that in ruling on the motion for judgment on the pleadings, the trial court, pursuant to the aforesaid stipulation, was permitted and authorized to review the proceedings had and evidence taken by both the Commission and the Board in granting to respondents the cemetery permit.

In the aforesaid writ of review case, the trial court held that the Board of Supervisors was clothed with jurisdiction to grant the cemetery permit sought by respondents herein, and the judgment therein was this day affirmed by this court. North Side Property Owners' Ass'n. et al v. County of Los Angeles et al., supra. Pursuant to the foregoing stipulations, and upon the authority of the case just cited, it must be held that, in so far as appellants' attack herein upon the jurisdiction of the Board of Supervisors is concerned, the trial court's ruling on the motion for judgment on the pleadings was correct and proper. The stipulation served to render totally inapplicable the many cases cited by appellants or the long established principles of law which ordinarily govern motions for judgment on the pleadings. The stipulations authorized the trial court to venture far beyond the allegations of the complaint and to consider all of the proceedings had before the administrative boards in connection with the application of respondents for the cemetery permit; to examine the applicable County Ordinances and to take into consideration the evidence offered in the proceedings before the administrative boards, to take into consideration the fact of personal appearances by appellants, through their counsel, at the hearings before the Commission and the Board. The proceedings herein, under the aforesaid stipulations, are comparable to those in which the court reviews the records of an administrative body on a general demurrer to the petition when the full transcript of the administrative proceedings is made a part of the petition for review. Vaughn v. Board of Police Commissioners, 59 Cal.App.2d 771, 140 P.2d 130; Sipper v. Urban, 22 Cal.2d 138, 137 P.2d 425.

We come now to a consideration of appellants' claim that the complaint and complaint in intervention pleaded ultimate facts which entitled them to a hearing in equity and to the right to submit proof that the establishment and maintenance of the cemetery here in question constitutes a nuisance which appellants are entitled to enjoin.

[4-6] There are two answers to appellants' contention in this regard. In the first place, it is a well recognized doctrine that where a party has an adequate remedy at law he may not resort to a court of equity for injunctive relief. City of South Pasadena v. Pasadena Land & Water Co., 152 Cal. 579, 595, 93 P. 490; Winrod v. Wolters, 141 Cal. 399, 402, 74 P. 1037. A plain, speedy and adequate remedy at law was open to appellants. In fact, they exercised such remedy when they instituted the review proceedings. A comparison of the complaint and complaint in intervention herewith with the petition for the writ of review reveals the fact that the issues presented on the writ of review and those tendered in the case at bar are identical. In the instant case, the trial court found that appellants, and each of them, "has an adequate legal remedy by the bringing and determination of said companion case No. 492,580; * * *." We are not here concerned with a case wherein the constitutionality of the ordinance under which respondents obtained their cemetery permit is under attack, and where neither certiorari nor mandamus are available as remedies. Here the appellants admit the constitutionality of the ordinance and proceeded under its terms to oppose the granting of the cemetery permit to respondents. And when the permit was granted, they challenged the validity of the same by writ of review, upon grounds exactly similar to the claims urged here. Conceding the constitutionality of the applicable ordinances, which provide that a cemetery may be established on the property here in question when a permit is granted therefor by the Board of Supervisors, it must be held that a speedy and adequate remedy at law was afforded appellants by a writ to review the legality of the Board's action in granting the permit, a remedy to which appellants resorted and in which they litigated the precise issues tendered in the instant proceeding. The record herein reflects that, at the administrative hearing before the Commission, one of the objectors present raised the point that the underground water supply would be injuriously affected by the proposed cemetery, and evidence thereon was received by the Commission from the County Health Department, which had examined the area in question, and which evidence was that the objectors' claim was groundless. Upon that issue, the Commission made a specific finding that:

"The water table in this district is low, and the Health Department and Flood Control District have submitted reports favorable to the granting of this permit. * * * After consideration of all the evidence, testimony, and factual data presented in this case, and after having made a field investigation of the premises and surrounding properties, and having determined that the use of the property in question for the establishment of a cemetery in accordance with the provisions above set forth would not become a public nuisance and would in no way jeopardize or adversely affect the public health, safety, or general welfare. * * *"

In granting the cemetery permit, the Board adopted the foregoing finding of the Commission. In hearing and passing upon an application for a cemetery permit under the ordinances, the administrative body functions in a judicial or quasi-judicial capacity. Ware v. Retirement Board, 65 Cal. App.2d 781, 793, 151 P.2d 549; Greif v. Dullea, 66 Cal.App.2d 986, 1009, 153 P.2d 589; Dierssen v. Civil Service Commission, 43 Cal.App.2d 53, 63, 110 P.2d 513. If appellants had any evidence to support their claim of underground water pollution, they should have presented it to the administrative bodies, and the same would have been reviewed by the court on the writ of review. Under the above mentioned stipulations, filed in this case, which permitted the trial court to consider the evidence presented to the administrative boards, the trial court was authorized to assume that, if appellants were in possession of any additional evidence of underground water pollution, they would not have remained silent before Commission and the Board. Whatever evidence appellants did present to the administrative board was reviewed by the court in the instant case, which, under the stipulation, amounted practically to a trial on the merits when the court had under consideration the motion for judgment on the pleadings.

We are persuaded that appellants not only had a speedy and adequate remedy at law, but that they availed themselves of the same. Therefore, a suit in equity to enjoin a private nuisance cannot be maintained. Furthermore, we are impressed from a reading of the allegations and prayer contained in appellants' pleadings in the review case and in the present proceeding, that the sole and only purpose and object of the present action is to accomplish the identical results sought in the review proceeding, namely, to attack the validity of and to set aside the cemetery permit granted respondents. The legal remedy utilized by appellants was wholly adequate to accomplish the main, if not the sole, purpose sought in the two proceedings.

Finally, we are persuaded that under the pleadings the court was required, because of the provisions of section 731a of the Code of Civil Procedure, to grant the motion. The section in question was made a part of the Code in 1935 and, so far as material to the issues here involved, reads as follows:

"Whenever any city, city and county, or county shall have established zones or districts under authority of law wherein certain manufacturing or commercial uses are expressly permitted, no person or persons, firm or corporation shall be enjoined or restrained by the injunctive process from the reasonable and necessary operation in any such industrial or commercial zone of any use expressly permitted therein, nor shall such use be deemed a nuisance without evidence of the employment of unnecessary and injurious methods of operation. * * *"

The cemetery site for the establishment and maintenance of which a permit was granted respondents by the Board is situated in Zone M—3. Under County Ordinance No. 1494 (N.S.), as amended, the unincorporated area of Los Angeles is divided into 16 zones, of which one is Zone M—3, and it is further provided that the area within said Zone M—3 may be used for any commercial use whatsoever, save and except that before any property situate in such Zone M—3 can be used for cemetery purposes a permit must be obtained from the Board. Use of the property here in question for cemetery purposes is specifically authorized by the permit issued to respondents by the Board and the legality of the proceedings in which such permit was granted has been upheld by the trial court, as well as by this court. North Side Property Owners' Ass'n v. County of Los Angeles, supra.

[7] The question then arises whether the establishment and maintenance of a cemetery comes within the purview of section 731a of the Code of Civil Procedure. That the maintenance and operation of a cemetery is a "commercial use" within the meaning of the Code section to us seems obvious. Section 7020 of the Health and Safety Code, St.1939, p. 671, defines the maintenance of a cemetery as a "business"; section 8275 of the same code, St.1939, p. 699, provides who may engage in or transact any of the "businesses of a cemetery" within this state. In Building Commissioner of Town of Brookline v. McManus, 1928, 263 Mass. 270, 160 N.E. 887, it was held that "undertaking, as commonly carried on,

is not a profession; it is a business or occupation"; and in Meyer v. Stein, 1940, 284 Ky. 258, 145 S.W.2d 105, 107, the court stated: "Therefore, we are constrained to hold these covenants excluded the use of the residence on Lot No. 27 as a funeral home, since it cannot be denied that a funeral home is a commercial enterprize." To us it seems quite clear that the use of land for cemetery purposes is a "commercial use" within the meaning of section 731a of the Code of Civil Procedure, and is therefore properly excluded by the County Zoning Ordinance from a residential zone and confined to Zone M—3, which provides for the unlimited and unrestricted use or occupancy of lands therein situate, except that in the case of cemeteries a permit must be obtained from the Board of Supervisors, as was done in the instant case.

[8] The only restriction enjoined upon "commercial uses" by section 731a of the Code of Civil Procedure is that the operation thereof shall be "reasonable and necessary." It is only when there is evidence of the employment of "unnecessary and injurious methods of operation" that any "commercial use" referred to in section 731a of the Code of Civil Procedure may be deemed a nuisance. Nowhere in the complaint or the complaint in intervention herein is there any allegation that respondent proposes to or will operate said cemetery in any other than a "reasonable and necessary" manner as cemeteries are usually and ordinarily conducted, nor is there any allegation of the threatened use of "unnecessary or injurious" methods in the operation of the cemetery. No cause of action on the nuisance theory is therefore stated in appellants' pleadings. Neither plaintiff nor intervenor in the instant proceeding seeks to recover damages. They challenge only the legality of the cemetery permit issued to defendant Hill Side Memorial Park, a corporation, and seek to enjoin the latter from establishing and maintaining the said cemetery. The "commercial use" of the property in question, located as it is in Zone M—3, being expressly authorized by County Zoning Ordinance, and a permit to establish and maintain such property as a cemetery having been granted in conformity with the County Ordinance, there being no allegation that respondents threaten to or will use the property in any but a "reasonable and necessary" manner, as cemeteries are ordinarily conducted, it follows that all the requirements of section 731a of the Code of Civil Procedure are here present, and the trial court properly denied appellants injunctive relief. McNeill v. Redington, 67 Cal.App.2d 315, 154 P.2d 428.

For the foregoing reasons, the judgment is affirmed.

YORK, P. J., and DORAN, J., concur.

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70 Cal.App.2d Supp. 872

PEOPLE v. GILES.

No. Cr. A. 2106.

Appellate Department, Superior Court,
Los Angeles County, California.

Aug. 29, 1945.

1. Assault and battery 🔑91

Evidence sustained conviction of chief of police of battery for momentarily choking one in his custody. Pen.Code, § 243.

2. Assault and battery 🔑66

Provocation by words and acts in protest against being taken into custody upon inability to immediately post bail on charge of minor traffic violation did not justify police officer's use of force upon protesting prisoner who was at the time in his custody.

3. Criminal law 🔑986

Trial court before pronouncing sentence upon police officer convicted of battery properly referred the matter to county probation officer for a report. Pen. Code, §§ 243, 1203.

4. Criminal law 🔑1208(3)

The policy enunciated in statute referring to circumstances which may aggravate or mitigate punishment, though provisions of statute are limited in their application to proceedings in superior court, governs proceedings in justice courts, in absence of express legislation on the subject. Pen.Code, §§ 1204, 1425–1461.

5. Criminal law 🔑977(1)

The steps to be taken by court in determining what sentence within the prescribed limits should be imposed in a particular case are part of the judicial proceedings in the case. Pen.Code, §§ 12, 13, 1204.

6. Criminal law ⚿986, 987

The determination of the sentence to be imposed upon one convicted of a misdemeanor should not be based even in part upon statements made to trial judge out of court and out of accused's hearing. Pen.Code, §§ 12, 13, 1204.

7. Criminal law ⚿987

One convicted of a misdemeanor for which a jail sentence may be imposed is entitled to be present when judgment is rendered, in absence of a statute to the contrary.

8. Criminal law ⚿633(1)

Though common law is of no effect so far as specification of what shall constitute a crime is concerned, with respect to criminal procedure, the common law is in force as law in absence of statutory provision at variance therewith. Pol.Code, § 4468.

9. Criminal law ⚿662(1)

Statute providing for taking of evidence by probation officer and its inclusion in his report to court creates a statutory exception to accused's fundamental right to be confronted by witnesses against him, but trial court is not authorized in disregard of such right to listen out of court to witnesses whispering against accused. Pen.Code, §§ 12, 13, 1203, 1204.

10. Criminal law ⚿662(1)

In determining sentence to be imposed on one convicted of battery, such facts as were not supplied by probation officer's report and by record of trial should have been obtained from witnesses called in open court in the presence of accused. Pen.Code, §§ 12, 13, 243, 1203, 1204.

11. Criminal law ⚿1188

Where judge in determining sentence to be imposed upon one convicted of battery permitted himself to be influenced by accusations made out of court which accused had no opportunity to refute, sentence to six months' imprisonment in county jail would be reversed with directions to re-arraign accused for sentence after proper proceedings to ascertain circumstances in aggravation and mitigation of punishment. Pen.Code, §§ 12, 13, 243, 1203, 1204.

Appeal from Justice's Court of San Antonio Township; Stanley Moffatt, Judge.

Ernest Giles was convicted in justice's court of offense of battery and was sentenced to serve six months in the county jail, and he appeals.

Judgment reversed with directions.

Edward R. Young and Milan Medigovich, both of Los Angeles, for appellant.

Fred N. Howser, Dist. Atty., and Jere J. Sullivan and Robert Wheeler, Deputy Dist. Attys., all of Los Angeles, for respondent.

BISHOP, Judge.

The defendant, convicted on a charge of having used force and violence upon the complaining witness, was sentenced to serve six months in the county jail. We have concluded, upon his appeal from the judgment, that the evidence supports the conviction and that no reason exists for disturbing it, but that the judgment should be reversed with directions that the defendant be resentenced, because, in determining the severity of the sentence to be imposed, the trial judge erred in listening to and being influenced by accusations made against the defendant outside of court. The error referred to is not a trivial one. A person convicted of a traffic offense or of another of the many misdemeanors which have been created by state laws and local ordinances, has a real concern in the sentence which follows. Will it impose a light or a stiff fine? Or is there to be a term in jail instead of a fine? It is a matter of more than passing interest, therefore, to know whether or not the trial judge may properly take into consideration, in determining the sentence, reports against the defendant which come to the judge privately neither in open court nor known to the defendant, and which he is given no opportunity to answer.

[1,2] As we have stated, the evidence supports the conclusion that the defendant did use force unlawfully upon the complaining witness. The latter, it appears, had been charged with a minor traffic violation by a complaint filed in the City Court of the City of Vernon, where the defendant, who was the City's Chief of Police, was acting as bailiff. The complaining witness was considerably incensed at having his bail set at $200 when he pleaded not

guilty and asked for a jury trial. When he found himself unable immediately to post bail, he did not yield graciously to being taken into custody by the defendant. In spite of his verbal and other protestations, however, the complaining witness was taken into custody and to the booking office of the city jail. There he continued to evince his unhappiness at what had taken place, by provoking words and perhaps provoking acts, until the defendant put a stop to it by choking him, for a brief moment. But the provocation, however great, was not legally sufficient to justify the defendant's use of force in any degree upon the complaining witness, who was at the time in custody as his prisoner.

[3] Standing convicted of the crime of battery, the defendant was subject to a fine (up to one thousand dollars) or to a jail sentence (not exceeding six months) or to a combination of the two. Section 243, Penal Code. To aid it, no doubt, in arriving at a just determination of the proper sentence to impose, the trial court referred the matter to the county probation officer for a report, and set the time for sentencing the defendant ahead twenty days. This course was a proper one, although the defendant was ineligible for probation, for the probation officer is to report not only as to matters of interest re probation, but he is further directed, section 1203, Penal Code, "to investigate and to report to the court at a specified time, upon the circumstances surrounding the crime and concerning the defendant and his prior record, which may be taken into consideration either in aggravation or mitigation of punishment." In this case, however, the probation officer's report, filed two days before the date set for the hearing, proved of little, if any, guidance to the trial judge, for his views in the matter became darkly colored from other, unofficial, reports he received.

That the trial judge listened to accusations made against the defendant out of court, and that they largely influenced his judgment, is clear from the events which took place at the time set for sentencing the defendant. "I will say in the beginning," the trial court prefaced the proceedings, "that I have received a great many telephone calls, letters and personal requests in this matter, and all of them so far have been against the defendant. I will read one letter from the probation officer's report, which duplicates most of the information I have received in an unsatisfactory hearsay sort of manner. I have tried my best to avoid hearsay testimony and not base anything on just rumor and hearsay and unreliable statements. I want to assure you in the beginning that the only purpose I have in this case is to try to rescue San Antonio Township and the City of Vernon from what most people seem to think is a bad situation."

The letter referred to was then read into the record. It was one from a Mr. Needle, and its gist is found in this paragraph: "The Chief of Police of Vernon should have never been allowed to come out on probation, for he is a menace to society; like myself, many other American citizens feel that he should be put away where he could do no further harm. He never did any direct harm to myself, but I am witness of some of his injustice in the performance of his duty. For instance, there was a certain day when a lady was letting out a soldier to whom she had given a lift, and in no way violating the traffic laws, and I saw an officer give that lady a citation. I saw that injustice and my heart bled when I found myself unable to do anything about it." The trial judge again referred to this letter when he said: "I might say that this probation officer's report here contains about a dozen letters from Mr. Giles' friends and he only gathered up one letter against Mr. Giles." We make no comment upon the value of this letter as an aid to the court in determining what punishment to inflict upon the defendant, other than to say that evidence may have graver faults than that of being hearsay.

Following the reading of the letter, two witnesses were called and interrogated by the trial judge. The first was a newspaper man who had found the office of the Chief of Police of Vernon and, upon one occasion years before, the Chief, himself, very uncommunicative when asked for "the names, etc.," of the persons involved in accidents which, presumably, although it was not stated, the department had investigated. Following the conclusion of the testimony of this witness, the trial judge inquired: "Is there any other news man here who cares to say anything on this matter? Of course, I realize the fact that the news men are in a rather tough spot in this case and I won't insist on hearing any more on that. They have certainly told me enough on the side about the matter, however." Later, following a statement by defendant's counsel to the effect that so far there was no evidence that the press had been denied access to the police department, the trial judge remarked: "The previous witness testified he had been, and dozens of people have told me the same thing, even though they are afraid to come here this morning because they are afraid of physical violence by the police department of Vernon."

The second witness called by the trial judge was the mayor of the City of Vernon. "The point is," the trial judge announced by way of explanation, "if the Mayor instructed this sort of thing I would forgive Mr. Giles for it. If he does it on his own volition that makes him solely responsible." The Mayor testified that he had never given any instructions to the defendant with reference to the treatment of prisoners in the City of Vernon, and he had not heard that the police department had refused to cooperate with the Metropolitan press regarding persons arrested in the City of Vernon, and the trial judge expressed his conviction that the Mayor "had nothing to do with the matter." This, it would seem, left the onus on the defendant for the failure of his office to cooperate with the press concerning arrests, a matter expressly stated by the witness first called to be not within his "information," and so if known to the trial judge at all was known only by virtue of the "dozens of people" who had told him about it on the outside, but who were afraid, according to the trial judge's report, to appear as witnesses in his court. There was no witness to any mistreatment of any prisoner other than of the complaining witness; that is, no witness who testified in court.

The city attorney of Vernon was called by the defendant as a witness, but was immediately taken over by the trial judge, who addressed to him these statements and questions, each revealing a state of mind, existing in the trial judge, not brought about by any court witness or judicial proceeding: "Do you know anything about his reputation that he seems to have developed of brutality or ill-considered treatment of the public or press, or anything of that kind?" "Do you know about this rule in the Vernon Police Department which requires the taking of the name and address of every person who comes into the police headquarters?" "Do you know about the law that no trailer is allowed to park in Vernon for more than thirty days?" "Do you know why it is that it is so impossible for the press to get any information from the police department?" The inquiries put to the witness concluded with this colloquy:

"Q. Let me ask you this: Have you ever heard of a jury trial being granted in Vernon? A. Yes, sir.

"Q. How many times? A. Well, I have acted as prosecutor down there a good many times.

"Q. How long ago was that? A. Well, I think the last one was about a month ago.

"Q. You actually got a jury, did you? A. Absolutely. A jury trial is never denied anybody in Vernon.

"The Court: I understand the judge has a system of hiking the bail so that only rich men can get bail."

The witness's replies to the facts assumed in the various statements and questions were, with one exception, to deny that they were facts or to disclaim having any knowledge of them. He knew that it was the practice to take the name and address of those who called at police headquarters for information, and added that it was he who had suggested the practice, many years ago. But except as noted, no substance was given by his testimony to any of the assumed facts contained in the court's statements and questions. They remained based solely upon the reports which had come to the trial judge, ex parte.

We are not undertaking to answer the question: What relevancy did the matter of jury trials, and the several other matters inquired about, have to the problem then before the court, the problem of determining what was a just and proper sentence to be imposed on the defendant? Nor are we passing upon the propriety of making the proceeding by which the sentence to be imposed upon the defendant was to be determined, a proceeding "to rescue the City of Vernon and bring it back into the United States," as the trial court stated he was trying his best to do. Our attention is centered upon an inquiry into the legal propriety of the practice of a trial judge who, in making up his mind as to the punishment to be imposed upon a convicted defendant, receives and gives heed to charges leveled at the defendant out of court and out of the defendant's hearing.

[4] In section 1204, Penal Code, we discover the legislature expressly condemn-

ing the practice followed by the trial court. That section, referring to circumstances which may either aggravate or mitigate the punishment, states: "The circumstances must be presented by the testimony of witnesses examined in open court * * *. No affidavit or testimony, or representation of any kind, verbal or written, can be offered to or received by the court, or a judge thereof, in aggravation or mitigation of the punishment, except as provided in this and the preceding section." We are not exploring the field of speculation arising out of the repeated and drastic changes made through the years in the "preceding section" to determine the effect of the amendments upon the provisions of section 1204, for we are persuaded (we are not elaborating the matter) that the provisions of section 1204 are limited in their application to proceedings in the superior court; they do not constitute legislation governing proceedings in justices' courts. But we note that there is not a word in that chapter of the Penal Code which does prescribe the proceedings for justices' courts (Sections 1425–1461) which is in any way inconsistent with the policy enunciated in section 1204, and that policy, we find, is the policy that governs in the absence of express legislation on the subject.

[5] In the first place, "The several sections of this code which declare certain crimes to be punishable as therein mentioned, devolve a duty upon *the court* authorized to pass sentence, to determine and impose the punishment prescribed." Section 12, Penal Code. "Whenever in this code the punishment for a crime is left undetermined between certain limits, the punishment to be inflicted in a particular case must be determined by *the court* authorized to pass sentence within such limits as may be prescribed by this code." Sec. 13, Penal Code. The words of these two sections (to which we have added the emphasis) need no interpretation. Plainly they stamp the steps to be taken to determine the severity of a sentence as a part of the judicial proceedings in the case. The duty here imposed upon the court is closely analogous to that imposed upon the court in these words of section 1192 of the Penal Code: "Upon a plea of guilty of a crime distinguished or divided into degrees, the court must, before passing sentence, determine the degree." Of these two duties we find the supreme court speaking in People v. Gilbert, 1943, 22 Cal. 2d 522, 528, 140 P.2d 9, 12, in these words: "In determining the degree of an offense and the punishment to be imposed, after a plea of guilty, it is the duty of the trial court to consider matters in aggravation as well as in mitigation of the offense. The legal significance of established facts may well constitute an element of which cognizance is taken in the exercise of judicial discretion. A hearing for the determination of the degree of an offense and the punishment therefor is not a trial in the full technical sense, and is not governed by the same strict rules of procedure as a trial. As stated in People v. Williams, 14 Cal.2d 532, 536, 95 P.2d 456, 458 (quoting from People v. Popescue, 345 Ill. 142, 153, 158, 177 N.E. 739, 77 A.L.R. 1199) it is 'simply a statutory hearing, by which the court examined witnesses to determine whether any facts existed to aggravate or mitigate the punishment,' and 'in considering evidence in aggravation or mitigation of the offense the court may consider many matters "not admissible on the issue of guilt or innocence" * * *.'" The fact that the hearing is not a trial in the full technical sense and is not governed by the same strict rules of procedure as a trial, does not mean, however, that the facts needed by the court to enable it to perform its duty may be picked up by the judge at the club or on the street. In People v. O'Brien, 1932, 122 Cal.App. 147, 155, 9 P.2d 902, 905, we find this statement: "Notwithstanding the fact that it has been decided that the hearing which may be conducted by the trial court for the purpose of determining the degree of the offense 'is not a trial,' nevertheless the only means by or through which the court is authorized to reach a conclusion in the matter is by the aid of evidence. People v. Chew Lan Ong, 141 Cal. [550], 551, 553, 75 P. 186, 187, 99 Am.St.Rep. 88; People v. Bellon, 180 Cal. 706, 182 P. 420, 421." In the first case cited in the text just quoted, People v. Chew Lan Ong, the defendant had pleaded guilty to the charge of murder and had been sentenced to death. The contention was made, on appeal, that the trial judge had no power to determine the degree of the crime for the reason that the section which purported to grant the power (section 1192, quoted above) failed to provide the "mode whereby the court is to reach its determination." [141 Cal. 550, 75 P. 187.] The supreme court disposed of this contention with these words, pertinent to our

problem, 141 Cal. at page 552, 75 P. at page 187, 99 Am.St.Rep. 88:

"Jurisdiction to determine the matter is, however, expressly conferred on the court by the section. This means that there shall be a judicial determination, and where power is especially conferred upon a court of general jurisdiction to determine a particular question, and no special mode for that determination is pointed out, the jurisdiction conferred necessarily implies authority in such court to call to its assistance in determining the particular question, the same aid as is usually employed by it in reaching a judicial determination in other cases.

"The universal aid is evidence. This was the means employed by the lower court in determining the degree of crime in the case at bar. It is the only means by which a judicial determination can be had, and was the means which it was contemplated by the Legislature should be invoked by the court.

"If there could be any doubt of this general rule, we are satisfied that the course pursued by the lower court is provided for and sanctioned by section 187, Code Civ.Procedure, which declares that 'When jurisdiction is, by the constitution or this code, or by any other statute, conferred on a court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this Code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this Code.' "

[6-8] Our conclusion that the determination of the sentence to be imposed upon a defendant convicted of a misdemeanor should not be based even in part upon statements which come to the ear or eye of the trial judge in an unofficial way, finds further support in these two legal principles: the defendant has a right to be present when judgment is imposed upon him, and he has a right to be confronted by the witnesses who have accusations to make against him. As to the first of these principles, again we find the Penal Code silent, but the common law is not silent. While it is true that "In this state the common law is of no effect so far as the specification of what acts or conduct shall constitute a crime is concerned. Section 6, Pen.Code; 7 Cal.Jur. 841", People v. Whipple, 1929, 100 Cal.App. 261, 262, 279 P. 1008, 1009, with respect to criminal procedure, "The common law is in force as law in this state in the absence of statutory provisions at variance with the common law." Ex parte Hudspeth, 1929, 100 Cal.App. 478, 479, 280 P. 179, 180; Political Code, sec. 4468. Looking, then, to the common law, we find the general rule to be that in the absence of a statute to the contrary, one convicted of a misdemeanor for which a jail sentence may be imposed has the right to be present when the judgment is rendered. 24 C.J.S., Criminal Law, § 1574b, p. 79, 15 Am.Jur. 113; 1 Bishop's New Crim.Procedure, 2d Ed., 241. One of the purposes of requiring that the defendant be present may well be to give him an opportunity to show that accusations made against him, other than the one of which he stands convicted, are without foundation, and a chance to object to the consideration of improper evidence. In the latter connection, see People v. O'Brien, supra, 122 Cal.App. 147, 157, 9 P.2d 902, 905.

[9] Closely allied to the principle just considered is the second of the two to which we made reference. We find it to be recognized in People v. Beatty, 1923, 132 Cal.App. 376, 380, 22 P.2d 757, 759, that "* * * the right of a defendant to be confronted by witnesses is fundamental. * * * The right in this state is guaranteed by section 686 of the Penal Code, and the defendant can be deprived of the same only by statutory authority to the contrary. People v. Ward, 105 Cal. 652, 39 P. 33." In so far as the code approves the gathering of evidence by the probation officer and its inclusion in his report, there is "statutory authority to the contrary." But no exception to the fundamental right has been made authorizing the trial court to listen, out of court, to witnesses whispering against the defendant.

We find two decisions from sister states which condemn the practice followed by the trial court in the present case as being in violation of the fundamental right of a person to be confronted by the witnesses against him. The first of these is State v. Simms, 1925, 131 S.C. 422, 127 S.E. 840, where the defendant had been sentenced to four months' imprisonment and a $500 fine for a violation of a state law. In sentencing the defendant the trial court remarked: "Mr. Simms, you must be a bad man. A number of people from your community have been to see me at my office about you, and they have all spoken against you. I have been impressed with the fact that no one has come to see me to speak a good word in your behalf." The supreme court of South Carolina set the sentence aside and remanded the case to the trial court for a resentence, stating that they did so in reliance upon a prior decision wherein they had said that the information necessary to pass sentence should have been obtained in open court or in the presence of the defendant or his counsel, and that the defendant "has a right that everything appertaining to the case, in the way of evidence affecting the case, be open and above board and public * * *".

The second of the two cases from sister states is Commonwealth v. Johnson, 1944, 348 Pa. 349, 35 A.2d 312, 313. In this case the defendant had pleaded guilty to the charge of murder, and the degree of the crime and the sentence had been determined by three judges sitting en banc. These judges talked with the warden of the penitentiary where the defendant had been confined when the murder was committed, and from one source and another, all out of court and not in the presence of the defendant, had picked up quite a bit of information, none to his credit. "No one has a good word for him—he is troublesome and dangerous," reported one of the judges. The judgment imposed was reversed because "the record does not show affirmatively that no ex parte evidence was received by the court before it determined and declared the degree of the defendant's guilt of murder." The reversal was not because of the ex parte receipt of evidence in connection with the punishment to be inflicted. However, the opinion contains these declarations which we find pertinent to the latter matter, 35 A.2d at pages 313, 314:

"It is a prisoner's constitutional right in this Commonwealth 'to meet the witnesses face to face' (Sec. 9, Declaration of Rights Const.P.S.). In Com. v. Corsino, 261 Pa. 593, at page 598, 104 A. 739, 740, we held: 'It is the inherent right of the prisoner in a capital case to be present at every stage of the proceedings from the arraignment to the rendition of the verdict. Neither court nor judge can take any step affecting his right in his absence.' * * * A judge whose duty it is to determine the proper sentence imposed on those convicted of crime cannot be expected to limit himself to only that which appears in the record of the trial of the prisoner. It is to the benefit of society and it may be of benefit to the prisoner, to have the sentencing judge consider facts other than those adduced at the trial. Such facts might militate in a prisoner's favor or they might militate against him.

"However, when a judge is faced with the duty of determining whether or not a convicted murderer is to be sentenced to death or life imprisonment the seriousness of the problem is such that a judge who is possessed of that zeal to do justice which characterizes the just judge, will as far as is practicable, give the defendant an opportunity to confront the witnesses against him and to offer evidence in his own behalf. Such a procedure if followed will be informative to the understanding and enlightening to the judgment of the sentencing tribunal."

[10, 11] Our conclusions, then, are these: The defendant was regularly convicted, on sufficient evidence, of the charge of battery. In undertaking to ascertain facts from which it could determine what sentence should be imposed on the defendant, the trial court was engaged in a judicial proceeding. Such facts as were not supplied by the probation officer's report and by the record of the trial, which had been held, should have been obtained from the lips of witnesses called in open court, in the presence of the defendant. Instead of limiting his search for the facts to these proper sources, the trial judge listened and gave great weight to reports received outside of court, with the result that the judgment entered was prejudicially influenced by these improperly received accusations. For these reasons we reverse the judgment with directions that the defendant be rearraigned for sentence after proceedings conducted in harmony with the principles set forth in this opinion.

SHAW, P. J., and KINCAID, J., concur.

26 Cal.2d 833

KIRK v. LOS ANGELES RY. CORPORATION.

L. A. 19343.

Supreme Court of California.
Aug. 28, 1945.

1. Street railroads 🔑117(8)

Where there was evidence which would have authorized finding that defendant's streetcar entered intersection before "Go" signal and struck pedestrian who, while attempting to cross street on which streetcar was operating, was caught in intersection by change of traffic signal, defendant's negligence was for jury.

2. Trial 🔑142

Trial court must deny a motion for nonsuit at close of plaintiff's case if there is any substantial evidence which, with the aid of all legitimate inferences favorable to plaintiff, tends to establish averments of complaint or where plaintiff's evidence is sufficient to support a verdict for plaintiff.

3. Trial 🔑142, 143

Trial court should deny motion for nonsuit at close of plaintiff's case even when there is a conflict in the evidence and some evidence tends to sustain plaintiff's case, or when evidence for plaintiff is such that different conclusions can reasonably be drawn therefrom.

4. Appeal and error 🔑927(3)

On appeal from a judgment of nonsuit, the reviewing court must view evidence in light most favorable to appellant, must disregard all inconsistencies, and draw only those inferences from evidence which can reasonably be drawn which are favorable to appellant.

5. Negligence 🔑136(9)

Contributory negligence is not established as a matter of law unless the only reasonable hypothesis is that such negligence exists, or unless reasonable men could have drawn only that conclusion, and, where different inferences may be drawn, one for and one against, the one against will be followed.

6. Street railroads 🔑98(7), 117(22)

Where traffic signal was in favor of pedestrian who was attempting to cross street, pedestrian was justified in leaving curb and starting across, and question of whether or not she should have observed that streetcar on intersecting street had started forward at that time and, if it had, whether she was aware of the danger, was for jury.

7. Street railroads 🔑98(7)

A pedestrian, while she is bound to exercise due care when crossing at an intersection in a crosswalk with the traffic signal in her favor, has the right of way and may assume that traffic signal will not be violated by traffic crossing her path.

8. Street railroads 🔑98(7)

When a pedestrian is in or about the middle of the street she is crossing, and the traffic signal changes against her, she may assume that due care will be exercised by the released cross traffic.

9. Street railroads 🔑117(22)

Whether a mistake in judgment by a pedestrian, who is crossing a street at a crosswalk with a traffic signal which is about to change, as to the speed and danger from an approaching vehicle constitutes contributory negligence, is for jury.

10. Street railroads 🔑117(22)

Whether acts of plaintiff in leaving curb to cross street in a marked crosswalk with traffic signal in her favor, and her continuation when signal changed while she was partly across and she saw defendant's streetcar approaching, were compatible with the conduct of a person of ordinary prudence, was for jury.

11. Street railroads 🔑98(7)

The fact that pedestrian's judgment may have been faulty in concluding that she had reached a place of safety at a point some two feet past the tracks on which defendant's streetcar was approaching did not necessarily establish pedestrian's negligence.

12. Street railroads 🔑117(33)

Where purse belonging to pedestrian, who was caught in an intersection by change of traffic signals, fell from her arm and she was hurrying to cross streetcar tracks in front of streetcar, which had started before the signal completely changed, whether pedestrian's act in stooping to pick up purse was contributory negligence or was an act in emergency was for jury.

13. Negligence 🔑136(27)

Generally, whether forgetfulness of known danger by one injured as result thereof constitutes negligence barring recovery of damages by showing want of ordinary care is for jury.

14. Negligence ⟹71

Where situation requires an immediate choice between alternative courses of conduct, negligence may not be inferred from an unwise choice if a reasonable man, under similar circumstances, would choose similarly.

15. Negligence ⟹72, 136(28)

Whether a person in a position of imminent danger acted reasonably is a question of fact for the jury, but, in determining the question, conduct must be viewed in light of excitement of the moment, and not from view of the surroundings of one not in danger.

16. Street railroads ⟹117(34)

Where evidence warranted finding that defendant street railroad should have anticipated that pedestrians were in crosswalk when streetcar jumped the signal and that pedestrians would act on natural impulses, and hence would have warranted a finding that defendant's negligence was proximate cause of accident to pedestrian, entry of nonsuit was error.

17. Negligence ⟹2

The actor is bound to know the qualities and habits of human beings, and the qualities characteristic and capacity of things and forces insofar as they are matters of common knowledge at the time and in the community.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by Helen Kirk against the Los Angeles Railway Corporation for injuries suffered when struck by defendant's streetcar. At the conclusion of plaintiff's evidence, the trial court granted a motion for nonsuit and, from the ensuing judgment, plaintiff appeals.

Reversed.

Prior opinion, 155 P.2d 405.

Entenza & Gramer and John J. Craig, all of Los Angeles, for appellant.

Gibson, Dunn & Crutcher and E. H. Chapman, all of Los Angeles, for respondent.

CARTER, Justice.

Plaintiff was nonsuited in an action for personal injuries claimed to have been received as the result of defendant's negligence.

Broadway, a north-south street, crosses at right angles Seventh, an east-west street in the city of Los Angeles. Both streets have double streetcar tracks on them. The traffic at the intersection is controlled by a traffic light. At 11 o'clock at night defendant was operating a southbound streetcar on its west track on Broadway. Plaintiff, a pedestrian, was proceeding west across Broadway on the south side of Seventh in the middle of the lane marked for pedestrians. She was accompanied by two men, one on each side of her. When she left the east curb on Broadway the traffic signals were in her favor. Two lines of cars were waiting on her left for a change of signal. When she was between the rails of the east streetcar tracks the east-west traffic signal changed to "Stop." A few seconds later, and when she was close to the west tracks, she saw the streetcar approaching. One of her companions grasped her arm, calling her attention to the approach of the streetcar. Her purse, which she was carrying under her right arm, fell to the street some two feet west of the west tracks. In plaintiff's language the following occurred:

"Q. What happened to the contents of the purse? A. They were scattered about.

"Q. Did you continue on across the street after the purse was knocked out from under your elbow? A. Well, without pausing, I attempted to retrieve the purse.

"Q. How did you do that, what did you do? A. Well, I just bent slightly and grabbed it up as I went.

"Q. Did you ever succeed in getting it in your hand? A. I don't know, I was knocked unconscious.

"The Court: You say you grabbed it up or grabbed at it? A. Grabbed at it.

"Q. By Mrs. Gramer: What movement did you make in grabbing at it; were you still in motion, your legs still moving? A. I was.

"Q. Did you ever stop or stand still even for a split second? A. Not to my recollection."

The right front of the streetcar struck plaintiff's right hip while she was in a stooping position. The streetcar was traveling 10 to 12 miles per hour when it was crossing Seventh Street. Plaintiff's two companions reached the west curb of Broadway in safety.

[1] A pedestrian, Walter S. Walters, who was crossing at the same time and place as plaintiff, testified that he was on the west rail of the east tracks when the east-west signal changed to red. At that time he saw the streetcar moving over the crossing, meaning about the middle or a "little" south of the tracks on Seventh Street, at 10 to 12 miles per hour. While there is evidence that the streetcar did not leave the north line of Seventh Street until the north-south signal signified "Go," yet it may be inferred from the foregoing evidence that it "jumped the gun on the signal." Walters stated that he saw the east-west signal change and at that time the streetcar was at or near the middle of the intersection traveling at 10 to 12 miles per hour. Inasmuch as there would be an interval between the change to red of the east-west signal and to green of the north-south signal, it must be clear that the streetcar had not waited for the "Go" sign. Also, plaintiff testified that in a few seconds after the time the east-west signal changed, the streetcar was in the intersection. Moreover, in view of the amount of traffic on the street, it was incumbent upon defendant to allow a reasonable time for the street to clear of pedestrians who had started across the street with the signal in their favor, but had been caught in the intersection between a change of signals. Considering all of those factors, including the speed of the car, it cannot be doubted that the question of whether or not defendant was negligent should have been submitted to the jury.

[2, 3] It is well settled that it is the duty of the trial court to deny a motion for a nonsuit at the close of plaintiff's case, "if there is * * * any substantial evidence, which, with the aid of all legitimate inferences favorable to the plaintiff, tends to establish the averments of the complaint, or, in other words, where the plaintiff's evidence is sufficient to support a judgment on the verdict. It should deny a nonsuit even where there is a conflict in the evidence and some evidence tends to sustain the plaintiff's case, or when the evidence of the plaintiff is such that different conclusions can reasonably be drawn therefrom. If there is any doubt, it is the duty of the court to let the case go to the jury." 9 Cal.Jur. 558, 559.

[4] The uniform rule which an appellate court should follow in disposing of an appeal from a judgment of nonsuit is, that the court must view the evidence in the light most favorable to appellant, must disregard all inconsistencies and draw only those inferences from the evidence which can reasonably be drawn which are favorable to appellant. Union Construction Co. v. Western Union Telegraph Co., 163 Cal. 298, 125 P. 242; Gregg v. Western Pac. R. Co., 193 Cal. 212, 223 P. 553; Ezmirlian v. Otto, 139 Cal.App. 486, 34 P.2d 774.

Defendant urges that plaintiff was contributively negligent as a matter of law in three respects: (1) In looking in the direction of the streetcar as she left the east curb of Broadway, but nevertheless proceeding even though the car must have then been in motion if it violated the traffic signal; (2) proceeding in front of the car when it was approaching after she was on the west-east track; (3) in stooping to retrieve her purse.

[5] In considering those contentions, the rule, as recently stated by this court in Anthony v. Hobbie, 25 Cal.2d 814, 818, 155 P.2d 826, 829, is applicable:

"But cases in which it can be said that the negligence of plaintiff contributes proximately to the accident as a matter of law are rare. The rule has been stated in various ways in a legion of cases, that contributory negligence is not established as a matter of law unless the only reasonable hypothesis is that such negligence exists; that reasonable or sensible men could have drawn that conclusion and none other; that where there are different inferences that may be drawn, one for and one against, the one against will be followed; and that before it can be held as a matter of law that contributory negligence exists, the evidence must point unerringly to that conclusion."

[6-11] Plaintiff was justified in leaving the east curb of Broadway inasmuch as the traffic signal was in her favor. Whether or not she should have observed that the streetcar had started forward at that time, and if it had, she was aware of the danger, was for the jury to decide. Moreover, a pedestrian while he is bound to exercise due care when crossing at an intersection in the crosswalk with the traffic signal in his favor, yet he has the right of way and may assume that the traffic signal will not

be violated by traffic crossing his path, and the issue of his negligence is for the jury. See Lowell v. Harris, 24 Cal.App.2d 70, 74 P.2d 551; Welch v. Sink, 24 Cal. App.2d 231, 74 P.2d 832; King v. Unger, 25 Cal.App.2d 632, 78 P.2d 255; Salomon v. Meyer, 1 Cal.2d 11, 32 P.2d 631; Collom v. Bloch, 70 Cal.App. 33, 232 P. 486; Whitelaw v. McGilliard, 179 Cal. 349, 176 P. 679; Walker v. Mason, 109 Cal.App. 361, 293 P. 125; Schulman v. Los Angeles Ry. Corp., 44 Cal.App.2d 122, 111 P.2d 924; Ladas v. Johnson's B. & W. Taxicab Co., 43 Cal.App.2d 223, 110 P.2d 449; Sanker v. Humborg, 48 Cal.App.2d 203, 119 P.2d 431; Torrey v. Nelson, 51 Cal.App.2d 191, 124 P.2d 336; Reed v. Stroh, 54 Cal.App.2d 183, 128 P.2d 829; Connolly v. Zaft, 55 Cal.App.2d 383, 130 P.2d 752; Young v. Tassop, 47 Cal.App.2d 557, 118 P.2d 371; Lang v. McKinney Blueprint Paper Co., 91 Cal.App. 84, 266 P. 616; Pinello v. Taylor, 128 Cal.App. 508, 17 P.2d 1039; Nightingale v. Birnbaum, 11 Cal.App.2d 34, 52 P.2d 955; Gnesa v. San Francisco, 40 Cal. App.2d 640, 105 P.2d 376; Kuhn v. San Francisco, 13 Cal.App.2d 641, 57 P.2d 147. When a pedestrian is in or about the middle of the street he is crossing, and the traffic signal changes against him, he may assume that due care will be exercised by the released cross traffic as to pedestrians so trapped. Whether a mistake in judgment by a pedestrian when crossing a street, as to the speed and danger of an approaching vehicle constitutes contributory negligence, is a question for the jury. Lowell v. Harris, 24 Cal.App.2d 70, 84, 85, 74 P.2d 551; Welch v. Sink, 24 Cal.App.2d 231, 74 P.2d 832; Ladas v. Johnson's B. & W. Taxicab Co., 43 Cal.App.2d 223, 229, 110 P.2d 449; Sanker v. Humborg, 48 Cal. App.2d 203, 119 P.2d 431; Nightingale v. Birnbaum, 11 Cal.App.2d 34, 52 P.2d 955; Gallardo v. Luke, 33 Cal.App.2d 230, 91 P.2d 211. In the instant case whether the acts of plaintiff in leaving the curb to make the crossing, and her continuation after she was part way across, and the signal changed, and she saw the car approaching, were compatible with the conduct of a person of ordinary prudence, was for the jury to decide. She was at a busy intersection. There were automobiles behind her waiting to proceed across the course she had completed. When the signal changed she was confronted with the dilemma of whether it was wiser to retreat and run the risk of injury from the cars waiting to cross the path she had already traveled, being caught between two streams of traffic, or to proceed on across the street. She, as well as those accompanying her, chose the latter course. Her companions reached the west curb in safety. She was two feet past the tracks on which the car was approaching, and as a person of ordinary prudence, she could have concluded that she had reached a place of safety. Even though her judgment may have been faulty, that does not necessarily establish her negligence.

Defendants rely upon such cases as Gore v. Market Street Ry. Co., 4 Cal.2d 154, 48 P.2d 2; Anderson v. Market Street Ry. Co., 116 Cal.App. 282, 2 P.2d 529; and McHugh v. Market St. Ry. Co., 29 Cal. App.2d 737, 85 P.2d 467. Each case must be viewed according to its particular circumstances. In the cited cases, there was no obedience to a traffic signal by the pedestrian or disobedience by defendant as in the instant case. Nor is the instant case one in which the pedestrian blindly and without any care for her own safety walked into the path of an oncoming vehicle, the result of which must necessarily be disaster.

[12-17] Whether the act of plaintiff in stooping to retrieve her purse was contributory negligence should have been submitted to the jury. She testified that even though she stooped, she continued her forward progress, and being two feet or more past the west tracks, she might, as a person of ordinary prudence, have considered herself in a safe position, and she was very near to such a haven inasmuch as the west steps on the west front side of the car struck her hip. Under those circumstances it was a jury question whether the act of retrieving the purse was such as would be performed by a person of ordinary prudence. It could be reasoned that such act was an instinctive unthinking effort to preserve property which would be reasonable to expect of a reasonably prudent person having due regard for his safety. It is not a case of momentary forgetfulness which is not induced by some disturbing event, such as existed in Reynolds v. Los Angeles Gas & Electric Co., 162 Cal. 327, 122 P. 962, 39 L.R.A.,N.S., 896, Ann.Cas.1913D, 34; and Brett v. Frank & Co., 153 Cal. 267, 94 P. 1051. Rather, it was an instinctive reaction or act on sudden impulse which we are unable to say was out of character for a person of ordinary prudence. It is the

rule that "Even forgetfulness of a known danger will not operate to prevent a recovery, for to forget is not negligence unless it shows a want of ordinary care. Generally the question is one for the jury." Neel v. Mannings, Inc., 19 Cal.2d 647, 656, 122 P.2d 576, 581. Moreover, there were disturbing factors, that is, the busy intersection, the change in traffic signals, the oncoming streetcar, the sudden dropping of the purse to the street. The situation presented is analogous to acts in emergencies. Defendant's negligence created a dangerous situation in which plaintiff chose to hurry across in front of the car. Her companion grasped her arm. In the process her purse fell to the ground. "Accordingly, where a situation requires an immediate choice between alternative courses of conduct, negligence may not be inferred from an unwise choice, if a reasonable man, under similar circumstances, would choose similarly. And under such circumstances one may be excused if he loses his presence of mind, momentarily forgets, errs in judgment, or omits cautionary measures which should otherwise have been taken, even though the effect of his conduct is to cause him to encounter the danger sought to be avoided. Whether a person in a position of imminent danger acted reasonably is a question of fact for the jury, but in determining the question, conduct must be viewed in the light of the confusion and excitement of the moment and not in view of the circumstances and surroundings of one not in danger." 19 Cal.Jur. 598. And the rule has been extended to cover rescue of property. Henshaw v. Belyea, 220 Cal. 458, 31 P.2d 348. The jury could have determined that defendant should have anticipated that pedestrians were in the crosswalk when the car jumped the signal and also that they would react to natural impulses. "The actor is bound to know the 'qualities and habits of human beings and animals and the qualities, characteristics and capacities of things and forces insofar as they are matters of common knowledge at the time and in the community.'" Mosley v. Arden Farms Co., 26 Cal.2d 217, 157 P.2d 372, 374. Hence, the jury could have decided that defendant's negligence was the proximate cause of the accident.

The judgment is reversed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.

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70 Cal.App.2d 721

ZAKAESSIAN v. ZAKAESSIAN et al.

Civ. 12854.

District Court of Appeal, First District,
Division 1, California.
Sept. 7, 1945.

Hearing Denied Nov. 5, 1945.

1. Trusts 🔑61(3)

If trustee of a resulting trust transfers the trust property to beneficiary or at beneficiary's direction, the resulting trust terminates.

2. Pleading 🔑254

Amended complaint insofar as it stated a cause of action to establish a resulting trust in favor of plaintiff was demurrable, where original complaint disclosed termination of the resulting trust by conveyance of trust property by trustee to plaintiff, and amended complaint merely omitted mention of such conveyance without explanation.

3. Deeds 🔑188

By alleging that he did not intend to vest title to realty in defendants' predecessor in interest, plaintiff alleged the nondelivery of deed which he allegedly executed without understanding the nature of the transaction, and stated a cause of action for cancellation of a void instrument. Civ.Code, § 3412.

4. Deeds 🔑188

Statement of the facts showing invalidity of deed constitutes a sufficient allegation of a cause of action under statute permitting an action to cancel an instrument which is void or voidable. Civ.Code, § 3412.

5. Limitation of actions 🔑37(4), 39(7), 96(2), 100(10)

A suit to set aside a void instrument is ordinarily governed by the four-year statute of limitations, but, where the gravamen of cause of action stated involves fraud or mistake, the three-year statute of limitations applies and the cause of action is not deemed to have accrued until discovery of the facts constituting the fraud or mistake. Code Civ.Proc. § 338, subd. 4; § 343.

6. Limitation of actions 🔑37(4)

Where plaintiff alleged that, through ignorance of English language, he mistakenly issued a deed the existence of which he did not discover until the date on which he brought suit to cancel such deed, the basis of action was mistake and the three-year period of limitations after discovery of the mistake was applicable. Code Civ.Proc. § 338, subd. 4.

7. Limitation of actions ⚷182(2)

The three-year statute of limitations could not be relied on to sustain demurrer, where such statute was not pleaded. Code Civ.Proc. § 338, subd. 4.

8. Pleading ⚷205(2)

The defense of laches may be raised by general demurrer.

9. Pleading ⚷193(4)

Complaint seeking to set aside deed mistakenly issued by plaintiff through ignorance of the English language 16 years before commencement of action was not demurrable on ground of laches, where the only possible prejudice to defendants which might give rise to an estoppel appearing upon the face of the complaint other than mere lapse of time was the death of the grantee under whom defendants claimed.

10. Equity ⚷73

The death of a material witness is one factor in determining whether laches is present.

11. Appeal and error ⚷843(4)

Where reversal of judgment entered on order sustaining demurrer to amended complaint without leave to amend was necessitated by conclusion that second cause of action stated sufficient facts, it was unnecessary for appellate court to determine the effect to be given the demurrer to third cause of action containing stock complaint to quiet title.

12. Pleading ⚷204(2), 225(2)

Where one of the causes of action stated in amended complaint was sufficient as against general demurrer trial court abused its discretion in sustaining demurrer without leave to amend, regardless of the merits of the grounds for special demurrer.

13. Appeal and error ⚷1201(4)

Reversal of judgment entered on order sustaining demurrer without leave to amend necessitated by sufficiency of complaint as against general demurrer did not determine whether complaint was subject to special demurrer or preclude trial court from exercising its discretion to require clarification of any uncertainties in complaint.

Appeal from Superior Court, City and County of San Francisco; Peter J. Mullins, Judge.

Action by Dichran Zakaessian against Martha Zakaessian and another to establish a resulting trust in favor of plaintiff and to have plaintiff declared equitable owner of realty, to have a deed executed by plaintiff declared void as having been executed by mistake, and to quiet title to the realty. From a judgment entered on an order sustaining a demurrer to his second amended complaint without leave to amend, plaintiff appeals.

Judgment reversed and cause remanded with directions.

Edmund J. Holl, Alan H. Critcher, and M. Anderson Thomas, all of San Francisco, for appellant.

Samuel Vartan, of San Francisco, for respondents.

WARD, Justice.

Plaintiff appeals from a judgment entered on an order sustaining the demurrer to plaintiff's second amended complaint without leave to amend.

The second amended complaint was divided into three causes of action: First, the plaintiff alleged that on or about December 15, 1921, May and H. D. Saville and Amber H. and W. J. Chase conveyed a certain described piece of property, of which they were the owners, to Karkin Zakaessian for a consideration of $7,000, which was supplied solely by plaintiff, pursuant to an agreement between Karkin and plaintiff that title was to be taken in Karkin's name; that Karkin died intestate on January 22, 1941, and after due administration of his estate the property was distributed to the defendants in this action; that at no time had Karkin or the defendants in this action repudiated the trust in favor of plaintiff. Under the second cause of action the plaintiff alleged that on August 15, 1927, plaintiff was the owner of record of the property described in the first cause of action; that plaintiff is unable to read or write English and is able to understand only very little; that plaintiff believes he signed a deed which purported to convey the property to Karkin but that plaintiff did not understand the nature of this transaction and did not "intend to vest title" in Karkin and that no consideration was ever received for said deed; that said deed was recorded on August 15, 1927, but that plaintiff had no knowledge that record title to said property appeared to be in Karkin until the commencement of this action by the filing of the original complaint on October 26, 1943. The paragraphs relating to Karkin's death, succession of interest and non-repudiation of the trust found in the first cause of action are incorporated by reference into the second cause of action. Under the third cause of action the plaintiff set forth a stock complaint to quiet title to the property described in the first and second causes of action with no allegations of specific facts. Wherefore plaintiff prayed that he be declared the equitable owner of the property by reason of the first cause of action; that under the second cause of action the deed recorded August 15, 1927 be declared null and void, having been executed by mistake; and that defendants be required to set forth their claims to the described piece of property and that such claims be declared invalid under the third cause of action. The orginal complaint, called a complaint to declare a trust, contained all the foregoing facts except the allegation relating to plaintiff's difficulties with the English language and lack of understanding and intent concerning the deed of August 15, 1927, included one further transaction between Karkin and plaintiff whereby Karkin conveyed the property to plaintiff on or about September 12, 1924, which deed was recorded September 16, 1924, and alleged that the property was improved property which produced income and sought an accounting in addition to a decree that plaintiff was the owner of the property.

[1, 2] The defendants demurred on the grounds that the complaint did not contain facts sufficient to constitute a cause of action and that the first and second causes of action were barred by sections 337(1), 336(2), 339(1) and 343 of the Code of Civil Procedure. The principal questions before the court on this appeal involve whether the alleged first and second causes of action state facts sufficient as against a general demurrer or the specific statutes of limitation pleaded. In the first cause of action plaintiff sought to have a resulting trust declared upon the property on the basis of a conveyance in 1921, for which he paid the purchase price. In the original complaint he alleged that legal title vested in himself in 1924. Consequently, plaintiff has at one time alleged the creation of a resulting trust and the termination thereof by the merger in plaintiff of the legal and equitable titles. Section 410, Com. (b) of the Restatement of the Law, Trusts, states the rule as follows: "If a trustee of a resulting trust transfers the trust property to the beneficiary or at his direction, the resulting trust terminates." 3 Scott on Trusts, sec. 410; See, also, Malinow v. Dorenbaum, 51 Cal.App.2d 645, 652, 125 P.2d 554 (hearing denied by the Supreme Court). This result is a necessary consequence of the vesting of both legal and equitable titles in the beneficiary, because there is no longer any purpose in keeping the trust relationship alive. The plaintiff cannot cure this essential defect in his cause of action upon this theory, once it has been disclosed, by omission of mention of the 1924 deed in subsequent statements of the same cause of action without explanation. Wennerholm v. Stanford Univ. Sch. of Med., 20 Cal.2d 713, 716, 128 P.2d 522, 141 A.L.R. 1358; Williamson v. Joyce, 137 Cal. 151, 153, 69 P. 980; Johnson v. Nolan, 105 Cal.App. 293, 294, 288 P. 78. Therefore the demurrer to the complaint insofar as it attacked the first cause of action was properly sustained.

[3, 4] The second cause of action seeks to set aside and cancel a deed which was issued by mistake. By the allegation that he did not intend to vest title in defendants' predecessor in interest, the plaintiff has alleged the non-delivery of the deed and therefore he is seeking to cancel an instrument which is void. Section 3412 of the Civil Code permits an action to cancel an instrument which is void or voidable and the statement of the facts constituting a deed's invalidity constitutes a sufficient allegation of a cause of action thereunder. Hart v. Church, 126 Cal. 471, 475, 58 P. 910, 59 P. 296, 77 Am.St.Rep. 195; Keele v. Clouser, 101 Cal.App. 500, 502, 281 P. 1073. Therefore the plaintiff has stated a good cause of action unless it is barred by one of the statutes of limitation pleaded or is subject to some defense which can be raised by demurrer.

[5-7] Ordinarily a suit to set aside and cancel a void instrument is governed by Sec. 343 of the Code of Civil Procedure. Moss v. Moss, 20 Cal.2d 640, 644, 128 P.2d 526, 141 A.L.R. 1422. However, when the gravamen of the cause of action stated involves fraud or a mistake, Code of Civil

Procedure, sec. 338(4), is the statute of limitations applicable and the cause of action is not deemed to have accrued until the discovery of the facts constituting the mistake. 4 Cal.Jur. 806. Here the plaintiff alleges that through ignorance of the English language he mistakenly issued a deed in August, 1927, the existence of which he did not discover until October 26, 1943, the date he brought suit. Clearly the basis of the action is a mistake and the three-year period after discovery, Code Civ.Proc., sec. 338(4), applies. This statute was not pleaded and therefore cannot be relied on in sustaining the demurrer.

[8] However, it is a well-settled rule of law that the defense of laches can be raised by a general demurrer. Kleinclaus v. Dutard, 147 Cal. 245, 250, 81 P. 516; Arnold v. Universal Oil Land Co., 45 Cal.App.2d 522, 530, 114 P.2d 408. It remains to be determined if the statement of facts constituting this cause of action shows such delay in the assertion of plaintiff's rights that the defense of laches can be said to exist as a matter of law. The most recent expression of the Supreme Court on the matter of laches is in Maguire v. Hibernia S. & L. Soc., 23 Cal.2d 719, 146 P.2d 673, 151 A.L.R. 1062. At page 736 of 23 Cal.2d, at page 681 of 146 P.2d, the court says: "The policy of this state with respect to lapse of time is embodied in statutes applicable to both legal and equitable actions, and mere lapse of time, other than that prescribed by such statutes, does not bar relief. * * * The defense of stale claims is nothing more than a particular application of the doctrine of laches and is based on estoppel. * * * Where, for example, an action is commenced many years after its accrual, the death of witnesses or destruction of evidence, presumed as well as actual, may prejudice the defendant and justify denial of relief because of staleness of the claim. * * * Even the authorities which refer to staleness of claims as a distinct concept recognize that lapse of time is of no consequence in the absence of a showing of any act by the defendant in denial of the plaintiff's rights which would have required affirmative action by the plaintiff." Although this statement was made in reference to a claimed distinction between laches and the defense of stale claims, the court held that a complaint for declaratory relief filed after 1940 based upon allegedly invalid corporation by-laws passed in 1864, stated a cause of action. The court stated that inasmuch as it did not affirmatively appear from the face of the complaint that any of plaintiffs' rights as members had been abridged in fact, any cause of action which the plaintiffs might have as a result of the by-laws had not yet accrued and consequently neither the statute of limitations could bar the action, nor could the defense of laches or stale claims be asserted. No prejudice to defendants other than mere lapse of time was shown on the face of the complaint and the cause of action had not yet accrued.

[9, 10] The only possible prejudice to the defendants which might give rise to an estoppel in the set of facts being considered now, which appears from the face of the complaint other than that present in mere lapse of time, is presented in the death of Karkin Zakaessian, the predecessor in interest of defendants and the other party to the misunderstood transaction. The earlier cases in California, where laches has been held to appear on the face of the complaint and wherein there is no discussion of the necessity that prejudice to the defendant appear on the face of the complaint, involve much greater periods of time than that here shown, generally more than half of a normal lifetime (Garrity v. Miller, 204 Cal. 454, 268 P. 622 (55 years); Kleinclaus v. Dutard, supra (35 years); Lichtenberg v. Burdell, 101 Cal.App. 20, 47, 281 P. 518 (25 years); Lindley v. Hinch, 57 Cal.App.2d 717, 720, 135 P.2d 421 (40 years), or a great increase in value in the property as shown on the face of the complaint (Livermore v. Beal, 18 Cal.App.2d 535, 545, 64 P.2d 987; Arnold v. Universal Oil Land Co., supra, 45 Cal.App.2d at page 534, 114 P.2d 408), even though such increase in value is sometimes not specifically mentioned in the opinion. Here there is a delay of 16 years without any increase in value being shown on the face of the complaint. The cases cited in the briefs relating to actions for rescission and restoration to the status quo have no application in their discussion of laches to an action such as the one before us because of the code section requiring promptness in such actions. If the defendants in their answer and proof show a great increase in value and improvements to the property, plus possession for the elapsed 16 years, the plaintiff's cause may be barred by laches, but it can not be said as a matter of law on the basis of the facts now before us that there is such prejudice to defendants shown on the face of this complaint

as to permit the assertion of that defense by general demurrer. The death of a material witness is one factor in determining whether laches is present. Austin v. Hallmark Oil Co., 21 Cal.2d 718, 735, 134 P.2d 777; Newport v. Hatton, 195 Cal. 132, 148, 231 P. 987. For the foregoing reasons the demurrer to the complaint here under consideration should not have been sustained on the ground that laches appeared from the face of the complaint.

The only case which appears to be at variance with the views herein expressed is Redpath v. Aagaard, 217 Cal. 63, at page 67, 16 P.2d 998, at page 999, wherein the court states inter alia in the last paragraph of the decision that a demurrer was properly sustained to a complaint on the ground of laches wherein the only prejudice to defendants which appeared from the face of the complaint was a delay of 16 years. However, it should be noted that the statute of limitations was properly pleaded and was an alternative and the main ground for sustaining the demurrer. In the light of the more recent statements of the Supreme Court, this case should be taken to stand on the statute of limitations ground and not on the dicta concerning laches.

Upon the oral argument appellant was asked to present to the court what amendments he would make to the second amended complaint if he were given leave to amend. A proposed amendment was submitted to this court. In view of the conclusion reached herein it is not necessary to consider at this time the merits of the proposed amendments.

[11] Counsel have argued the effect to be given the demurrer to the third cause of action containing the stock complaint to quiet title. In view of the reversal necessitated by the conclusion that the second cause of action states sufficient facts it is unnecessary to decide this point. See Bates v. Daley's, Incorporated, 5 Cal.App.2d 95, 104, 42 P.2d 706 and Earl v. Lofquist, 135 Cal.App. 373, 379, 380, 27 P.2d 416.

[12, 13] Certain grounds of special demurrer to the first and second causes of action were also urged. However, in view of the conclusions reached herein, it is unnecessary to consider the merits of the grounds for special demurrer because it is well settled that it is an abuse of discretion to sustain such demurrers without leave to amend. Wennerholm v. Stanford Univ. Sch. of Med., supra, 20 Cal.2d at page 720, 128 P.2d 522, 141 A.L.R. 1358; Maguire v. Hibernia S. & L. Soc., supra, 23 Cal.2d at page 737, 146 P.2d 673, 151 A.L.R. 1062. It is not here decided that the complaint may not be subject to special demurrer, and the trial court may in its discretion require the clarification of any uncertainties or ambiguities.

The judgment is reversed and the cause is remanded to the trial court with directions to enter an order overruling the demurrer of the defendants to the complaint as a whole.

PETERS, P. J., and KNIGHT, J., concur.

Hearing denied; SCHAUER, J., dissenting.

70 Cal.App.2d 731

HOWARD v. HOWARD. *

Civ. 12891.

District Court of Appeal, First District, Division 2, California.

Sept. 12, 1945.

1. Divorce 🔑331

An order of superior court, denying motion for allowance of attorney's fees and costs incurred by moving party in defending appeal from judgment establishing Nevada court's divorce and alimony decree as a judgment in California, was invalid.

2. Divorce 🔑331

An order, merely stating that superior court concluded as matter of law that counsel fees and costs could not be allowed divorced wife in aid of her defense of appeal from judgment establishing as judgment in California, a Nevada court's decree granting her divorce and alimony, without stating any facts in addition to those on which superior court based its previous invalid order denying motion for such fees and costs, was void as attempt to cure judicial error by merely stating reasons on which later order was based.

3. Divorce 🔑331

Though superior court's order, amending its order denying divorced wife's motion for attorney's fees and costs, incurred in defending appeal from judgment establishing as judgment, in California, a Nevada court's decree granting her divorce and alimony, by stating reasons for refusal of such allowance without stating any additional facts, was void, movant had right to appeal therefrom, but District Court of Appeal will dismiss appeal of its own motion for want of jurisdiction.

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* Subsequent opinion 163 P.2d 439.

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Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Action by Anita Z. Howard against Lindsay C. Howard to establish as a judgment in California a decree of a Nevada district court granting plaintiff a divorce from defendant, alimony, and support for the parties' minor children, in which defendant filed a cross-complaint. From an order amending an order denying plaintiff's motion for allowance of counsel fees and costs incurred in defense of defendant's appeal from a judgment for plaintiff, plaintiff appeals.

Appeal dismissed.

Prior opinion 157 P.2d 874.

Supplemental opinion, 163 P.2d 439.

Francis W. Murphy, Torregano & Stark, Remington Low, and Charles M. Stark, all of San Francisco, for appellant.

Walter McGovern, of San Francisco, and Neil S. McCarthy, of Los Angeles, for respondent.

STURTEVANT, Justice.

This is an appeal by the plaintiff from an order refusing to allow her moneys to pay alleged attorney fees and costs in defending an appeal, which the defendant has taken from a judgment establishing as a judgment in this state a decree rendered by the Second Judicial District Court of the County of Washoe in the State of Nevada in an action brought by the plaintiff to obtain a decree of divorce. The said California decree was rendered March 3, 1944. Later the defendant appealed. Thereafter the plaintiff filed a notice of motion. In that notice she alleged she would ask an order of court allowing her $5000 as counsel fees and $500 as and for costs. She also alleged she would base her motion on "all the records and files in the above entitled action, together with the affidavit of plaintiff attached hereto, points and authorities attached hereto and further affidavits or evidence as may be introduced at the time of the hearing of said motion." In the said affidavit so attached to said notice she alleged among other things that she had no moneys, that she desired to defend said appeal, that the defendant had a personal fortune of a value in excess of $3,000,000 and an annual income in excess of $150,000 and that since the first day of December 1941 she had been dependent upon relatives for the maintenance of herself and her children and had been unable to pay any moneys to her attorneys. Said documents were served on the defendant and he served and filed an affidavit in which he alleged that the plaintiff was not without moneys to pay such alleged costs, that their children were not supported by plaintiff's relatives, that defendant had supported said children from the date they were born, that of the costs thereof $15,920 was paid by defendant's father, C. S. Howard, and the balance $27,882.38 was paid by the defendant, that said C. S. Howard was by an order of court appointed guardian of said children on January 20, 1944, duly qualified and has since acted as such guardian, that the children are in boarding schools; that plaintiff never at any time supported, educated or maintained said children; that $5000 is not a reasonable sum to pay plaintiff's attorneys and that $500 is not a reasonable sum to pay her costs. Defendant denied he had a personal fortune of $3,000,000 or that he had an annual income in excess of $150,000 and alleged that his income was not in excess of $20,000.

On those affidavits the motion was heard. The trial court, on October 17, 1944, made an order "that the motion of the above named plaintiff and cross-defendant, Anita Z. Howard, for attorney fees and costs heretofore filed herein be and the same is hereby denied." From that order no appeal was taken. On October 27, 1944, the plaintiff served and filed a notice of motion to amend said order. The notice recited said motion would be based on "the motion for an allowance of attorneys' fees and costs heretofore made, the affidavits in support thereof, the order denying the same, this motion, the affidavit in support thereof, plaintiff and cross-defendant's points and authorities in support of said motion, and the records and files of said action." On the same date Mr. Charles M. Stark, one of plaintiff's attorneys, made an "affidavit in support of motion" which we assume is the affidavit above mentioned in that notice. The only allegation of new matter contained in said affidavit was as follows: "That in order to properly present a record to said appellate court, said order denying said motion for attorneys' fees and costs properly should set forth the grounds upon which the court arrived at its conclusion that said motion should be denied." Later the trial court, on December 6, 1944, entered an order reciting no new facts but merely providing: "Said court concludes as a matter of law that counsel fees and costs in such a case as that at bar can, under no circumstances be allowed to plaintiff and cross-defendant in aid of her defense of said appeal and that counsel fees and costs are not legally allowable under the laws of the State of California in the defense of an appeal from a judgment of the court establishing as a foreign judgment the judgment of a sister state for a divorce and the payment of alimony and support for minor children as same was by said sister state decreed. For that reason, the court has not considered the application of plaintiff and cross-defendant for said fees insofar as her need therefor as a matter of fact is concerned but has hereby passed upon the allowability thereof under any circumstances as a matter of law."

[1, 2] From that order this appeal was taken. The defendant contends the order appealed from in effect impeached the order dated October 17, 1944, and was invalid. We think the latter order was invalid. The order dated October 17, 1944, was made in response to a written application therefor. From that order no appeal was taken. On December 6, 1944, the trial court made the order appealed from which in effect amends the order dated October 17, 1944. The order last mentioned was based on a written application therefor. That written application set forth no additional facts than were set forth in the preceding application. The latter order set forth no additional facts but it purported to set forth the reasons on which it was based. That was an attempt to cure judicial error and such procedure was not permissible. Stevens v. Superior Court, 7 Cal.2d 110, 113, 114, 59 P.2d 988; Phillips v. Trusheim, 25 Cal.2d 913, 156 P.2d 25. In that case, 25 Cal.2d at page 916, 156 P.2d at page 27, the court said:

" 'The situation here more closely resembles the cases of Egan v. Egan, supra (90 Cal. 15, 27 P. 22); Coombs v. Hibberd, 43 Cal. 452, and Owen v. Crocker-Huffman Land & Water Co., 38 Cal.App. 649, 177 P. 299, in all of which it was held that, all of the matters before the court at the time of the making of the second order having been considered by it at the time of the making the first order, it cannot, simply because upon a reexamination of the same matters it has reached a different conclusion, give effect to the second determination of the same issue by modifying or annulling the original order or judgment.' Stevens v. Superior Court, supra; see, also, Vale v. Maryland Casualty Co., 101 Cal.App. 599, 281 P. 1058.

"In the present case, Judge Thompson, before whom the appellants' action was pending determined, it must be assumed, that he had the power to enter judgment against Trusheim and his decision was correct. Trusheim's motion was heard by Judge Turrentine of the same court, who ruled that there was no jurisdiction to enter the judgment and made the order now under review. His action was clearly an attempt to correct a determination which, in his opinion, was rendered by reason of judicial error. There is no showing whatever of judicial inadvertence but the ruling on the motion was made upon the ground that the judgment had been given in disregard of section 581a of the Code of Civil Procedure. Moreover, as in the Stevens case, supra, it is neither asserted nor does it appear that, in ruling upon Trusheim's motion, Judge Turrentine had before him any matters not considered by Judge Thompson when he rendered judgment for the appellants."

[3] In Holtum v. Greif, 144 Cal. 521, commencing on page 524, 78 P. 11, at page 12, the court said: "The decisions of this court are numerous and uniform to the effect that a judgment or order once regularly entered can be reviewed and set aside only in the modes prescribed by statute. If they have been entered prematurely or by inadvertence, they may be set aside on a proper showing (Odd Fellows' Sav. Bank v. Deuprey, 66 Cal. 168, 170, 4 P. 1173, and cases cited), and if the order as entered is not the order as made, the minutes may be corrected so as to make them speak the truth (Garoutte v. Haley [104 Cal. 497, 38 P.194], and cases cited), but, subject to these exceptions, the order is reviewable only on appeal, and, the decision of the trial court having been once made after regular submission of the motion, its power is exhausted. It is functus

officio. Odd Fellows' Sav. Bank v. Deuprey [66 Cal. 168, 170, 4 P. 1173]; Dorland v. Cunningham, 66 Cal. 484, 6 P. 135; Lang v. Superior Court, 71 Cal. [491], 492, 12 P. 306 [416]; Carpenter v. Superior Court, 75 Cal. [596], 597, 19 P. 174; Belser v. Hoffschneider, 104 Cal. 455, 38 P. 312." It is clear, therefore, that the order dated December 6, 1944, was void. Notwithstanding that fact the plaintiff had the right to appeal. Ivory v. Superior Court, 12 Cal.2d 455, 85 P.2d 894. However, having appealed and the record being presented to us showing as it does an appeal from a void order, this court has no jurisdiction and will of its own motion dismiss the appeal. 2 Cal.Jur. 746, Appeal and Error, sec. 434; Bienenfeld v. Fresno Milling Co., 82 Cal. 425, 22 P. 1113; Pedlar v. Stroud, 116 Cal. 461, 463, 48 P. 371.

The appeal of the plaintiff is dismissed.

NOURSE, P. J., and GOODELL, J., concur.

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70 Cal.App.2d 811

PACIFIC STATES SAVINGS & LOAN CO. v. MORTIMER, Building and Loan Com'r.

Civ. 12994.

District Court of Appeal, First District, Division 2, California.

Sept. 20, 1945.

As Modified on Denial of Rehearing Oct. 4, 1945.

1. Appeal and error 🔑801(1)

District Court of Appeal could not determine on notice of appeal alone, and in absence of any other parts of the record on appeal, that an appeal was frivolous by assuming upon respondent's statement that only issue that would be tendered on appeal was one which respondent anticipated.

2. Appeal and error 🔑801(4)

Where a consideration of a motion to dismiss an appeal on ground that it is frivolous requires an examination of the appeal on its merits, the motion will be denied.

3. Appeal and error 🔑786

An appeal may be dismissed where mere examination of judgment roll demonstrates that appeal is frivolous.

4. Appeal and error 🔑91(9)

Order confirming sales of parcels of real property owned by building and loan association by commissioner in liquidation of association was an appealable order on theory that it was an order for doing of an act against association which would otherwise become final and which would deprive association of a substantial property right. Code Civ.Proc. § 963.

5. Appeal and error 🔑76(1)

A judgment conclusive of any question in controversy between parties is a "final judgment" from which an appeal is authorized. Code. Civ.Proc. § 963.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Judgment".

6. Appeal and error 🔑138

The word "party", as used in statute providing that any party aggrieved may appeal, includes any person who is a party to the record. Code Civ.Proc. § 938.

See Words and Phrases, Permanent Edition, for all other definitions of "Party".

7. Appeal and error 🔑138

One may become "party to the record", so as to be entitled to appeal, by an order to show cause which brings him into the proceedings and enables the court to make an order adverse to him. Code Civ.Proc. § 938.

8. Appeal and error 🔑143

Where order to show cause was served on building and loan association pursuant to statute authorizing sale of property in liquidation only after a hearing "on such notice as the court shall prescribe", and association appeared and contested the order for a sale, association became a "party to the record" and entitled to appeal from the subsequent order. Code Civ.Proc. § 938; Gen.Laws 1937, No. 986.

See Words and Phrases, Permanent Edition, for all other definitions of "Party to the Record".

9. Appeal and error 🔑357(2)

Where appellant and trial judge assumed that statute giving members of

Legislature right to a continuance in pending proceeding was applicable to extend time for serving notices of appeal in a cause where appellant's counsel was attending the Legislature, and respondent did not question trial judge's power to grant continuance until filing date fixed in order had passed, reviewing court was authorized to relieve appellant from default in failing to file notices of appeal within time required by the new rule, especially where notices in 20 of the 62 cases in which appeal was taken were timely filed, and respondent had not been prejudiced by delay in filing other notices. Code Civ. Proc. § 1054; Rules on Appeal, rule 53.

Appeal from Superior Court, City and County of San Francisco; Elmer E. Robinson, Judge.

◆

Special proceedings wherein the Pacific States Saving & Loan Company appeared in response to several orders to show cause why the several sales of 62 parcels of real property owned by the corporation by Frank C. Mortimer, as Building and Loan Commissioner, serving as commissioner in liquidation of the affairs of the corporation, should not be approved. From separate orders authorizing the commissioner in liquidation of the affairs of the corporation to sell the parcels of real property, the corporation appeals. On motion by Frank C. Mortimer, as Building and Loan Commissioner, to dismiss the appeals in the present and in the 61 other related cases, and on corporation's motion to be released from default.

Appellant ordered relieved from alleged default, and motion to dismiss the several appeals denied.

Gardiner Johnson, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., and John J. Dailey, Clarence A. Linn, and Lenore D. Underwood, Deputy Attys. Gen., for respondent.

NOURSE, Presiding Justice.

Respondent moves to dismiss the appeals in this and in sixty-one other related cases from separate orders of the superior court authorizing the commissioner in liquidation of the affairs of the corporation to sell sixty-two parcels of real property owned by the corporation. The appeals have been taken by the corporation as an interested party appearing in response to the several orders to show cause why the several sales should not be approved. Since the questions presented on this motion are identical in each of the sixty-two cases the reasons given for our judgment is made equally applicable to all.

[1-3] It is argued that the appeal is frivolous because the respondent is alone charged with the duty of determining whether to liquidate, and, having sold under that authority, and the sale having been approved by the superior court, the appeal merely puts in issue the question of authority heretofore determined in Pacific States Savings & Loan Co. v. Hise, 25 Cal.2d 822, 155 P.2d 809. But we cannot determine on the notice of appeal alone, and in the absence of any other parts of the record on appeal, that an appeal is frivolous by assuming upon the statement of respondent that the only issue that will be tendered on the appeal is the one which respondent anticipates. It has been held that where a consideration of a motion to dismiss an appeal on this ground requires an examination of the appeal on its merits the motion will be denied. Christin v. Story, 211 Cal. 381, 295 P. 515; In re Estate of Sayles, 212 Cal. 437, 298 P. 971; Kelso v. Ulrich, 66 Cal.App.2d 873, 153 P.2d 440. The exception to this rule that an appeal may be dismissed where a mere examination of the judgment roll demonstrates that the appeal is frivolous, Sonoma Magnesite Co. v. National, Etc., Corporation, 189 Cal. 433, 208 P. 962, is not applicable here because no part of the judgment roll is before us.

[4, 5] Respondent states that the order of confirmation is not an appealable order, but does not argue the point. It would seem that such an order, like one made during a receivership, would be appealable on the theory that it is an order for the doing of an act by or against the appellant which would otherwise become final and which would deprive appellant of a substantial property right. Colma Vegetable Ass'n v. Superior Court, 75 Cal.App. 91, 95, 242 P. 82; Fish v. Fish, 216 Cal. 14, 16, 13 P.2d 375. See also Grant v. Superior Court, 106 Cal. 324, 39 P. 604; Grant v. Los Angeles, etc., Ry. Co., 116 Cal. 71, 47 P. 872; City of Los Angeles v. Los Angeles City Water Co., 134 Cal. 121, 66 P. 198; Anglo-Californian Bank v. Superior Court, 153 Cal. 753, 96 P. 803. In the Colma Vegetable Ass'n case the court pointed out that section 963 of the Code of Civil Procedure authorized an appeal from *a* final

judgment—not from *the* final judgment; that a judgment conclusive of any question in controversy between the parties is "final" as to that question, Sharon v. Sharon, 67 Cal. 185, 196, 7 P. 456, 635, 8 P. 709; and that, if the judgment or order requires "the doing of some act by or against the aggrieved party" [75 Cal.App. 91, 242 P. 83], it is final as to that controversy and hence appealable. In the case of Fish v. Fish, supra, the clause just quoted was cited with approval in a holding that an order made in a receivership determining the interest of the parties to the main litigation was appealable as an "act by or against" the aggrieved party.

[6-8] Respondent argues that the appellant is not a proper party to the proceeding and hence has no right to appeal from the order. He cites Pacific States Savings & Loan Co. v. Hise, 25 Cal.2d 822, 155 P.2d 809, and Trede v. Superior Court, 21 Cal.2d 630, 134 P.2d 745. Neither case is in point. Section 938 of the Code of Civil Procedure provides that "any party aggrieved may appeal." The word "party" includes any person who is a "party to the record." Elliott v. Superior Court, 144 Cal. 501, 507, 77 P. 1109, 1112, 103 Am.St.Rep. 102. One may become a "party to the record" by an order to show cause which brings him into the proceeding and enables the court to make an order adverse to him. Anglo-Californian Bank v. Superior Court, 153 Cal. 753, 756, 96 P. 803. Section 13.16 of the Building and Loan Association Act, Deering's General Laws Act No. 986, authorizes the sale of property in liquidation only after a hearing "on such notice as the court shall prescribe." Here an order to show cause was served on appellant pursuant to this section; it appeared and contested the order for a sale, and thereby became a party entitled to appeal from the subsequent order.

The remaining ground urged by respondent for a dismissal of the appeal relates to the failure of appellant to comply with the Rules on Appeal governing the preparation of the transcript. Appellant did not serve upon the respondent its request filed with the county clerk to prepare a transcript, and in forty-two of the sixty-two cases such request was not filed within the time prescribed in the Rules on Appeal.

Appellant makes two replies: First, that all the requests for the preparation of transcripts were either delivered to counsel for respondent or were made available to him before the time for filing them had expired and that counsel for respondent undertook to accommodate appellant's counsel in relation to the proceedings on appeal while the latter was engaged in his duties at Sacramento as a member of the legislature. From this it is argued that since counsel for respondent had notice of the time and place of filing thereof in due time and made no objection to the manner in which they were received the requirement of "service" upon him has been waived.

[9] Secondly, appellant argues that the notices were in fact served within due time. The argument rests upon these facts: counsel for appellant was a member of the state Legislature which was at the time in regular session at Sacramento. Before expiration of the time within which these notices should have been filed the judge of the superior court in San Francisco in which the proceedings were pending, upon application duly made by counsel for appellant, entered an order directing that "all hearings and other proceedings in the above-entitled action and/or proceeding be continued until thirty (30) days after final adjournment of the Fifty-Sixth Session of the California Legislature." The order was made pursuant to section 1054 of the Code of Civil Procedure. But respondent argues that the section is not applicable because it permits an extension of time when an act is to be done "as provided in this code" whereas the time for filing the notices here involved is fixed in the Rules on Appeal. The argument rests upon a very narrow interpretation of the code section. When it was enacted, and during its frequent amendments, the procedure for the preparation of a record on appeal in civil cases was prescribed in the same code and the new rules which became effective in 1943 correlated and unified the various steps of procedure found in the former code sections such as § 953a et seq. Whether the right given to a member of the legislature under section 1054 of a continuance in pending proceedings was intended to cover those acts which were thereafter covered by the Rules on Appeal has not been determined by any authority cited to us and we do not deem it necessary to decide it here, because if respondent correctly interprets the section it is such a case as that contemplated by Rule 53 where the reviewing court is authorized to relieve a party from default in failing to comply with the new rules. Here the

appellant and the trial judge assumed that the code section was applicable and acted accordingly. The respondent did not question the power of the court to grant the continuance until the filing date fixed in the order of court had passed. Of the sixty-two cases in which an appeal was taken, the notices in twenty were filed within the time fixed in the rules. As to the remaining forty-two, respondent states that they were filed "from fourteen to seventeen days" late. This is not a serious default as each appeal is taken separately and none have been consolidated for hearing. It may be assumed that many of the legal questions to be presented in the twenty perfected appeals would be determinative of those following. Assuming that appellant is in default in this respect the respondent has not shown any prejudice to him by reason of the short delay.

Ordered that appellant is hereby relieved from the alleged default on condition that all transcripts on appeal be filed herein without further delay. The motions to dismiss the several appeals are denied.

GOODELL, J., and DOOLING, Justice pro tem., concur.

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70 Cal.App.2d 755

FRENCH v. FRENCH.

Civ. 3404.

District Court of Appeal, Fourth District, California.

Sept. 14, 1945.

1. Contracts 🔑147(2)

Intention of the parties must be ascertained, if possible, from language of instruments constituting the contract, and when so ascertained it should be given effect.

2. Husband and wife 🔑31(4)

Where prenuptial agreement provided that husband should execute irrevocable will creating in wife a life estate in certain property the remainder of which was to be left to husband's son by prior marriage, and contained additional provision conditioning vesting of life estate in wife upon parties not being divorced or separated because of marital difficulties at time of husband's demise, subsequent provision would not be disregarded as repugnant to first provision giving wife a life estate, but would be construed as creating a condition subsequent whereby wife's right to life estate might be lost before vesting.

Appeal from Superior Court, Inyo County; Wm. D. Dehy, Judge.

Action by Ann K. French against Leland Wesley French, as executor of the estate of C. W. French, also known as Charlie Wesley French, deceased, for a declaration that defendant held in trust for plaintiff a life estate in certain real property. From a judgment for plaintiff, the defendant appeals.

Reversed.

William K. Young, of Los Angeles, and Glenn E. Tinder, of Bishop, for appellant.

Jess G. Sutliff, of Independence, for respondent.

MARKS, Justice.

This is an action brought by the widow of C. W. French against the executor of his estate to declare that defendant held in trust for her a life estate in certain real property in Inyo County.

Plaintiff and C. W. French were married in Reno, Nevada, on December 18, 1938. They separated on July 22, 1939, and did not thereafter live together. Mr. French died on February 18, 1943. He had one son, Leland Wesley French, the issue of a former marriage.

On December 17, 1938, plaintiff and C. W. French entered into a prenuptial agreement the provisions of which form the basis of this action. In it the prospective marriage is given as the reason for the contract. The agreement contained the following pertinent provisions:

"* * * the said first party (C. W. French) does hereby promise and agree to and with second party (Mrs. French) that he will immediately upon the solemnization of said proposed marriage make and execute in the manner and form prescribed by law, a last will and testament, under and by virtue of which document the said real property shall be disposed of in the following manner, to wit: The right to the use, occupancy and control of the same and the rents, issues and profits thereof for and during the term of the natural life of the second party, shall be vested in the second party * * * and that title in fee simple thereto, subject to such liens or encumbrances as may have been placed thereon by the first party, shall immediately vest in those who may be designated by the last will and testament or by other instrument duly executed by first party; provided, however, that should the second party at any time subsequent to the demise of the first party abandon said real property or permit the same to become dilapidated or to become substantially depreciated in value because of lack of repair or lack of proper attention, then and in that event all rights of the second party in and to the same and in and to the rents, issues and profits therefrom shall immediately cease and determine, as hereinbefore provided. * * * (if) at the time of the demise of the first party the said first party and second party be divorced or separated or living separate and apart each from the other because of marital difficulties, misunderstandings or disagreements, then and in that event and in either of said events this agreement shall be absolutely null and void and of no force and/or effect whatsoever with respect to any rights or alleged rights of the second party in and to said real estate hereinbefore described."

It was also provided that the will to be executed should be irrevocable and if French failed to make it the contract might be used for "the definition or declaration of the rights of the second party in and to the real estate." No such will was made or at least none was found when he died.

The trial court construed the provisions of the contract as repugnant and gave effect to the first, that is, the provision to make an irrevocable will, giving plaintiff a life estate in the property (Henne v. Summers, 16 Cal.App. 67, 116 P. 86. See Civ.Code, Secs. 1636 to 1654 incl.), and disregarded the subsequent provisions specifying conditions under which the life estate would be forfeited or the right to it terminated.

[1] It is a fundamental rule of construction of contracts that the intention of the parties must be ascertained, if possible, from the language of the instruments and when so ascertained should be given effect. Universal Sales Corporation v. California, etc., Mfg. Co., 20 Cal.2d 751, 128 P.2d 665; Schrank v. Sterling Products Co., 33 Cal.App.2d 107, 91 P.2d 143; Hamilton v. Ferguson, 26 Cal.App.2d 390, 79 P.2d 427; Turner v. Cook, 117 Cal.App. 399, 4 P.2d 182.

[2] We think the intention of the parties clear from the terms of the contract. They intended to provide towards the support of Mrs. French by creating in her a life estate in the property and also to provide for the son of Mr. French. However, the life estate of Mrs. French was not to be absolute but might be terminated on the happening of at least one of two conditions. The first condition set forth in the contract was intended to arise, if at all, after the death of Mr. French. If Mrs. French abandoned the property or suffered it to become dilapidated or depreciated in value because of lack of repair, her life estate was to be terminated. Second, the vesting of the life estate was conditioned upon the parties not being divorced or "separated or living separate and apart each from the other because of marital difficulties, misunderstandings or disagreements * * *" Thus it appears rather clearly that it was the intention of the parties to create conditions subsequent whereby the life estate of Mrs. French might be terminated after vesting, or the right to it might be lost before vesting. As the parties had separated and were living separate and apart from each other at the time of the death of Mr. French, it would seem that Mrs. French had lost the right to her life estate unless some legal reason can be found to suspend this condition of the contract. The present record fails to show any such reason.

Plaintiff introduced in evidence a certified copy of a complaint for separate maintenance filed by Mrs. French against Mr. French on August 13, 1940. It was alleged that Mrs. French left Mr. French because of his cruel treatment of her. No other part of the record in that case is before us and the balance of the record here is silent on the question of the reason for the separation.

Plaintiff argues that she was compelled to leave Mr. French because of his cruel and inhumane treatment of her; that it would be inequitable and unjust to deprive her of her life estate because of the separation; that to do so would permit the devisees of Mr. French to profit from his wrongs which prevented plaintiff from performing under the contract. In support of this argument she cites the cases of Barnes v. Barnes, 110 Cal. 418, 42 P. 904; Schneppe v. Schneppe, 124 Md. 330, 92 A. 891, Ann.Cas.1916D, 988; and Jackson v. Jackson, 222 Ill. 46, 78 N.E. 19, 6 L.R.A.,N.S., 785.

We cannot pass on the question under the present state of the record. If we should assume, without holding, that these arguments of plaintiff are legally sound and that defendant may not urge the voiding of the contract because of the separation if it was caused by the misconduct of Mr. French, there is no sufficient evidence in the record to support the conclusion that the cruelty of Mr. French drove plaintiff from the family domicile. Plaintiff states in her brief that the "matter was judicially decided in favor of respondent." If in so stating she referred to a final judgment in the separate maintenance action there is nothing in the record to indicate how that case was decided. There is no evidence in the record on the question of the cause of the separation. If the misconduct of defendant be finally held to be sufficient to suspend the provisions of the contract providing for the voiding of its provisions because of the separation of the parties, that matter must be left to future determination upon competent evidence produced at another trial. Under the present state of the record we need express no opinion on the legal sufficiency of the argument.

The judgment is reversed.

GRIFFIN, Acting P. J., concurs.

70 Cal.App.2d 776

FIDELITY & CASUALTY CO. OF NEW YORK v. ABRAHAM et al.

Civ. 12797.

District Court of Appeal, First District, Division 2, California.

Sept. 19, 1945.

1. Trial 🔑397(1)

Where whole evidence supporting defendant's defense of estoppel depended upon oral testimony of particular witness and to determine that issue it was incumbent upon trial court to rule upon truth of such testimony, failure of court to so rule was error.

2. Evidence 🔑594

The uncontradicted and unimpeached testimony of a witness cannot be arbitrarily disregarded.

3. Appeal and error 🔑931(1)

Where trial court did not find that uncontradicted and unimpeached testimony of particular witness was false, District Court of Appeal would assume that it was true.

4. Attorney and client 🔑101(2)

Attorneys for plaintiff and for defendant, without their clients' consent, did not have statutory authority to make an agreement, binding upon respective clients, that any judgment acquired would not be enforced against defendant in exchange for information which would permit a greater recovery against codefendants. Code Civ. Proc. § 283.

5. Attorney and client 🔑63

The rules governing the attorney-client relation are founded on the general rules governing the relation of principal and agent. Code Civ.Proc. § 283.

6. Attorney and client 🔑103

The rule that, notwithstanding lack of express or apparent authority in agent, his act is binding on principal if principal ratifies act and accepts benefits thereof applies to attorney-client relation. Code Civ. Proc. § 283.

7. Attorney and client 🔑104

Where plaintiff was an employee in office of attorney and acted merely as a nominal plaintiff for purpose of suit and acted upon attorney's agreement with defendant's counsel not to press collection of any judgment against such defendant in exchange for information as to property of codefendants by amending complaint and levying an attachment upon property disclosed, was charged with knowledge of agreement and could not contend that attorney, rather than plaintiff, accepted benefits. Code Civ.Proc. § 283.

8. Principal and agent 🔑177(3)

Where purchaser of judgment used employee in office of its attorney as a nominal plaintiff in action against indemnity company, which had posted an undertaking for release of an attachment made during course of original action, nominal plaintiff's knowledge of agreement between original judgment creditor and one of the judgment debtors under which judgment was not to be enforced against such judgment debtor because of information furnished concerning property of other judgment debtors was assumed to be that of her principal and she was bound thereby.

9. Estoppel 🔑92(1)

Where plaintiff, by reason of its liability on undertaking to release attachment against defendant in a prior litigation, and with knowledge of judgment creditor's agreement not to collect judgment from defendant in consideration for information which had enabled judgment creditor to attach property of a codefendant in such action, upon an outlay of less than $6,000 and over defendant's objection, purchased judgment and sued indemnity company on its undertaking to release attachment against such codefendant, recovering over $9,000, plaintiff was estopped to repudiate agreement in a subsequent action on defendant's indemnity contract to recover from defendant amount of plaintiff's attorney's fees and expenses incident to suit against indemnity company.

◆

Appeal from Superior Court, City and County of San Francisco; Robert McWilliams, Judge.

Action by the Fidelity & Casualty Company of New York against N. Abraham, sometimes known as Nathan Abraham, and another, to recover attorney's fees and expenditures incidental to an indemnity agreement executed by defendants with plaintiff for the release of an attachment against named defendant. Judgment for plaintiff, and defendants appeal.

Reversed.

A. B. Bianchi, of San Francisco, for appellants.

Hadsell, Sweet & Ingalls, of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued to recover attorney's fees and expenditures incidental to an indemnity agreement executed by defendants with plaintiff for the release of an attachment against N. Abraham in another action then pending against that defendant. The cause was tried to the court without a jury upon a stipulation of facts and the testimony of one witness. Plaintiff had judgment for the full amount prayed for.

In the year 1926 the defendant N. Abraham entered into a joint venture with Harry and Lou Silberman who were engaged in the scrap metal business under the corporate name of San Francisco Iron & Metal Company. The new venture became indebted to Goodyear Redwood Lumber Company in the sum of $4909.61. In December 1927 the partnership dissolved; its assets were transferred to the San Francisco Iron & Metal Company which assumed the indebtedness of the partnership including the claim of the lumber company. The Silbermans disputed this claim, asserting, on the basis of weighers' receipts, that they had been overcharged approximately one-half the amount of the claim. In 1929 the lumber company represented by attorney Hatch assigned the claim to Miss V. Berges who was a secretary in the attorney's office and who, through her attorney, filed suit on the claim against N. Abraham, the two Silbermans, and the N. Abraham Mercantile Company. On February 13, 1929, Berges caused a writ of attachment to issue and levy was made upon the personal property of N. Abraham. On February 21, 1929, N. Abraham and his wife Rose executed the indemnity agreement with respondent herein for the release of such attachment.

The foregoing facts are not controverted but the respondent disputes appellants' version of what occurred thereafter. At all the times herein mentioned A. B. Bianchi was the attorney acting for these appellants. He testified, without contradiction, that before this undertaking was filed and on many occasions thereafter he had several conversations with the attorney for Berges, the effect of which was that, for various considerations promised to Berges, the latter would press her claim against the codefendant of the Abrahams only, and would not attempt to collect from the Abrahams.

After Berges obtained judgment against all the parties sued for the full amount of the claim, it is conceded that the respondent herein carried on negotiations for the purchase of the judgment and that respondent was fully informed of the so-called Hatch-Bianchi agreement. One of the considerations for this agreement was that Bianchi would disclose to Berges the interest of the San Francisco Iron & Metal Co. and give her information as to property of the Silbermans which she could attach. Bianchi performed this part of the agreement and, acting on the information so received, Berges amended her complaint to include the corporation as a party defendant and levied an attachment on its property and upon that of the Silbermans. To release this attachment the Century Indemnity Company executed its indemnity agreement. Other elements of the Hatch-Bianchi agreement will be referred to later. Following the history of the case, it appears that over the repeated protests of these appellants and with full knowledge of the Hatch-Bianchi agreement the respondent herein purchased the Berges judgment at its face value and commenced suit in the name of Nelson, an employee in the office of the attorneys, against the Century Indemnity Company in September, 1931. This litigation was carried into the federal courts and was not ended until January, 1939, when judgment in favor of Nelson became final. Thereupon the Century Company paid to Nelson the sum of $9,528.62 covering the amount of the Berges judgment, interest and costs recovered from the Century Indemnity Company. The present suit is to recover attorneys' fees and other expenses incidental to the litigation with the Century Indemnity Company. It was tried upon an amended complaint, an answer and an amendment to the answer which set up the special defense of estoppel arising out of the Hatch-Bianchi agreement.

In support of this defense Bianchi was the sole witness. He testified that Hatch promised not to proceed to a satisfaction of a judgment against Abraham if he could obtain security against the co-defendants sufficient to satisfy any judgment he recovered, and if Bianchi would give him information by which he would obtain a judgment against the Metal Company. This portion of the agreement was immediately acted upon. Through Abraham's information, Berges acting through her attorney Hatch, amended her complaint to include the Metal Company as defendant, and through the same source, Berges attached property of the co-defendants who forthwith posted a bond in the sum of $6000 with the Century Indemnity Company as surety. But Berges was still reluctant to go to trial without the aid of Bianchi and Abraham to meet the counterclaim of the co-defendants. Upon the repeated assurance of Hatch that the agreement would be honored Bianchi and Abraham gave him the evidence through which he was able to prove that the weight receipts relied on by the Silbermans were false. Hence, through Bianchi's compliance with his agreement, Hatch and Berges were enabled to obtain a judgment against the co-defendants for the full sum sued for. This judgment was entered in October, 1929. The co-defendants took an appeal and Hatch persuaded Bianchi not to appeal in behalf of Abraham and again stated that he would abide by his agreement and asked and received, as further consideration for the agreement, the professional aid of Bianchi in securing a dismissal of the Silbermans' appeal and money paid to Hatch as attorney for Berges.

In explanation of a letter dated February 26, 1929, from Hatch to Bianchi in which he stated that he proposed "to primarily direct" his efforts against the co-defendants, and that "this is not to be considered as in any way exonerating your client" the witness Bianchi testified that this "was just a feeler" and after that date, and after Hatch got his bond from the Century Indemnity Company, and after Hatch was pretty well assured he would get a judgment in full against the co-defendants that "he expressly committed himself * * * not to enforce the judgment against the defendant Abraham." The witness also testified that knowledge of this agreement was disclosed to respondent before it purchased the Berges judgment together with a protest and demand that respondent stand suit on the bond so that the defense of estoppel might be raised against Berges—the claimed beneficiary of the Hatch-Bianchi agreement. All this testimony stands uncontradicted—except for the self-serving line in the Hatch letter of February 26, 1929. Then at the close of the trial it was stipulated that Bianchi should be deemed to have testified that he informed Hatch of the existence of a bank account of the co-defendants Silbermans, that thereafter Hatch levied on that account, and thereafter the co-defendants delivered the release bond of the Century Indemnity Company upon which the respondent herein sued and recovered judgment.

On this evidence the trial court found:

"That it was not orally or otherwise agreed or understood by the said Berges and the said Nathan Abraham, either in consideration of any promises of the defendant, Nathan Abraham, to divulge information as to the identity and location of attachable property belonging to his co-defendants in the action mentioned in paragraph III of these findings or information which would make possible and facilitate the proof of the total of the claim of the plaintiff, Berges, in said action, or in or for any other consideration, or at all that said Berges would not press the payment of any judgment obtained against said Nathan Abraham but would proceed to the satisfaction thereof against his said co-defendants only and/or their surety; that it was not further understood or agreed by said Berges and said Nathan Abraham that, pending any appeal or motion for a new trial by the co-defendants of Nathan Abraham in said action mentioned in paragraph III of these findings, said Berges would also refrain from proceedings for satisfaction of judgment against said Nathan Abraham or surety; that the counsel for Berges in said action did not promise or agree orally or otherwise or at any time that he would not proceed to enforce any judgment in said action against said Nathan Abraham or his surety; that the said defendants Nathan Abraham and Rose Abraham did not consent to or authorize the purchase of said judgment in said Berges action by the said G. Nelson and/or the plaintiff herein and that said defendants herein advised the plaintiff herein of their objection to the purchase of said judgment; that prior to the purchase of said judgment by the said G. Nelson as found in these findings, the plaintiff herein and said G. Nelson were advised by defendants that defendants claimed that said Berges and said defendant Nathan Abraham had entered into the agreements which are herein found not to have been made."

In denying a motion for a new trial the court amended this finding as follows: "That, without reflecting or ruling upon, and without intending to reflect or rule upon, the truth of the oral testimony of A. B. Bianchi as a witness for defendants, the court finds that the evidence in this case, taken as a whole, does not affirmatively establish that such agreements were made or that such understandings were had and does not affirmatively establish that the attorney for Berges (Hatch) had any authority to make such agreements or to enter into such understandings, and the findings in this paragraph in respect to said agreements or understandings are to be so understood."

[1-3] The finding is confusing. If it was intended as a finding that Berges and Abraham did not personally enter into the agreement it is correct to that extent. If it was intended as a finding that Hatch and Bianchi did not enter into the agreement as their agents it is contrary to all the evidence. The portion of the finding that plaintiff and Nelson were advised of defendants' claim or version of the Hatch-Bianchi agreement before they purchased the Berges judgment is supported by the evidence and not controverted by the respondents at this time. But the amended finding puts an entirely different phase upon the whole subject. It reads: "without reflecting or ruling upon * * * the truth of the oral testimony of A. B. Bianchi as a witness for defendants." Now the whole evidence supporting appellants' defense of estoppel depended upon the oral testimony of the witness Bianchi and to determine that issue it was incumbent upon the trial court to "rule upon" the "truth" of that testimony. If that testimony was true the defense of estoppel was proved, assuming that the contract is valid, a point to be considered later. But, if the testimony of this witness was false, it was necessary for the court to so find and then the question would be presented here whether, under all the circumstances found in the record, there was anything to support the finding that the testimony was false, or that it was so inherently improbable that it should be rejected as a matter of law. But the settled rule is that the uncontradicted and unimpeached testimony of a witness can not be arbitrarily disregarded. In Gomez v. Cecena, 15 Cal.2d 363, 366, 101 P.2d 477, 478, the supreme court said: "While no universal and immutable formula can be prescribed for determining the weight to be accorded testimonial evidence, it has frequently been said that testimony which is not inherently improbable and is not impeached or contradicted by other evidence should be accepted as true by the trier of facts." (Citing cases.) Since the trial court did not find that the testimony was false we must presume that it was true. Hence, the purport of the finding as a whole is that the agreement was made as testified to but that neither Hatch nor Bianchi had authority to make it or to bind their clients.

[4-6] It may be conceded that, under the provisions of section 283 of the Code of

Civil Procedure defining the powers of an attorney in relation to his client, neither Hatch nor Bianchi had statutory authority to make the agreement binding their clients without the latters' consent. But the rules governing the attorney-client relation are founded on the general rules governing the relation of principal and agent. In this respect the rule is universal that, notwithstanding the lack of express or apparent authority in the agent his act is binding on the principal if the latter ratifies it and accepts the benefits of the agent's act. This principle has been recognized in a long line of decisions commencing with Smith v. Whittier, 95 Cal. 279, 288, 30 P. 529, 530 where the supreme court said: "The section does not require a construction that in no instance shall an agreement which the attorney may make in behalf of his client be binding, unless entered in the minutes of the court or filed with the clerk. Its provisions have reference to executory agreements, and not to those which have been wholly or in part executed; and it was with reference to oral agreements of [an executory] character that the court said in its opinion in Borkheim v. [North B. & M.] Ins. Co., 38 Cal. [623], 628: 'Of such agreements, therefore, there can be no specific performance.' If under the terms of a mutual stipulation, which was only verbal, one party has received the advantage for which he entered into it, or the other party has at his instance given up some right, or lost some advantage, so that it would be inequitable for him to insist that the stipulation was invalid, he will not be permitted to repudiate the obligation of his own agreement upon the ground that it had not been entered in the minutes of the court. Himmelmann v. Sullivan, 40 Cal. 125; Hawes v. Clark, 84 Cal. 272, 24 P. 116; People v. Stephens, 52 N.Y. 306. If the party admits that he made such verbal stipulation, it will be as binding upon him as if it had been entered in the minutes of the court. Patterson v. Ely, 19 Cal. [28], 36; Reese v. Mahoney, 21 Cal. [305], 306." This language was quoted with approval in Webster v. Webster, 216 Cal. 485, 490, 491, 14 P.2d 522, 524, where the court added that the agreement having been fully executed, and the plaintiff therein having retained the benefits "it would be inequitable to permit plaintiff to now repudiate the agreement." The same principle was followed in Cathcart v. Gregory, 45 Cal.App.2d 179, 187, 113 P.2d 894; Witaschek v. Witaschek, 56 Cal.App.2d 277, 283, 132 P.2d 600, and Jones v. Noble, 3 Cal. App.2d 316, 320, 39 P.2d 486, to the effect that the code section had "reference to executory agreements, and not to those which have been wholly or in part executed." Cathcart v. Gregory, supra [45 Cal.App. 2d 179, 113 P.2d 898].

[7] But respondent replies that there is no evidence that Berges had knowledge of the agreement, that Hatch and not Berges accepted the benefits. Berges was an employee in the office of Hatch and acted merely as his instrument as a nominal plaintiff for the purpose of the suit. Berges first acted upon the agreement when she amended her complaint and followed this with a levy of an attachment upon property of the co-defendants disclosed to her under the agreement.

[8] Then respondent argues that there was no showing that either Nelson or respondent affirmed the agreement. Nelson was an employee of the attorneys for respondent. She was used only as a nominal plaintiff to cover the corporate interest of respondent in the litigation. When she took the assignment of the Berges judgment respondent paid her the money to pay Berges. Her knowledge must be assumed to be that of her principal. Respondent's knowledge of the agreement claimed by Bianchi was fully proved by the testimony of Bianchi and in that respect the trial court found the testimony true. The evidence is that before respondent, through Nelson, purchased the Berges judgment Bianchi informed them and their counsel of his version of the agreement, that when he learned that Hatch threatened to repudiate it he offered to go directly to Hatch to clear the matter up but was urged by respondent's counsel not to do so. There can be no question therefore that both respondent and Nelson had full knowledge of Bianchi's contention as to the purport of the agreement before they purchased the Berges judgment, and that they were at least put upon notice.

As consideration for the agreement Hatch was able to levy upon assets of the Silbermans because of which they deposited the release bond of Century Indemnity Company. Because of this bond, and not otherwise, respondent was able to recover judgment in excess of $9000 upon an outlay of less than $6000, which represented an investment at seven per cent interest. We may take notice that this was a profitable investment for the period following

February 21, 1930, the date of the purchase.

[9] If we are not correct in assuming that by the amendment to paragraph twenty-four of the findings it was intended to find that the Hatch-Bianchi agreement was made as testified to, but that Hatch was without authority to make it, then the finding must be deemed amended accordingly as there is no evidence to support it in its present form. Since all the uncontradicted evidence shows that such agreement was made, that knowledge thereof was conveyed to Berges's assignee, and that all the parties affected by the agreement retained the fruits of it, it must be held that the respondent is now estopped from repudiating the agreement and that the equities demand a reversal of the judgment. For this reason it is not necessary to discuss the several other grounds raised by appellants.

The judgment is reversed.

GOODELL, J., and DOOLING, Justice pro tem., concur.

HARRIS v. JOFFE. *

Civ. 14910.

District Court of Appeal, Second District, Division 1, California.

Sept. 20, 1945.

Hearing Granted Nov. 15, 1945.

1. Appeal and error 🔑1010(1)

Negligence and contributory negligence are fact questions for trial court, whose findings thereon, if supported by any substantial evidence, will be upheld.

2. Landlord and tenant 🔑164(1)

In absence of fraud, concealment, or covenants in lease, landlord is not liable to tenant for injuries due to defective condition or faulty construction of demised premises, unless caused by landlord's failure to use ordinary care to keep portion of premises, reserved by him for use in common by himself and tenants or by different tenants, in safe condition.

3. Landlord and tenant 🔑168(1)

A tenant's contributory negligence bars his recovery of damages from landlord for injuries sustained because of defects, of which tenant has knowledge, in demised premises.

4. Landlord and tenant 🔑168(1)

A tenant assumes all risks obvious to ordinary observation from defects in demised premises and cannot recover damages from landlord for injuries caused thereby, in absence of attendant circumstances relieving tenant from inference of contributory negligence.

5. Negligence 🔑66(1)

An owner or occupant of premises is not liable for injuries to another thereon as result of dangers which are obvious or as well known to injured person as to such owner or occupant.

6. Landlord and tenant 🔑168(1)

A tenant, voluntarily remaining on leased premises with full knowledge of their dangerous or defective condition, assumes all risks obvious to ordinary observation.

7. Evidence 🔑20(1)

Extensive use of tile and composition materials in both exterior and interior construction, with common and general approval, is matter of common knowledge.

8. Landlord and tenant 🔑169(6)

In action against apartment house owner for injuries to tenant falling down entrance vestibule steps, evidence that vestibule floor was of tile or artificial composition and rather slick or slippery was insufficient to support court's finding of defendant's negligent failure to exercise ordinary care to keep floor or entrance in safe condition.

9. Negligence 🔑56(3)

Violation of city ordinance is not negligence per se, unless incident, act, or omission constituting such violation is proximate or contributing cause of personal injury.

10. Landlord and tenant 🔑164(7)

An apartment house owner is not liable for injuries to tenant having knowledge of slippery condition of entrance vestibule floor and fact that it was raining before falling down vestibule steps as result of such condition.

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* Subsequent opinion 170 P.2d 454.

* * *

Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Action by Sophye Harris against Rosamond Joffe for injuries sustained in a fall down steps from the vestibule of defendant's apartment house. Judgment for plaintiff, and defendant appeals.

Reversed.

C. A. Pinkham, of Los Angeles, for appellant.

Samuel De Groot, of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal by defendant from a judgment for plaintiff in an action for damages.

The facts are summarized in respondent's brief as follows:

"Appellant was the owner of an apartment house, located at 211 South Fuller Street, Los Angeles, California, containing several apartments. The respondent was one of the tenants in said apartment house, and had lived there since September, 1942.

"The only entrance from the front of said apartment house was through a vestibule. The floor of said vestibule was finished with tile or a composition material. There were two steps in said vestibule. In order for respondent and other tenants to enter or leave said premises, it was necessary to pass through said vestibule, and the vestibule was at all times under the care, maintenance and control of the Appellant.

"On the 3rd day of December, 1943, about 8:00 P.M., respondent, going from her apartment to the outside of the building, had to pass through said vestibule. At said time it was dark. There was no light burning in the vestibule. The floor and steps of the vestibule were slippery and without any covering. The condition of the weather was "drizzling"; and the condition of the floor was slick and wet.

"The vestibule contained a lighting fixture with one electric lamp, which was not burning at the time. Respondent and others had notified the Appellant on several occasions prior to December 3, 1943, that the light in the vestibule had not been burning and that the floor was slippery, because of the lack of floor covering. The Appellant, on each occasion when so notified, stated that she would have the vestibule light turned on; but, notwithstanding such notices, she failed to do so and did not have the light burning on the night of December 3, 1943.

"The Municipal Code of the City of Los Angeles, Section 57.47 entitled 'Lighting Hallways,' provides:

" 'Every person conducting or managing any hotel, lodging house, boarding house, rooming house or apartment house shall, from sunset to sunrise of each day, light every hallway, corridor and stairway thereof so as to enable all persons to readily find, distinguish and use such means and ways of exit therefrom.'

"On the night of December 3, 1943, about 8:00 P.M., the respondent, in the company of her husband and nephew, had to pass into and through the vestibule. The vestibule was dark. By reason of the darkness, respondent was not able to see the condition of the floor and steps. Respondent slipped and fell and broke her ankle."

Plaintiff, on direct examination, testified as follows:

"Q. Now, as you came through the door just state what happened? A. As we came out of the door it was drizzling a little, it was wet.

"Q. The condition of the weather had been drizzling? A. Yes.

"Q. Do you know for how long that day it had been drizzling? A. No, I couldn't say because I was in my apartment from early in the evening, and when I came out I discovered it was drizzling.

"The Court: By 'drizzling' you mean a light rain? A. A light rain, yes, Your Honor.

"Q. By Mr. De Groot: Go ahead and explain what happened. A. The corridor as we stepped out was rather slick.

"Q. You mean the vestibule? A. Yes, the vestibule, and I slipped and fell clear down the steps.

"Q. When you say 'slick' what do you mean? A. Rather slippery.

"The Court: You mean it was wet? A. Yes.

"Q. By Mr. De Groot: And do you know how you fell, what caused you to fall outside of being slippery? A. No, it happened so fast."

It appears, also, that plaintiff had complained several times over a period of several months preceding the accident, of the alleged dangerous condition of the entrance.

It is contended by appellant that there was "no showing of negligence on the part of the defendant"; that, "if appellant was negligent, then respondent was contributorily negligent in two respects", first, because, with full knowledge of such alleged dangerous condition, "she remained upon the premises and thus assumed the risks attendant thereon", and, second, because, "The danger of which she complained was an open and obvious one and was as well known to her as to appellant and with such knowledge she failed to exercise ordinary care for her own safety and protection."

The trial court found for the plaintiff and, it is respondent's contention that as to contributory negligence, the burden of proof "was on the appellant"; that, "unless it appears from the transcript of the testimony that there was no basis for such finding, the judgment must be affirmed." It is also contended, in substance, that defendant's negligence was the proximate cause of the injury and that the evidence sustains the court's conclusions in this regard.

[1] There appears to be no dispute as to the facts. It is well settled that the issues of negligence and contributory negligence present questions of fact to be determined by the trial court and, that any substantial evidence in support of the findings on such issues will support them on appeal. On the contrary, where there is an absence of substantial evidence, such findings cannot be upheld on appeal.

[2-6] The parties to the within action were landlord and tenant respectively, hence, the law applicable to such relations, in the circumstances, is controlling. "In the absence of fraud, concealment, or covenants in the lease, a landlord is not liable to a tenant for injuries due to defective condition or faulty construction of the demised premises. * * * A qualification of the foregoing rule is that, 'where a portion of the premises is reserved by the landlord for use in common by himself and tenants, or by different tenants, a duty is imposed upon him to use ordinary care to keep those particular portions of the premises in a safe condition; and if he is negligent in this regard, and a personal injury results to a tenant by reason thereof, he is liable therefor.'" Ellis v. McNeese, 109 Cal.App. 667, 293 P. 854, 855; Hassell v. Denning, 84 Cal.App. 479, 258 P. 426. But in Nelson v. Myers, 94 Cal.App. 66, 270 P. 719, 722, in an action by a tenant for damages resulting from a defective gas heater, the court declared that, "The contributory negligence of a tenant will bar his recovery for injuries sustained from defects of which he has knowledge." And, in Priver v. Young, 62 Cal.App. 405, 216 P. 966, 967, an action for damages against the landlord resulting from a defective wallbed it was held that, "It must therefore be conclusively presumed that plaintiff was fully aware of the unsafe condition of the bed and, in the absence of any allegation in the complaint setting forth such attendant circumstances as would relieve plaintiff from the inference of contributory negligence, the rule of law that in such circumstances plaintiff assumed all risks which were obvious to ordinary observation would apply and preclude any recovery." And, as was quoted in Vosburgh v. Meda, 61 Cal.App.2d 396, 399, 143 P.2d 41, 42, from Mautino v. Sutter Hospital Association, 211 Cal. 556, 561, 296 P. 76, "There is no liability for injuries from dangers that are obvious, or as well known to the person injured as to the owner or occupant." Colburn v. Shuravlev, 24 Cal. App.2d 298, 74 P.2d 1060, 1061, concerned an action for damages by a tenant for injuries resulting from a fall; plaintiff had tripped on a defective rug. Plaintiff had notified defendant's manager of the defect in the rug and had received the promise that it would be repaired. Referring to the rule herein considered, the court declared that, "The purport of these decisions is that, when a tenant voluntarily remains on leased premises with full knowledge of their dangerous or defective condition, he assumes all risks which are obvious to ordinary observation." See also Zavalney v. Donovan, 70 Cal.App.2d 182, 160 P.2d 558. Although the facts in the various cases cited are different, nevertheless, the principle involved is the same.

[7, 8] The only evidence of the alleged "dangerous" condition of the surface of the entrance consisted of the testimony of

the plaintiff. The floor was tile or "artificial composition" and described by the witness according to the testimony quoted above, as, "rather slick," "rather slippery." The type of floor, as above described, was not disputed; nor was there any evidence of defective construction. It is common knowledge that tile and composition materials are extensively used both in exterior and interior construction with common and general approval. With regard to the surface of the floor in question, both as to the character thereof and its condition, the record reveals no evidence of a lack of ordinary care. It follows, therefore, that the court's finding of negligence on the part of defendant due to the condition of the floor or the entrance, is not supported by substantial evidence and cannot, as a matter of law, be upheld.

[9] As to respondent's contention that the alleged violation of a city ordinance is negligence per se, it appears to be well settled that, unless the incident or act constituting such violation also is the proximate cause of the injury, the rule is not applicable. And, the converse of the rule is also true, as the court declared in Flores v. Fitzgerald, 204 Cal. 374, at page 378, 268 P. 369, at page 371, "Although the violation of the ordinance may have been negligence per se, yet, as it was not shown that such negligence was the direct or proximate cause of his injury, it will not defeat his right of recovery for damages sustained by reason of said injury." "The principle that a violation of a statute or ordinance is negligence per se is subject to the limitation that the act or omission must proximately cause or contribute to the injury in order to bar a recovery." Burtt v. Bank of California National Association, 211 Cal. 548, at page 551, 296 P. 68, at page 69. And in Blodgett v. B. H. Dyas Co., 4 Cal.2d 511, at page 513, 50 P. 2d 801, at page 803, appears the following: "The evidence shows that the lack of the hand rail was neither the proximate nor any cause of plaintiff's fall. Any violation of the ordinance by the defendant would therefore be immaterial."

[10] The evidence clearly and without dispute shows the proximate cause of plaintiff's fall to have been the slippery surface above described and not the fact that the entrance was not lighted as the ordinance required. Moreover, appellant was aware of the alleged "dangerous" condition of the entrance and of the fact that it was raining, as well. The law imposes no liability in such circumstances.

For the foregoing reasons the judgment is reversed.

YORK, P. J., and WHITE, J., concur.

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70 Cal.App.2d 768

TUCKER v. FONTES.

No. 12843.

District Court of Appeal, First District, Division 1, California.

Sept. 19, 1945.

1. Execution 🔑377

An affidavit is not necessary to initiate proceeding supplemental to execution under statute providing generally for commencement of such proceeding after execution is returned unsatisfied in whole or in part by issuance of order directing judgment debtor to appear. Code Civ.Proc. § 714.

2. Execution 🔑377

The affidavit contemplated by statute providing for commencement of supplemental proceedings at any time after issuance of execution upon proof by affidavit that judgment debtor has property which he unjustly refuses to apply toward satisfaction of judgment need not be in any particular form and may be made on information and belief. Code Civ.Proc. § 715.

3. Execution 🔑377

Affidavit showing issuance of execution and its return wholly unsatisfied, and alleging on information and belief that judgment debtor had property not exempt from execution that he unjustly refused to apply to satisfaction of judgment, was sufficient to warrant order requiring judgment debtor to appear and answer concerning his property. Code Civ.Proc. §§ 714, 715.

4. Execution 🔑406(1)

If evidence introduced at hearing of proceeding supplemental to execution discloses that judgment debtor has property not exempt from execution which may not be reached by execution and which judgment debtor refuses to apply to satisfaction of judgment, appointment of receiver is authorized without the necessity of taking additional evidence. Code Civ.Proc. § 564, subd. 4; §§ 714, 715.

5. Execution ⟹405

Where examination of judgment debtor in proceedings supplemental to execution showed net exempt worth to be more than $36,000, including joint tenancy interest with wife in apartment house, trial court had discretionary power to appoint receiver. Code Civ.Proc. § 564, subd. 4; §§ 714, 715.

6. Execution ⟹405

Where execution was returned wholly unsatisfied and judgment debtor claimed inability to collect accounts due him, and no legal procedure was available to judgment creditor to compel judgment debtor to take legal action to enforce collection of such accounts, judgment debtor was entitled to appointment of a receiver to take such action. Code Civ.Proc. § 564, subd. 4; §§ 714, 715.

7. Execution ⟹406(1)

Under evidence trial court could reasonably infer that at time of hearing judgment debtor owned assets other than those disclosed by him in his testimony which could be made available to satisfaction of judgment through efforts of a receiver. Code Civ.Proc. § 564, subd. 4; §§ 714, 715.

8. Execution ⟹407

Order appointing receiver in proceeding supplemental to execution was not reversible error for failure definitely to define duties of receiver, in view of terms of order. Code Civ.Proc. § 564, subd. 4; §§ 714, 715.

9. Execution ⟹409, 410

The rights, powers, and duties of a receiver appointed in proceeding supplemental to execution are limited to purposes of such proceeding and those for which he was appointed and are analogous to those of a receiver appointed in a creditor's suit. Code Civ.Proc. §§ 568, 568.5, 714, 715.

10. Execution ⟹410

The rights, powers, and duties of a receiver appointed in proceeding supplemental to execution are limited to receiving and paying out, or demanding and suing for, under order of court, and taking into possession and applying in satisfaction of judgment, money, property, and interests of judgment debtor and do not include active management of property, operation of business of judgment debtor, or administration of his estate on basis of insolvency. Code Civ.Proc. §§ 568, 568.5, 714, 715.

11. Execution ⟹407

Order appointing receiver in proceeding supplemental to execution and authorizing him, subject to order of court, to take possession of judgment debtor's property and make certain collections and execute certain assignments, was not objectionable as placing receiver in active management of all judgment debtor's property and operation of his business. Code Civ.Proc. §§ 568, 568.5, 714, 715.

Appeal from Superior Court, City and County of San Francisco; Thomas M. Foley, Judge.

Proceeding supplemental to execution by M. H. Tucker against Joe Fontes. From an order granting plaintiff's motion for the appointment of a receiver, defendant appeals.

Order, as construed by the court, affirmed.

Waldo F. Postel, of San Francisco, for appellant.

J. W. Jackson, of San Francisco, for respondent.

KNIGHT, Justice.

After hearing evidence introduced in a proceeding supplemental to execution, the trial court granted plaintiff's motion for the appointment of a receiver; and from the order made in that behalf defendant has appealed.

The judgment in the action called for the payment of the sum of $3,168.75 and costs, found to be due on a promissory note. Execution issued and was returned wholly unsatisfied; whereupon plaintiff filed an affidavit setting forth the facts relating to the entry of the judgment, the issuance of the execution, the return thereof wholly unsatisfied, and averring on information and belief that defendant "has property in his possession and under his control not exempt from execution which he unjustly refuses to apply to the satisfaction of said judgment." Upon the filing of the affidavit the court issued an order requiring defendant to appear before the court at the time specified therein and answer concerning his property. Two days subsequent to the issuance of that order, plaintiff served and filed a notice of motion for the appointment of a receiver. Attached to the notice of the motion was a supporting affidavit similar in form to the one initiating the supplemental proceeding, and the motion was noticed to be heard at the same time fixed for the hearing of that proceeding. The defendant appeared in obedience to the order and was examined under oath by both parties; and at the conclusion of the hearing plaintiff presented the motion for the appointment of a receiver. After hearing argument on the motion, it was granted and a written order was signed and filed to that effect naming the receiver, fixing the amount of his bond and defining his duties.

In attacking the validity of the order, defendant contends that the form of affidavit filed by plaintiff was insufficient in that it did not specify the property defendant refused to apply to the satisfaction of the judgment, and that the affidavit was made on information and belief; that after hearing the supplemental proceeding no additional evidence was offered on the motion for the appointment of the receiver, and that no sufficient showing was made that such relief was necessary. We find no merit in any of the foregoing contentions.

[1-4] The two pertinent sections of the Code of Civil Procedure relating to proceedings supplemental to execution are sections 714 and 715. The former section provides generally for the commencement of such proceedings after the execution has been returned unsatisfied in whole or in part, by the issuance of an order directing the judgment debtor to appear; and it is held that in such cases no affidavit is necessary to initiate the proceedings. Collins v. Angell, 72 Cal. 513, 14 P. 135. The next section, 715, authorizes the commencement of supplemental proceedings at any time after the issuance of an execution "upon proof, by affidavit of a party or otherwise, to the satisfaction of a judge or justice of the court, that any judgment debtor has property which he unjustly refuses to apply toward the satisfaction of the judgment * * *." Defendant has not cited any authority holding that the affidavit so to be filed shall be in any particular form, or that it may not be made on information and belief; and it is well settled that if after hearing the evidence introduced at the hearing of the supplemental proceeding the court concludes that the situation calls for the appointment of a receiver, it is authorized to make such appointment. In California Jurisprudence (vol. 22, p. 455) the rule is stated as follows: "* * * in supplementary proceedings if there is property which cannot be reached by execution and which the judgment debtor refuses to apply to the satisfaction of the judgment, he may be compelled, upon examination, to deliver it in satisfaction of the judgment—that is, to a receiver appointed to dispose of it in aid of the execution * * * citing, among other cases, Pacific Bank v. Robinson, 57 Cal. 520, 40 Am.Rep. 120, and Habenicht v. Lissak, 78 Cal. 351, 20 P. 874, 5 L.R.A. 713, 12 Am.St.Rep. 63." In the first cited case the court said 57 Cal. at page 522, 40 Am.Rep. 120, 5 L.R.A. 713, 12 Am.St. Rep. 63: "* * * if there be property which cannot be reached by execution, and which the judgment debtor refuses to apply to the satisfaction of the judgment, he may be compelled, upon examination, in proceedings supplementary to execution, to deliver it in satisfaction of the judgment (§§ 714-721, Code Civ. Proc.); i.e., to a receiver appointed to dispose of it in aid of the execution. (§ 564, Code Civ. Proc.)" The decision in that case was subsequently expressly confirmed in Habenicht v. Lissak, supra, and both of those cases were afterwards approvingly referred to in Bruton v. Tearle, 7 Cal.2d 48, 59 P.2d 953, 106 A.L.R. 580. It was there held that where a plaintiff is not attempting to bring an independent action in the nature of a creditor's bill, but is proceeding strictly in accordance with the statutory provisions for proceedings supplemental to execution, and it is shown that despite the plaintiff's efforts to obtain satisfaction of judgment, by execution or otherwise, the judgment is not satisfied, and that the debtor has assets which he unjustly refuses to apply to the satisfaction of the judgment, the appointment of a receiver is authorized under subdivision 4 of section 564 of the Code of Civil Procedure. That subdivision reads as follows: "A receiver may be appointed * * * 4. * * * in proceedings in aid of execution, when an execution has been returned unsatisfied, or when the judgment debtor refuses to apply his property in satisfaction of the judgment * * *."

In the present case, the material facts disclosed by the evidence at the hearing of the supplemental proceeding were these: The defendant was then and for some time prior thereto had been engaged in business in San Francisco selling machinery and parts and units thereof on consignment from various manufacturers, and among his available assets were certain unpaid accounts due him from customers with whom he had conducted sales transactions. One of the accounts called for the payment of a balance of $375, and another a balance of $400, upon which he had obtained a judgment. Moreover, he was then receiving monthly payments of $80 on an allowed claim which he had filed in a proceeding in bankruptcy pending in Portland, Oregon. The total amount of the allowed claim was $3214, and he had already received five monthly payments thereon. At the hearing defendant showed an unwillingness to turn over any of the future monthly payments or the accounts receivable in satisfaction of the judgment. Furthermore, defendant admitted that less than two years prior to the hearing of the supplemental proceeding he had filed a financial statement with the Dun & Bradstreet agency showing his net worth to be more than $36,000, which he stated included a joint tenancy interest held by him with his wife in an apartment house.

[5-7] In view of the foregoing factual showing and under the law laid down in the cases above cited, it was entirely within the discretionary power of the trial court to appoint a receiver to take over any property, not exempt from execution, of which defendant was found to be the owner, and to collect all accounts receivable, and subject the same to the satisfaction of the judgment; and for such purpose to have access to all of the books and accounts pertaining to defendant's business. It is true that ordinarily a judgment creditor is able to collect money found to be due the judgment debtor from third persons, by way of garnishment or levy of execution. But here the defendant claimed he had been unable to collect the accounts due him, and there was no legal procedure available to plaintiff to compel defendant to take legal action to enforce collection thereof. Consequently plaintiff was entitled to the appointment of a receiver to take such legal action. Moreover, it is evident that an execution issued by the courts of this state would be without legal efficacy in another state, and that, therefore, without the aid of a receiver plaintiff would be powerless to collect any part of the balance due on the allowed claim in the bankruptcy proceeding in the state of Oregon. Then again, there is the evidence showing that less than two years prior to the hearing of the supplemental proceeding defendant had filed a statement showing his net financial worth to be more than $36,000, which he stated included a joint tenancy interest in an apartment house, from which the trial court could reasonably infer that at the time of the hearing defendant was the owner of assets other than those disclosed by him in his testimony, which could be made available to the satisfaction of the judgment through the efforts of a receiver.

The opinion rendered in the case of McCutcheon v. Superior Court, 134 Cal.App. 5, 24 P.2d 911, from which defendant quotes in support of his contention that the form of affidavit filed herein was insufficient, shows that the receiver was not appointed as the result of supplemental proceedings had pursuant to either section 714 or 715 of the Code of Civil Procedure. There, after the execution had been returned wholly unsatisfied, the plaintiff instituted a separate suit, termed a "creditor's bill," for the sole purpose of having a receiver appointed; and, as pointed out in the opinion, such suits are governed by rules of pleading and procedure different from those applicable to the appointment of receivers pursuant to proceedings supplemental to execution. And the court went on to hold as a matter of law that the complaint failed to state facts sufficient to constitute a cause of action, and that consequently the order based thereon for the appointment of a receiver was void. However, in pointing out the distinction between the two remedies the opinion therein sets forth a clear statement of the law pertaining to the appointment of receivers in proceedings supplemental to execution, and such statement fully supports the action of the trial court in the present case. It is there said (134 Cal.App. at pages 8–9, 24 P.2d at page 912): "And, although the statutory provisions [relating to proceedings supplemental to execution] may contain no express authorization for the appointment of a receiver in aid of the purpose to be effected, as early as 1864, in the case of Hathaway v. Brady, 26 Cal. 581, 593, it was ruled by the Supreme Court of this state (syllabus) that 'in proceedings supplementary to execution, the Court has power, when it has all the parties before it, to appoint a receiver.' That that principle has been recognized and established is attested by Professor Pomeroy in volume 1 of Pomeroy's Equitable Remedies, § 110, where it is said: 'Proceedings supplementary to execution being designed to be a substitute for the equity procedure by creditors' bill, receivers are appointed in such proceedings very much as a matter of course, where it appears that the judgment creditor (debtor) has, or probably has, property that ought to be subjected to the satisfaction of the judgment, after the return of the execution unsatisfied.'" From the foregoing it will be seen that since the evidence received in the present case pursuant to the supplemental proceeding was sufficient to authorize the appointment of a receiver, it was not essential to introduce any additional evidence in support of the motion therefor.

[8] Defendant further contends that the order fails to meet the requirements of the law in that the duties of the receiver are not therein definitely defined, and that the general terms used in the order are too broad and not warranted by the evidence. It is apparent that in some respects the duties imposed on the receiver could have been stated with more exactness; but we find nothing in the points urged by defendant in this behalf which would justify a reversal. In substance, the order authorizes the receiver, subject to the order of the court, to take possession of defendant's property and the books of account and papers relating to his business affairs, and to collect the debts and moneys due the defendant; also to take an assignment of the allowed claim in bankruptcy and to collect the money to be paid thereon; and defendant is ordered to make such assignment to the receiver.

[9-11] Defendant cites 33 C.J.S., Executions, § 391, at pages 717, 718, to the effect that rights, powers, and duties of a receiver appointed in a supplemental proceeding are limited to the purposes of such proceeding and those for which he was appointed; that they are not the same as those of general receivers, but are in great measure analogous to those of a receiver appointed in a creditor's suit; that they are limited to receiving and then paying out, or, more specifically, to demanding and suing for, under the order of the court, and taking into possession and applying in satisfaction of the judgment, money, property, and interests of the judgment debtor; and that they do not include active management of property or operation of a business of the judgment debtor, or the administration of his estate on the basis of his insolvency. In this connection defendant's chief contention seems to be that under the terms of the order herein the receiver is placed in the active management of all of defendant's property and the operation of his business. There is no direction to that effect in the order, and read as a whole it does not go that far. Reasonably construed, in the light of the evidence received at the hearing of the supplemental proceeding, the order simply authorizes the receiver to take possession of any property owned by the defendant, not exempt from execution, for the purpose of having it lawfully applied to the satisfaction of the judgment, as provided in sections 568 and 568.5 of the Code of Civil Procedure; also to have access to all books and papers pertaining to defendant's business for the purpose of securing the information and data necessary to collect the moneys due defendant. But, as stated, the order does not in terms or by implication authorize the receiver to take over the management of defendant's business affairs. In the event that the receiver should act in excess of authority granted by the order as above construed, or the law governing the activities of receivers of this type, defendant may invoke ample protection by bringing the matter before the trial court in an appropriate proceeding.

As thus construed, the order is affirmed.

PETERS, P. J., and WARD, J., concur.

70 Cal.App.2d 664

SIMMONS CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 12923.

District Court of Appeal, First District, Division 1, California.

Sept. 5, 1945.

Hearing Denied Nov. 1, 1945.

1. Workmen's compensation ⟹940

A foreman, with general discretionary powers as managing officer and superintendent, and particular supervisory authority over punch machine, was not "employee occupying a subservient position", so as to relieve employer from liability because of serious and willful misconduct for more than normal compensation of employee, injured in operation of such machine.

See Words and Phrases, Permanent Edition, for all other definitions of "Employee Occupying Subservient Position".

2. Evidence ⟹539

Ordinarily, engineers qualified by training and experience are proper witnesses as to matters within purview of their training, including construction, operation, and safety of instruments propelled by power or mechanical force.

3. Workmen's compensation ⟹1693

A referee's observations in viewing employer's premises or mechanical device, failure to guard which is claimed to have constituted serious and willful misconduct rendering employer liable to injured employee for more than normal compensation, may be considered by Industrial Accident Commission as evidence in proceeding for additional compensation.

4. Workmen's compensation ⟹1408

The Industrial Accident Commission is not bound by legally recognized rules of evidence, but evidence must at least have some degree of probative force to warrant finding by commission.

5. Workmen's compensation ⟹1674

A referee's report, from his observation of punch machine after injury to operator, that accident would not have happened had effective guard been in place on machine, was not substantial evidence, sufficient to warrant finding that employer was guilty of willful misconduct in failing to place guard on machine, in absence of specific order by Industrial Commission requiring safety device and in view of testimony of safety engineers that a guard was unnecessary.

6. Workmen's compensation ⟹939

Where injured employee claims that employer was guilty of willful misconduct entitling employee to more than normal compensation, Industrial Accident Commission must protect substantial rights of all parties to proceeding for additional compensation, as such claim is quasi-criminal charge.

7. Workmen's compensation ⟹939

"Serious and willful misconduct", rendering employer liable for more than normal compensation for resulting injuries to employee, is conduct which employer knows or should know is likely to cause serious injury to employee or evinces reckless disregard for employee's safety.

See Words and Phrases, Permanent Edition, for all other definitions of "Serious and Willful Misconduct".

8. Workmen's compensation ⟹1939

Whether employer's serious and willful misconduct caused employee's injury, so as to render employer liable for more than normal compensation, is essentially a fact question for Industrial Accident Commission, and its award will not be disturbed if its findings on such question are supported by any substantial evidence.

9. Workmen's compensation ⟹941

An employer's deliberate breach of law framed in workingmen's interests amounts to serious misconduct rendering employer liable for resulting injury to employee.

10. Workmen's compensation ⟹1674

Evidence was insufficient to warrant Industrial Accident Commission's finding that employer's failure to place guard on punch machine at point where operator thereof received injury constituted willful misconduct rendering employer liable for more than normal compensation under Workmen's Compensation Act.

11. Workmen's compensation ⟹1765

The Industrial Accident Commission being judicial body exercising judicial functions, its decisions and awards are subject to general legal principles circumscribing and regulating all judicial tribunals' judgments.

12. Workmen's compensation ⚷1738

A finding of Industrial Accident Commission may be declared sufficient by reference to record, including evidence. St. 1937, p. 294, § 5315.

13. Workmen's compensation ⚷1738

The Industrial Accident Commission's findings must be such that truth or falsity of each material allegation in issue can be demonstrated from such findings. St.1937, pp. 294, 301, §§ 5315, 5800.

14. Workmen's compensation ⚷1913

Where neither referee nor Industrial Accident Commission made findings on issue, presented to commission by amended application, filed just before hearing on application for adjustment of compensation claim, as to whether employer was guilty of serious and willful misconduct in directing inexperienced person to work on guardless punch machine, District Court of Appeal cannot pass on soundness of theory of rehearing referee, reporting on such subject, in proceeding to review commission's findings and award of more than normal compensation on ground of employer's serious and willful misconduct in failing to have guard on machine. St.1937, pp. 294, 301, §§ 5313, 5315, 5800.

Special proceeding by the Simmons Company to review the Industrial Accident Commission's findings and award of more than normal compensation to Doris Tringale, petitioner's employee, for personal injuries.

Award annulled, and cause remanded to the commission.

Keith & Creede, of San Francisco, for petitioner.

Everett A. Corten and Joseph Sheehan, both of San Francisco, for respondent Industrial Accident Commission.

WARD, Justice.

This cause is presented as a petition to review the findings and an award of the Industrial Accident Commission based upon the alleged "serious and wilful misconduct of the employer" wherein it was held that the injury to the applicant for industrial compensation resulted from the failure "to have in place a guard upon the machine upon which applicant was hurt at or near the point where she was required to handle its operation." In addition to normal compensation an award of fifty per cent was imposed on the employer.

On or about July 14, 1944, Doris Tringale filed an application for adjustment of a claim, alleging that on March 7, 1944, arising out of and in the course of her employment an injury had occurred to the index and middle fingers of her right hand which resulted in their amputation. The application contained a general allegation of "wilful misconduct." An amended application dated August 21, 1944, was filed just prior to the hearing by the referee alleging "serious and wilful misconduct of employer in directing applicant a wholly inexperienced person to work on a guardless punch machine." On January 10, 1945, the referee to whom the application had been assigned filed a report containing the following:

"The controversy is whether the accident was caused by the serious and wilful misconduct of the employer. Almost immediately after it occurred, at least within 48 hours, an effective guard was installed at small cost. If it had been in place at the time, the accident would not have happened.

"No photographs are in the file. It is difficult to obtain a clear view unless one sees the machine in operation, which I did.

"As briefly as possible: Applicant was putting necks on canisters used in gas masks. The canister is a tin can open at one end with a small hole opening at the other where the neck goes on. The open end of the canister is put over a cylinder, which is upon a rod, all part of the machine. The rod is pulled out and then pushed back, when the canister is in place, under the press. The peddle is then tripped and the press, or plunger, with the neck comes down upon the canister and the neck is attached. The left hand is used to push the rod back and forth, the right to put the canister in place on the cylinder. This is the work applicant did. She claims she was adjusting the canister as it went back in place under the press. She must have had her fingers on top of the can as it went under the plunger, because they were cut off.

"As long as the fingers are kept off the top of the can, there is no danger. Now that there is a guard, the fingers can't get in under the plunger. A guard could have been in place at the time of the injury.

"The defendant says a guard was not required by 'Mechanical Power Transmission Safety Orders' of the Industrial Accident Commission, particularly Order 2601, the first paragraph of which reads: 'These orders shall also apply to all connecting rods * * * revolving or reciprocating parts up to but not including the "point of operation."' It is argued that by reason of this provision, the defendant is exempt from placing any guard at the point where the plunger contacted the horn of the cylinder. Just what is meant by the 'point of operation' is debatable. The witness Horswell, a Safety Engineer of the Commission, testified that in his opinion the 'point of operation' is the point where the operator stands and feeds objects into the machine. In accordance with this view no guard is necessary at the point where the injury is most likely to occur.

"To construe the point of operation as the point where the operator stands in front of the machine and feeds materials into it so as to make it unnecessary to guard moving parts in front of him would be to render Order #2601 inoperative. Rather I would be inclined to think the proper interpretation of the section would be to find a guard unnecessary only where materials could not be put into the machine, if at the point of operation, a guard was in place.

"Here it was entirely possible to put on a guard at small cost, which, when in place, would offer adequate protection and while in place would not interfere or hinder the work. Should the employer have realized this before the accident happened?

"To work on this machine undeniably had a tendency to draw applicant's fingers in and about the plunger where there was an open and obvious danger of serious injury. It was the kind of a danger, which, if the employer had turned his attention to it, he should have anticipated and corrected.

"If he did rely on the Safety Orders of the commission, he placed an erroneous interpretation upon them. The machine could have been guarded at small cost and the accident avoided.

"The employer should pay the applicant fifty per cent additional compensation and I so recommend."

[1] Considerable space is devoted by each side to the question whether there was a sufficient showing that if there was serious and wilful misconduct, it was the result of an act or the failure to act on the part of an "executive, managing officer or general superintendent." In the present case there is sufficient evidence from which to draw a reasonable inference that the foreman had been invested with general discretionary powers as managing officer and superintendent, with particular supervisory authority in the care and operation of the machine and the direction of forty employees in that "department" of the Simmons plant. Manifestly he was not "an employee occupying a relatively inferior and subservient position." Bechtel, etc., Corp. v. Industrial Acc. Comm., 25 Cal.2d 171, 177, 153 P.2d 331, 334; Gordon v. Industrial Acc. Comm., 199 Cal. 420, 249 P. 849, 58 A.L.R. 1374; Bethlehem Steel Co. v. Industrial Acc. Comm., 23 Cal.2d 659, 145 P.2d 583; California Shipbuilding Corp. v. Industrial Acc. Comm., 64 Cal.App. 2d 622, 149 P.2d 432.

No recommendation or allusion is made in the report of the referee with reference to the allegations in the amended application relative to the employer's directing a wholly inexperienced applicant to work on a guardless punch machine.

Subsequent to the report of the referee, the commission on January 26, 1945, filed its findings and award and made a separate finding as follows: "Aforesaid injury was caused by the serious and wilful misconduct of the employer in that said employer failed to have in place a guard upon the machine upon which applicant was hurt at or near the point where she was required to handle its operation." The finding is limited to the failure of the employer "to have in place a guard upon the machine," but there is no finding that the employer knowingly and wilfully violated any provision required by "'Mechanical Power Transmission Safety Orders' of the Industrial Accident Commission, particularly Order 2601."

One of the safety inspectors for the Commission testified that prior to the accident he had inspected the machine in question and did not then or at any other time recommend that a guard should be placed "on that machine." Another safety engineer for the Commission testified: "We have never required guards on machines like that, and I have inspected hundreds of similar machines." The evidence shows that several months prior to the accident a security inspector representing a branch of the Security Command of the United States government interested in the manufacture of "gas masks," visited the Simmons plant and made certain recommendations for the "safety" of workers engaged in the manufacture of articles for the federal government, none of which required a guard on the machine in question. The only evidence upon which the finding of wilful misconduct may be based is the report of the referee who personally examined the machine after the accident.

In the absence of a specific order by the Industrial Accident Commission requiring a safety device, and in view of the opinions of safety engineers of the Commission and of the United States government that a safety device was not necessary, plus the report of the referee that the applicability of Order 2601 "is debatable," was the Commission justified, merely upon the referee's observation of the operation of the machine after the accident, in finding that there was substantial evidence that the employer was guilty of wilful misconduct in failing to place a guard on the machine? The applicant for compensation is not quite clear in her description of how the accident occurred. She had been operating the machine for over an hour. Contrary to the report of the referee, there is evidence that with the guard now on the machine it is still possible for a similar accident to occur, but it would "not be as easy as it was before."

[2] Ordinarily engineers qualified by training and experience are proper witnesses within the purview of their training. Such testimony includes evidence as to instruments propelled by power or mechanical force. 10 Cal.Jur. 1011. Whether a machine is of complicated construction, or its operation so simple that one educated in the law but untrained in the science of mechanical devices is able to say that a safety guard is necessary, are questions vital in the determination of this case. The members of the Commission who did not examine the machine must have determined that the referee's views, as expressed in the report, were superior to the opinions of the Commission's expert engineers.

[3, 4] The observations made by a referee in viewing the premises, or, as in this case, a mechanical device, may be considered by the Commission as evidence. Ethel D. Co. v. Industrial Acc. Comm., 219 Cal. 699, 28 P.2d 919. The Commission is not bound by legally recognized rules of evidence but at least the evidence must have some degree of probative force. There is no evidence that the referee was an expert or knew anything about the construction or operation of this or any other mechanical device.

[5, 6] This is not a case where the trier of the facts may use his independent judgment against the opinion of one presumably skilled in subjects not within the knowledge of the ordinary person, and may determine a disputed question from observation. The facts here show, without contradiction, that the experts of the Commission did not think, prior to the accident, that a guard was necessary. The referee's opinion was formed as a sequence of the accident. The evidence shows that, with the guard, a similar accident would not be as likely to occur, but there is no evidence to show that, prior to the accident, any one knew, or should have known, that such an accident would occur to an ordinarily prudent person. The referee's report on this question is merely a surmise and conjecture which the law does not recognize as the basis of a finding. It is not substantial evidence. Thoreau v. Industrial Acc. Comm., 120 Cal.App. 67, 7 P.2d 767; Southern Pac. Co. v. Railroad Comm., 13 Cal.2d 125, 87 P.2d 1055; Pacific Emp. Ins. Co. v. Industrial Acc. Comm., 47 Cal.App.2d 494, 118 P.2d 334; Winthrop v. Industrial Acc. Comm., 213 Cal. 351, 2 P.2d 142. It is merely a fanciful Conclusion that does not raise the possibility of a conflict in the evidence. Brant v. Retirement Board of San Francisco, 57 Cal.App.2d 721, 135 P.2d 396. A recent expression of the view of the Supreme Court of this state appears in Pacific Freight Lines v. Industrial Acc. Comm., 26 Cal.2d 240, 157 P.2d 634, 637; "The law under which the commission functions is founded upon sound public policy and with the general objective of compensating the injured employee or his dependents for injuries or death resulting from the ordinary hazards of the employment. But where, as here, the uncontradicted and unimpeached evidence points unerringly to the conclusion that the death was caused solely by the intoxication of the employee, and there is no substantial evidence in conflict therewith, a finding to the contrary and an award based on such finding are not within the jurisdiction of the commission. Eagles Home Ass'n v. Industrial Acc. Comm., 140 Cal.App. 646, 648, 35 P.2d 591. * * * Here no 'rational view of the evidence', North Pacific Steamship Co. v. Industrial Acc. Comm., 174 Cal. 500, 502, 163 P. 910, 911 supports the chal-

lenged finding of the commission." In this respect, when the employee makes a claim of wilful misconduct, which is a quasi criminal charge, it is incumbent upon the Commission to protect the substantial rights of all parties. It should not be amiss to repeat the accepted views on the subject of wilful misconduct.

[7-9] The views of the Supreme Court as set forth in the last three years are interesting. In Parkhurst v. Industrial Acc. Comm., 20 Cal.2d 826, 829–831, 129 P.2d 113, 115, it was said: "Serious and willful misconduct is conduct that the employer knew, or should have known, was likely to cause serious injury, or conduct that evinces a reckless disregard for the safety of others. [Citing cases.]" "It is true that not every violation of a statute is serious and willful misconduct. [Citing cases.]" "It is well settled that the question whether serious and willful misconduct of the employer caused the employee's injury is essentially one of fact, and that if there is any substantial evidence to support the findings of the commission its award will not be disturbed. Its award will be set aside, however, if there is no evidence to support its findings. Hatheway v. Industrial Acc. Comm., supra [13 Cal.2d 377, 90 P.2d 68]; Ethel D. Co. v. Industrial Acc. Comm., supra [219 Cal. 699, 28 P.2d 919]." "The test under these cases is whether the employer knowingly or willfully committed an act that he knew or should have known was likely to cause harm to his employee." "'* * * Where there is a deliberate breach of a law * * *, which is framed in the interests of the working man, it will be held that such a breach * * * amounts to serious misconduct.' So spoke the court in Fidelity, etc., Co. v. Industrial Acc. Comm., 171 Cal. 728, 154 P. 834, 835, L.R.A.1916D, 903, annulling an award based on a finding that an employee whose injury resulted from a violation of speed laws was not guilty of serious and willful misconduct. The rule must be similarly applied to the conduct of an employer." The same rule is recognized in Bethlehem Steel Co. v. Industrial Acc. Comm., supra. In the present case there is no "deliberate breach of a law."

In Ethel D. Co. v. Industrial Acc. Comm., supra [219 Cal. 699, 28 P.2d 923], inspectors employed by the Commission had visited the premises involved and made recommendation of "various unspecified changes," but did not make any recommendation with respect to a "ladder" from which the applicant in that case had fallen and suffered injuries. It was stated that the evidence "with respect to the visits of inspectors is too vague to support so bold an argument" as that the Commission had approved the use of the ladder without "handholds" which a specific safety order of the Commission required. The court held (219 Cal. at page 708, 28 P.2d at page 923): "The Industrial Accident Commission, in its administrative capacity, possesses no authority to waive or consent to the violation of a duty owing primarily and directly to the employee from the employer." In the present case there is no claim that the Commission waived a duty to an employee by the failure of the inspectors to examine the machine, thereby approving its construction. On the contrary, this particular machine was examined, approved at that time and specifically approved by safety inspectors as appears from testimony under oath before the referee. Ten years later upon facts somewhat similar to those in the Ethel D. Co. case and the present case, in Central Cal. Ice Co. v. Industrial Acc. Comm., 66 Cal.App.2d 339, 346, 347, 152 P.2d 33, 36 (petition for hearing by the Supreme Court denied), it is said: "It is not enough to prove negligence or even gross negligence on the part of the employer in order to fasten the added liability on it. In addition there must be a wilful disregard of consequences with injury to the employee as a probable result." "This suggests that neither the Commission nor its inspectors regarded the practice involved here as dangerous. Otherwise the Commission should have performed the duty imposed upon it by law and should have prohibited the practices which are now, for the first time, urged as inherently dangerous. As the Commission must be charged with notice of these practices and as it failed to regard them as sufficiently dangerous to require the issuance of a safety order regulating them, as neither it nor its employees had even criticized the practices, and as no similar accident had happened in the ice industry, those practices should not be held to furnish grounds for concluding that their employment by petitioner constituted serious and wilful misconduct until the Industrial Accident Commission issues a safety order prohibiting or regulating either or both of them which is in its power to do if either practice creates a serious hazard to an employee. Bethlehem Steel Co. v. Industrial Acc.

Comm., 23 Cal.2d 659, 145 P.2d 583." On the foregoing reasoning an award of extra compensation based upon a finding of serious and wilful misconduct in continuing the particular practices was annulled. In the present case, the Commission's engineers did not think that the safety order covered the machine in question. The referee thought this question was debatable.

[10] Extensive liberality has been exercised by appellate courts in construing and upholding findings made by the Industrial Accident Commission, but in view of the facts in this case and the holding in the Central Ice Company case it is impossible to approve the present finding of the Commission that the failure to place a guard at the point where the applicant received the injury is wilful misconduct.

[11] The second question presented concerns the duty of the Commission in making an award to state its determination as to the rights of the parties and make findings upon all facts involved in the controversy. Labor Code, sec. 5800, St.1937, p. 301; Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 156 P. 491, Ann.Cas. 1917E, 390. "Since the Industrial Accident Commission is a judicial body exercising judicial functions, its decisions and awards are subject to those general legal principles which circumscribe and regulate the judgments of all judicial tribunals." Gouanillou v. Industrial Acc. Comm., 184 Cal. 418, 420, 421, 193 P. 937, 938. Based upon the above rule it was stated in Taylor v. Industrial Acc. Comm., 38 Cal.App.2d 75, 80, 100 P.2d 511, 514: "Therefore, the sufficiency of the questioned finding must be determined in the light of rules applicable to such procedure in our courts. Section 5313 of the Labor Code provides that the referee shall report his findings in writing to the commission within fifteen days after the testimony is closed, and provides further that 'the facts found and conclusions of law shall be separately stated.' Section 5315 of the Labor Code clothes the commission with power to confirm, adopt, modify or set aside the report of the referee or any part thereof, and to enter its order, findings, decision or award, based in whole or in part upon the report of the referee, or upon the record in the case." The finding in the Taylor case differed from the finding in this case in that here there was a specific finding of failure to place a guard upon the machine upon which applicant was hurt instead of merely a general finding of wilful misconduct.

[12-14] In the present petition in addition to the difference in the form of the finding from that in the Taylor case, supra, an issue was presented to the Commission upon which neither the referee nor the Commission made a finding, though it was referred to by the "rehearing referee" in his recommendation to deny a motion for rehearing. Just before the hearing started an amended application for adjustment of claim was filed in which the charges of serious and wilful misconduct were based upon the act of directing "a wholly inexperienced person to work on a guardless punch machine." A finding may be declared sufficient by reference to the record, including the evidence (Ethel D. Co. v. Industrial Acc. Comm., supra), but in the present case there is no finding on the amended allegations of wilful misconduct based upon failure to instruct an inexperienced employee. It is "essential that findings be such that the truth or falsity of each material allegation in issue can be demonstrated from the findings." Taylor v. Industrial Acc. Comm., supra, 38 Cal. App.2d at page 81, 100 P.2d at page 514. In a rehearing before the Commission there may appear substantial evidence from which a reasonable inference may be drawn that an inexperienced girl was directed to operate a mechanical instrument, and it is possible, depending upon circumstances, that the evidence may show such disregard of probable or possible consequences as to warrant a finding of serious and wilful misconduct on that issue. The rehearing referee reported on this subject. His theory may or may not be sound. On this writ of review it is impossible to pass on that question.

The award of additional benefits based upon the alleged serious and wilful misconduct of the petitioning employer's failure to "place a guard upon the machine," etc., is annulled. In view of the failure of the Commission to find on the issue presented in the amended application for compensation, the cause is remanded to make such finding as may seem proper to the Commission.

PETERS, P. J., and KNIGHT, J., concur.

26 Cal.2d 860

Ex parte GILLIAM.

Cr. 4640.

Supreme Court of California.

Aug. 31, 1945.

1. Criminal law ⟹1202(1)

Petitioner's conviction under federal statute fixing penalty for entering railroad boxcar with intent to commit larceny therein, which conviction petitioner admitted was for burglary, was an offense which could be considered in fixing petitioner's status as an habitual criminal under state statute. Pen.Code, §§ 459, 644; 18 U.S.C.A. § 409.

2. Criminal law ⟹1202(1)

The character of the institution and the inmates, together with the nature of the proceedings leading to confinement therein, determines the status of the institution as respects question whether it is a "prison" or "penitentiary" within meaning of habitual criminal statute, irrespective whether the institution may be called a "reformatory", a "prison", or a "penitentiary". Pen. Code, § 644.

See Words and Phrases, Permanent Edition, for all other definitions of "Penitentiary" and "Prison".

3. Criminal law ⟹1202(1)

The serving of a term in the United States Industrial Reformatory at Chillicothe, Ohio, upon conviction under federal statute relating to entering a railroad boxcar and committing larceny therein, constituted the service of a sentence in a federal "penitentiary", within meaning of state habitual criminal statute. Pen.Code, § 644; 18 U.S.C.A. §§ 409, 831.

4. Criminal law ⟹1202(1)

That petitioner was 19 years of age at time he was sentenced to the United States Industrial Reformatory at Chillicothe, Ohio, for "boxcar robbery", was not a governing factor in determining character of the reformatory for purposes of state habitual criminal statute. Pen.Code, § 644; 18 U.S.C.A. §§ 409, 831.

5. Criminal law ⟹1202(3)

Where petitioner was charged with prior convictions of felony and with service of term of imprisonment on each of the convictions, petitioner pleaded guilty to the three counts and admitted in open court that he had been previously convicted of two prior offenses and that he had served time in the penitentiary under such convictions, fact that petitioner had actually served terms of imprisonment on the prior convictions was sufficiently established so as to bring petitioner within habitual criminal statute. Pen.Code, § 644.

In Bank.

Proceeding in the matter of the application of Wilford Gilliam for a writ of habeas corpus to be discharged from custody.

Writ denied, and petitioner remanded.

Prior opinion 157 P.2d 32.

Wilford Gilliam, in pro. per., and Thomas O'Hara, of Sacramento, for petitioner.

Robert W. Kenny, Atty. Gen., and Arthur A. Ohnimus and James O. Reavis, Deputy Attys. Gen., for respondent.

SPENCE, Justice.

By this proceeding in habeas corpus petitioner challenges the propriety of the trial court's adjudication that he is an habitual criminal. Pen.Code, § 644.

The information contained three counts, respectively charging petitioner with burglary and with two prior convictions of felonies. One of the prior convictions was alleged to have been for burglary committed in Texas, for which judgment was "pronounced and rendered and the defendant served a term of imprisonment" in the Texas State Prison. The other prior conviction was alleged to have been for "box car robbery, a felony," for which "judgment [was] pronounced and rendered" and "defendant * * * was imprisoned in a Federal Prison known as 'U.S.I.R.' at Chillicothe, Ohio." The last-mentioned prison is the United States Industrial Reformatory "used for the confinement of male persons who have been or shall be convicted of offenses against the United States, * * * and sentenced for terms of imprisonment for more than one year, with or without hard labor, except those who have been convicted previously of an offense punishable by imprisonment for more than one year, and except also those convicted of treason, murder in the first or second degree, rape or arson, and those sentenced to life imprisonment." 18 U.S.C.A. § 831. Upon arraignment, petitioner pleaded guilty to the principal charge of burglary, and admitted the two prior felony convictions and the service of the terms of imprisonment as alleged.

Following such plea and admissions, the trial court determined the principal crime to be burglary in the second degree, adjudged petitioner an habitual criminal as required by law, Pen.Code, § 644, and sentenced him to State Prison "for the term prescribed by law on Counts One, Two and Three of the information."

Petitioner claims to be illegally deprived of his liberty and in support thereof he argues that the trial court erred in these respects: (1) in holding his conviction of "box car robbery" and imprisonment therefor to be a "qualified prior" within the provisions of section 644 of the Penal Code; and (2) in adjudging him to be an habitual criminal without taking evidence on the point. The cited code section, so far as pertinent to petitioner's contentions, reads as follows: "Every person convicted in this State of any felony who shall have been previously twice convicted upon charges separately brought and tried, and who shall have served separate terms therefor in any State prison and/or Federal penitentiary, either in this State or elsewhere, of the crime of * * * burglary * * * shall be adjudged an habitual criminal and shall be punished by imprisonment in the State prison for life."

[1] Petitioner first maintains that the prior conviction for "box car robbery" should not be considered in fixing his status as an habitual criminal because that offense is not one of those enumerated in section 644. The record herein includes a certified copy of the writ of commitment which was issued in the matter of the designated offense and which recites that petitioner "was indicted * * * for having * * * violated sec. 409 of the U.S. Code—robbery of interstate shipments of freight, etc., contrary to the statutes of the United States in such case made and provided; and the said accused was convicted of said charge. * * *" Referring to said section 409 captioned "Larceny, etc., of goods in interstate or foreign commerce; penalty," 18 U.S.C.A. § 409, the following provision is pertinent: "Whoever * * * shall enter any [railroad] car [containing interstate or foreign shipments of freight or express] with intent * * * to commit larceny therein * * * shall * * * be fined not more than $5,000, or imprisoned not more than ten years, or both * * *." Our statutes contain a correlative provision in section 459 of the Penal Code where it is provided that "every person who enters any * * * railroad car * * * with intent to commit grand or petit larceny or any felony is guilty of burglary." At the time for sentence, petitioner was interrogated as to the nature of the two prior convictions and he stated: "They were for Burglary." As so admitted by petitioner, his offense against the federal statute manifestly comes within the import and intent of section 644, expressly specifying burglary among the enumerated crimes for consideration by the trial court in passing judgment. Upon such basis this case is distinguishable from People v. Lohr, 28 Cal.App.2d 397, 82 P.2d 615, cited by petitioner, because in that case the record furnished "no assistance" as to which section of the federal act there involved defendant had transgressed. Accordingly, it was said there at page 399, of 28 Cal.App.2d, at page 617 of 82 P.2d: "We must therefore assume that defendant was convicted of the violation of that portion of the * * * Act which" was the least offense thereunder, one not comparable with any of the enumerated felonies in said section 644. Likewise the record before us does not involve an "unindentified" crime as was the situation in People v. McChesney, 39 Cal.App.2d 36, 102 P.2d 455. Rather, the record here affirmatively establishes that the prior conviction in question does fulfill the statutory requirement, Pen.Code, § 644.

[2] With reference to this same prior conviction, petitioner next takes the position that the term of imprisonment served therefor does not come within the contemplation of section 644, because, he contends, that section of the Penal Code is based upon the serving of a term in any state prison or federal penitentiary, and not upon the serving of a term in a federal reformatory. In this connection he argues that a "reformatory" is distinguishable from a penal institution such as a "prison" or "penitentiary" because the primary purpose of a reformatory is to educate, discipline, and reform the persons confined therein rather than to punish them for their crimes. But this attempted general distinction, based merely upon the name which may be given to an institution, is of but little, if any, assistance in solving the question presented, for under enlightened modern practices the object of reformation may be as characteristic of the scheme of management of a so-called prison or penitentiary as it is of a reformatory. Webster's New International Dictionary, 2d Ed., pp. 1810, 1968. Rath-

er it is the character of the institution and its inmates together with the nature of the proceedings leading to confinement therein which determine its status in relation to the language of the code section under consideration. The word "penitentiary" may be used in a sense sufficiently broad to include a "reformatory" (50 C.J. § 3, Penitentiary, p. 330; State v. Vaughn, 15 Okl. Cr. 187, 175 P. 731), and so it would appear here with reference to the federal reformatory wherein petitioner was imprisoned.

[3, 4] As declared by federal statute, 18 U.S.C.A. § 831, supra, the "United States Industrial Reformatory" at Chillicothe, Ohio, is used for the confinement of male persons who have been convicted of offenses against the United States, with certain exceptions, and who have been sentenced for terms of imprisonment for more than one year. Said statute also provides that "it shall be sufficient for the courts *to sentence* said class of offenders *to imprisonment in the penitentiary without specifying the particular penitentiary or the United States industrial reformatory,* and the imprisonment shall be in such *penitentiary or the United States industrial reformatory* as the Attorney General shall from time to time designate." (Italics ours.) The provision for general sentence by the court of the designated class of offenders and for the attorney general's exercise of discretion in determining the place of imprisonment clearly indicates that the above-mentioned reformatory was nothing more or less than a particular type of penitentiary under the federal scheme for confinement of prisoners. Under similar considerations but involving the additional factor of an age limitation not here present, a state reformatory for the imprisonment of persons between the ages of sixteen and twenty-five years was held to be a "sub-prison or penitentiary" with respect to application of the Habitual Criminal Act. Hudson v. State, Okl.Cr., 145 P.2d 774, 776. Moreover in this state, it has been held that "imprisonment in the men's state reformatory [of Nebraska] * * * constitutes the 'serving of a term' in a state prison within the meaning of" section 644 of the Penal Code. In re Brady, 5 Cal.2d 224, 225, 53 P.2d 945. In contrast are proceedings under the Juvenile Court Law of this state (Welfare and Institutions Code, § 550 et seq., Stats. 1937, ch. 369, p. 1021), whereby "any person under the age of twenty-one years" is adjudged to be "a ward of the juvenile court" and is committed as such ward to a state industrial school for a period of time which may extend until he attains his majority. This precise situation is discussed in Ex parte Nichols, 110 Cal. 651, 43 P. 9, 10, where the Whittier Reform School is distinguished from a state prison because as a correctional institution for its inmates, its object "is not punishment, but reformation, discipline, and education." The distinction is further clarified in People v. DeFehr, 81 Cal.App. 562, at page 574, 254 P. 588, 593, where it is held that commitment to a reform school under the Juvenile Court Law of this state "does not involve a criminal prosecution or a judgment of sentence." The federal reformatory here involved is obviously not at all akin to a training school for juvenile offenders who are committed to the custody of such school but who are not confined therein under sentence of imprisonment. This reformatory is defined as a place "for the confinement of male persons," regardless of age, who have been "sentenced for terms of imprisonment for more than one year." Despite the fact that this institution is called a reformatory, it is clearly a penal institution established for the usual purpose of imposing punishment under sentence of imprisonment as well as for the purpose of effecting the reformation of the inmates. Petitioner's age at the time of sentence—nineteen years—is not a governing factor here in determining the character of the federal reformatory for the purposes of the habitual criminal statute of this state. It would be unreasonable to hold that confinement under sentence of a man twenty-two years of age in such reformatory constitutes service of a term of imprisonment in a "federal penitentiary" while like confinement under sentence of a minor is not to be similarly regarded. The federal statute in question furnishes no ground for such distinction as to inmates of the reformatory on the basis of age, and a reasonable interpretation of section 644 of the Penal Code warrants the conclusion that petitioner's service of sentence in such reformatory constitutes "the serving of a term in a federal penitentiary" within the meaning of that section. Cf. People v. Salisbury, 29 Cal.App.2d 697, 85 P.2d 456.

[5] Petitioner finally argues that no proof was made that he had actually served terms of imprisonment on the prior convictions, and that the trial court's adjudication of his status as an habitual criminal

may not therefore be sustained. In re Bertrand, 61 Cal.App.2d 183, 142 P.2d 351. A review of the proceedings had at the arraignment and sentence of petitioner readily distinguishes the record here from that prevailing in the cited case and demonstrates that petitioner's point of objection is without merit. By Counts II and III of the information petitioner herein was expressly charged with two prior convictions of felony and with the service of a term of imprisonment on each of said prior convictions. On arraignment, petitioner pleaded guilty to "count one, count two and count three." Later at the time of sentence, petitioner, in response to a question as to how long he had followed a certain trade, answered: "I followed that occupation after I left the reformatory." Also pertinent to the point of petitioner's previous penal terms is the following testimony: "Q. How many times have you been convicted of a felony? A. Two. Q. And what were they for? A. They were for Burglary. One was committed and the other one I was supposed to plead guilty to a charge and it was carried through." Then, as authorized by law in pursuance of petitioner's plea and admissions of prior convictions and imprisonment as charged, the trial court formally adjudged petitioner to be an "habitual criminal, he having suffered two prior confinements." In re Boatwright, 216 Cal. 677, 15 P.2d 755.

Petitioner's reliance on the Bertrand case, supra, is of no avail because there, in contrast to the present record, the information contained "no allegation that defendant had served terms of imprisonment on any of the prior convictions"; his admission on arraignment that "he had suffered the prior convictions 'charged in the information'" was "only an admission that he had suffered said prior convictions and not that he had served terms of imprisonment thereon"; "no proof was made to the court that he had ever served such terms of imprisonment"; "the trial court did not adjudge him to be an habitual criminal"; and in consequence of these deficiencies in the record, "the Board of Prison Terms and Paroles acted without authority of law in fixing his term at life imprisonment." 61 Cal.App.2d at pages 184, 185, 142 P.2d at page, 352. A complete answer to petitioner's argument is found in the recent case of People v. Stone, Cal.App., 159 P.2d 701, 702: "Contention that the trial court's judgment is erroneous because it did not take evidence upon the question of the prior convictions is utterly without merit. It is not an arbitrary judgment of the court when it adjudicates a prisoner to be an habitual criminal after he admits in open court two prior convictions for felonies and service of prison terms therefor at the time of his pleading guilty to the felony charged in the pending accusation. The confession of a prisoner at the bar of his guilt as charged as well as of the truth of the allegation of prior convictions is, in the absence of insane delusions, most satisfactory evidence upon which to convict and will support a judgment that he is an habitual criminal. People v. Nicholson, 34 Cal.App. 2d 327, 93 P.2d 223; In re Boatwright, 216 Cal. 677, 15 P.2d 755; People v. Dawson, 210 Cal. 366, 292 P. 267; People v. Birdsell, 6 Cal.App.2d 749, 45 P.2d 378."

The writ is discharged and petitioner is remanded to custody.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.

26 Cal.2d 867

BROWN v. REPUBLIC PRODUCTIONS, Inc., et al.

L. A. 19145.

Supreme Court of California.

Sept. 14, 1945.

1. Literary property ⊂⇒4, 9

A motion picture company's and music publishing company's use of all music and portion of lyrics of musical composition in revised composition with same title, pursuant to license agreement executed by two of three authors and owners of original composition without third owner's knowledge or consent, did not destroy original composition or third owner's rights therein as matter of law, but question whether such destruction resulted was fact issue requiring proof by competent evidence in third owner's action against such companies for damages.

2. Literary property ⊂⇒9

A judgment, requiring two of three authors and owners of musical composition to account to third owner for profits realized from use of revised composition by such other owners and their licensees, but denying third owner any relief as against licensees, was not erroneous as wholly destroying such owner's rights in original composition, from which his rights in revised composition necessarily derived.

3. Appeal and error ⚷704(2)

On appeal on judgment roll alone, error cannot be predicated on trial court's failure to find on an issue raised by pleadings, in absence of a record showing introduction of sufficient evidence on such issue to sustain finding for appellant.

4. Appeal and error ⚷907(3)

On appeal on judgment roll alone, where no record, showing introduction of evidence sufficient to sustain finding for appellant on issue as to which trial court failed to find, is presented, Supreme Court must assume that finding on such issue would have been adverse to appellant.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Suit by George R. Brown against the Republic Productions, Inc., Mills, Music, Inc., and others for plagiarism, infringement, and conversion or destruction of the music, lyrics and title of a musical composition. From a portion of the judgment rendered, denying plaintiff relief against named defendants, plaintiff appeals.

Affirmed.

Prior opinion, 156 P.2d 40.

See, also, 161 P.2d 798.

Ray Sandler, of Los Angeles, Max Fink, of Hollywood, and Robert Kingsley, of Los Angeles, for appellant.

Loeb & Loeb, Herman F. Selvin, and Milton H. Schwartz, all of Los Angeles, for respondents.

SCHAUER, Justice.

In this suit brought by plaintiff for the plagiarism, infringement, conversion or destruction of the music, lyrics and title of a certain musical composition known as "Puddin' Head," plaintiff appeals, on the judgment roll alone, from such portion of the judgment rendered by the trial court, sitting without a jury, as denies to plaintiff relief by injunction, damages, or otherwise, against a motion picture company and a music publishing company.

The court found, among other things, that plaintiff, and defendants Jule Styne and Sol Meyer, were the coauthors and coowners of the composition; that before publication thereof defendant Styne, within the scope of his employment by defendant Republic Productions, Inc., used all of the music and a portion of the lyrics of the composition by incorporating them in a similar composition also entitled "Puddin' Head," and that defendants Styne and Republic Productions, Inc., thereby altered and changed the original lyrics of plaintiff and his coauthors with knowledge of plaintiff's rights; that thereafter defendant Republic Productions, Inc., used the revised composition in a motion picture produced by it which had been and is being distributed by it for profit; that defendant Mills Music, Inc., has distributed and is distributing for profit copies of the revised composition; that the use by the two corporate defendants of the revised composition was made pursuant to a written agreement executed by Styne and Meyer permitting and licensing such use; and that the alteration of the original composition and the licensing and use by defendants of the revised product were done without plaintiff's knowledge or consent and without compensating him.

From such findings the court concluded that plaintiff was entitled to an accounting against his coowners Styne and Meyer for profits realized and to be realized by them from the use of the revised composition, but that he was entitled to nothing as against defendants Republic Productions, Inc., and Mills Music, Inc. Judgment was entered accordingly.

Plaintiff in support of his appeal from the latter portion of the judgment earnestly contends that, as alleged by him in his complaint, the effect of the use by defendants of the revised composition "now is, and unless * * * enjoined, will continue to be, the impairment and *destruction* of plaintiff's property and property rights" (italics added) and that therefore plaintiff is entitled to relief against the two corporate defendants in addition to that awarded him against his coauthors, defendants Styne and Meyer. He concedes that if the composition had been used in its original form he could not recover against the corporate defendants, inasmuch as Styne and Meyer as owners in common with plaintiff of the original composition were severally entitled to use the composition and to license others to use it without first securing plaintiff's consent. (See Klein v. Beach (D.C.1916), 232 F. 240, 247; Id. (2 Cir., 1917), 239 F. 108, 151 C.C.A. 282; Lee Chuck v. Quan Wo Chong & Co. (1891), 91 Cal. 593, 598, 599, 28 P. 45; Dinsmore v. Renfroe (1924), 66 Cal.App. 207, 214, 225 P. 886; Herbert v. Fields (Sup., 1915), 152 N.Y.S. 487, 489.) But he asserts that the acts of defendants amount to more than a license and user of the original composition; that they amount to a destruction thereof; that the authority of a cotenant over literary property is not different from the authority of a cotenant over tangible personal property; and that such authority, as to tangible property, does not extend to acts of destruction or to the rendering impossible of further enjoyment of the common property by another cotenant. In support of such assertion plaintiff cites Shafter, Musical Copyright (1939), pp. 165–166; Yadkoe v. Fields (1944), 66 Cal.App.2d 150, 159, 151 P.2d 906. (See, also, Herbert v. Fields (1915), supra, 152 N.Y.S. 487; Amdur, Copyright Law and Practice (1936), p. 835; Horn v. Klatt (1944), 65 Cal.App.2d 510, 517, 151 P.2d 149.) However, for the reasons hereinafter stated, we find it wholly unnecessary in the disposition of this appeal to resolve the propositions of law asserted in the contentions above stated.

[1, 2] The trial court made no finding as to whether plaintiff's property (the original composition) or his property rights therein were *destroyed* in whole or in part by the enumerated acts of defendants. Whether a destruction resulted was an issue of fact requiring proof by competent evidence. The use to which parts of the composition were put by defendants does not by itself show destruction of the original composition or plaintiff's rights therein. Under the judgment plaintiff is to be compensated for rights in the rewritten composition. This, in itself, is in a measure inconsistent with the theory that he has been wholly deprived of his rights in and under the original literary property; his interest in and rights under the revised composition necessarily derive only from his interest in and rights under the original. Hence such rights are being recognized and given efficacy rather than being wholly destroyed.

[3, 4] As mentioned above, this is an appeal on the judgment roll alone and the evidence introduced in the trial court is not before us. Therefore, as stated in Delanoy v. Delanoy (1932), 216 Cal. 23, 27, 13 P.2d 513, 514, "Even though it appears that the trial court failed to find on an issue raised by the pleadings [i. e., the issue of destruction of the musical composition], error cannot be predicated upon such failure in the absence of a record showing that evidence was introduced on such issue sufficient to sustain a finding on behalf of appellant. 2 Cal.Jur. 525, § 262. In order to warrant the reversal of a judgment for failure to find on an issue, it must be shown by the *record on appeal* that evidence sufficient to sustain a finding for the complaining party was introduced. 24 Cal.Jur. 947, § 189. No such record has been presented. We must assume, therefore, that, had a finding been made on the issue, it would have been adverse to appellant." (See, also, Franklin v. Bettencourt (1936), 16 Cal.App.2d 511, 513, 60 P.2d 1017; Klein v. Maddox (1943), 59 Cal.App.2d 141, 146, 138 P.2d 28; 2 Cal.Jur. § 614, p. 1034.)

Plaintiff makes no other attack on the judgment and therefore, for the reasons stated above, the portion of the judgment appealed from is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SPENCE, JJ., concur.

26 Cal.2d 874

BROWN v. REPUBLIC PRODUCTIONS, Inc., et al.

L. A. No. 19146.

Supreme Court of California.

Sept. 14, 1945.

Literary property ⟹9

A judgment, awarding one of three authors and owners of musical composition an accounting against other owners for profits from use and sale of revised composition by motion picture company and music publishing company under licenses granted by such owners without third owner's knowledge or consent, but denying him relief against such companies, was not erroneous as destroying his rights in original composition.

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Suit by George R. Brown against Republic Productions, Inc., Mills Music, Inc., and others for plagiarism, infringement and conversion or destruction of the music, lyrics and titles of certain musical compositions. From a portion of the judgment rendered, denying plaintiff relief against named defendants, plaintiff appeals.

Affirmed.

Prior opinion, 156 P.2d 42.

Ray Sandler, of Los Angeles, Max Fink, of Hollywood, and Robert Kingsley, of Los Angeles, for appellant.

Loeb & Loeb, Herman F. Selvin, and Milton H. Schwartz, all of Los Angeles, for respondents.

SCHAUER, Justice.

The controlling issue in this case is basically the same as that of Brown v. Republic Productions, Inc., 161 P.2d 796, our opinion in which has been this day filed and reference to which is suggested for a statement of pertinent facts. The cases may be said to differ only in that the findings establish that the extent to which portions of the original compositions were incorporated in the revised productions is substantially smaller here. The musical compositions involved are five: "All This and Heaven Too," "Peek-a-Boo," "I Could Love You Any Time At All," "Hunky-Dunky-Dory," and "Bonita Lolita."

The court found that plaintiff, and defendants Styne and Meyer, were coauthors and coowners of the music and lyrics of such songs; that prior to publication thereof defendants Styne and Meyer, within the scope of their employment by defendant Republic Productions, Inc., used certain portions of the music and lyrics of the several compositions by incorporating them into other compositions with various titles; that such use was made with full knowledge of plaintiff's rights in the original compositions; that thereafter defendant Republic Productions, Inc., used the revised compositions in various motion pictures produced by it which had been and are being distributed by it for profit; that defendant Mills Music, Inc., has distributed and is distributing for profit copies of the revised compositions; that the use by the two corporate defendants of the revised compositions was made pursuant to a written agreement executed by Styne and Meyer permitting and licensing such use; and that alteration of the original compositions and the licensing and use by defendants of the revised products were done without plaintiff's knowledge or consent and without compensating him.

Plaintiff was awarded judgment requiring defendants Styne and Meyer to account to him for profits from the revised compositions, but was denied relief against the corporate defendants. Plaintiff's argument in support of his appeal is substantially the same as that advanced in the companion case, mentioned hereinabove. Here, as in that case, the appeal is upon the judgment roll alone. We are satisfied that the mere fact that the findings here establish that the extent to which portions of the original compositions were incorporated in the rewritten productions is substantially smaller than in the preceding case cannot alter our conclusion. In neither case has the court found, directly or in effect, that the plaintiff's rights have been destroyed. In both cases the judgments award an accounting for plaintiff's interest in profits from the rewritten compositions. For the reasons stated above and in the opinion therein referred to, the portion of the judgment appealed from is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SPENCE, JJ., concur.

70 Cal.App.2d 785

MORGAN et ux. v. FRENCH.

Civ. 12929.

District Court of Appeal, First District, Division 2, California.

Sept. 19, 1945.

1. Courts 🔑122

Complaint, in action brought in superior court for actual and exemplary damages exceeding $1,000, alleging that defendant unlawfully entered into residence of plaintiffs, stated facts giving court jurisdiction of defendant's person and of the subject matter irrespective of special demurrer on ground of ambiguity, since such fact could not affect superior court's jurisdiction. Code Civ.Proc. § 112; Const. art. 6, § 5.

2. Trespass 🔑40(1)
Trover and conversion 🔑32(1)

Complaint, in action for actual and exemplary damages, alleging that defendant wrongfully and by force and without authority by plaintiffs entered their residence during their absence and took certain enumerated articles belonging to plaintiffs and converted them to her own use and that discovery of unlawful entry caused plaintiffs to suffer fright, nervousness, and humiliation, was sufficient to state cause of action in tort.

3. Action 🔑45(3)

A complaint joining cause of action for alleged injury to person and property of plaintiffs was not demurrable on ground of misjoinder. Code Civ.Proc. § 427.

4. Evidence 🔑14

That the burglary of one's home causes fright and nervousness and injury to the feeling of the homeowner is a matter of common knowledge.

5. Evidence 🔑14

That another has unlawfully made a search of one's personal belongings, papers, and clothing causes injury to the feeling of the owner is a matter of common knowledge.

6. Pleading 🔑192(2)

Complaint, in action for exemplary damages, alleging that defendant unlawfully entered plaintiffs' residence and unlawfully searched plaintiffs' personal belongings, and that discovery caused mental anguish to plaintiffs and thereafter to suffer from fright, nervousness, and humiliation, was not demurrable for ambiguity and uncertainty on ground that it could not be ascertained how plaintiffs sustained such mental sufferings.

7. Trespass 🔑40(5)
Trover and conversion 🔑32(6)

Where complaint sought only damages to extent of value of personalty allegedly unlawfully taken by defendant from plaintiffs' residence, complaint was not demurrable on ground that it could not be ascertained whether damage was caused to plaintiffs' realty or personalty.

8. Pleading 🔑192(2)
Trespass 🔑50

Plaintiffs, who sued for actual and exemplary damages for alleged unlawful entry of defendant into plaintiffs' residence, would be entitled under statute to interest from date of unlawful entry, if plaintiffs should succeed in proving that entry was made maliciously; hence, fact that plaintiffs pleaded for interest at a rate of 7% did not make pleading demurrable as ambiguous or uncertain. Civ.Code, § 3288.

9. Pleading 🔑8(6)

Complaint, alleging that defendant deliberately and willfully without plaintiffs' authority entered plaintiffs' residence for purpose of injuring plaintiffs, did not plead a conclusion of law, but pleaded facts showing malice so as to state a cause of action for exemplary damages under statute authorizing recovery of exemplary damages if defendant was guilty of malice. Civ. Code, § 3294; Code Civ. Proc. § 1962.

10. Damages 🔑151

A complaint which pleads deliberate commission of an unlawful act for purpose of injuring another pleads the only facts necessary to put in play conclusive presumption of a malicious and guilty intent, so as to warrant recovery of exemplary damages under statute. Civ.Code, § 3294; Code Civ.Proc. § 1962.

11. Damages 🔑163(1)

Before statutory conclusive presumption of a malicious and guilty intent arises so as to authorize recovery of exemplary damages, commission of an unlawful act, that its commission was deliberate, and that it was committed with deliberate purpose of injuring plaintiff, must be established. Civ. Code, § 3294; Code Civ.Proc. § 1962.

12. Damages ⚷**91(1)**

A malicious motive or intent so to authorize recovery of exemplary damages will be presumed or implied in law from intentional commission of a wrongful act which causes injury to another. Civ.Code, § 3294.

13. Damages ⚷**91(1)**

Though it may appear that party acted without hatred or revenge, if he acted wantonly, doing what any man of reasonable intelligence must have known to be contrary to his duty, and purposely prejudicial and injurious to another, the law will imply malice, so as to warrant recovery of exemplary damages. Civ.Code, § 3294.

14. Damages ⚷**91(1), 163(1)**

Legal "malice" so as to authorize recovery of exemplary damages means wrongful intention to do harm which the law always presumes as accompanying a wrongful act without any proof of malice in fact. Civ.Code, § 3294.

See Words and Phrases, Permanent Edition, for all other definitions of "Malice".

15. Courts ⚷**122**

Whether superior court has jurisdiction of action is to be determined on demurrer to complaint upon amount of "the demand" and not upon what may then be deemed to be the probable recovery. Code Civ.Proc. § 112; Const. art. 6, § 5.

◆

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action by Rupert Morgan and wife against Mary Belle French for actual and exemplary damages for an alleged unlawful entry of defendant into plaintiffs' residence. From a judgment sustaining defendant's demurrer to the complaint, plaintiffs appeal.

Reversed.

Sefton & Quattrin, of San Francisco, for appellants.

Ross & Ross, of Redwood City, for respondent.

NOURSE, Presiding Justice.

The plaintiffs sued for actual and exemplary damages for the alleged unlawful entry of defendant into the residence of plaintiffs. A demurrer to the second amended complaint was sustained; the plaintiffs declined to amend further; and defendant took judgment. We will herein refer to the second amended complaint as the "complaint."

This alleges that the defendant "wrongfully and by force" entered the residence of plaintiffs during their absence, conducted a search of plaintiffs' household goods, clothing, and personal effects, and "took" certain enumerated articles therefrom which belonged to plaintiffs and converted them to her own use; that the entry and taking "were without any authority or consent by the plaintiffs"; that in "so entering" into the home of plaintiffs "the defendant was guilty of malice in that said entry was deliberately and wilfully made by the defendant for the purpose of injuring the plaintiffs, and said entry constituted an unlawful act." Then follows an allegation that the discovery of the unlawful entry caused plaintiffs "mental anguish and thereafter to suffer from fright, apprehension, nervousness, disgrace and humiliation."

Damages were prayed in the sum of $19—the value of the articles taken; $1,000 for the unlawful entry; $10,000 as exemplary damages; and interest at 7% a year from June 22, 1944, the date of the entry.

[1-7] The defendant demurred on eleven grounds. The first and second are that the complaint does not state facts giving the court jurisdiction of the person, and of the subject matter. Both are without merit. The third ground urged is the failure to state a cause of action. The complaint pleads a case in tort with alleged injury to the person and property of plaintiffs and clearly, though briefly, pleads a cause of action. The fourth ground claims a misjoinder of causes of action. Defendant has failed to observe section 427 of the Code of Civil Procedure which permits the joinder of causes of action for injuries to person and to property. Under the fifth ground the defendant claims that the complaint was ambiguous because it can not be ascertained therefrom how the plaintiffs suffered from fright, nervousness, humiliation and had their feelings injured. It is a matter of common knowledge that the burglary of one's home causes fright and nervousness and injury to the feelings of the home owner. The knowledge that another has unlawfully made a search of one's personal belongings, papers and clothing

may also cause suffering. It was not necessary to plead any further facts in this respect. The same may be said as to the sixth ground relating to the allegations that plaintiffs suffered mental anguish by the alleged unlawful entry of their home. The seventh ground asserting ambiguity in that it can not be ascertained if damage was caused to the real or personal property of plaintiffs does not present any debatable question. The complaint does not seek damages for injuries to real property, but does claim damages to the extent of the value of the personal property alleged to have been taken.

[8] The eighth ground asserts ambiguity in that it can not be ascertained how plaintiffs are entitled to ask for interest from the date of the unlawful entry. This is not a question of ambiguity or uncertainty. Section 3288 of the Civil Code provides that in every case of oppression, fraud or malice interest may be given in the discretion of the jury. If plaintiffs succeed in proving that the unlawful entry was made maliciously, they would be entitled to interest under this section, and the fact that they pleaded for interest at the rate of 7% does not make the pleading either ambiguous or uncertain. The tenth and eleventh grounds merely asserted that the complaint is unintelligible and uncertain for the same reasons theretofore asserted as to its ambiguity.

[9, 10] The ninth ground presents the only debatable question. It is there argued that the complaint is ambiguous because it can not be ascertained therefrom what acts, if any, of the defendant entitled plaintiffs to ask for exemplary damages. The defendant relies upon the dictum found in Avakian v. Noble, 121 Cal. 216, 218, 53 P. 559, where the court said: "It may be conceded that, as against a special demurrer for uncertainty or ambiguity, the complaint would be bad, and that plaintiff would have been required to allege in a more specific manner the circumstances showing oppression or malice in the doing of the act complained of, in order to entitle him to damages in excess of the actual value of the property taken." In that case the plaintiff recovered both actual and exemplary damages upon a complaint alleging that the defendants "unlawfully, oppressively, and with force and arms," took and carried away a certain lot of raisins to the value of $300. It was conceded that the verdict of $500 included an award for exemplary damages. In affirming the judgment the supreme court, after using the language heretofore quoted, held that the point was not before it because no special demurrer had been interposed, and all the evidence showing the circumstances of aggravation was admitted without objection. The difference between the complaint there considered and the one before us is substantial. Here the plaintiffs rely upon malice; there the plaintiff relied upon oppression only. Here the complaint alleges that the entry was deliberate and wilful, made for the purpose of injuring the plaintiffs and that the entry was without authority or consent of the plaintiffs. Thus all the facts tending to show malice that could have been pleaded are pleaded with such certainty that no one could have any doubt as to their meaning. The argument that the complaint merely pleads a conclusion of law is not sound. Section 3294 of the Civil Code provides that a party may recover exemplary damages where the "defendant has been guilty of oppression, fraud, or malice, express or implied." Malice is not only "implied" but it is conclusively presumed "from the deliberate commission of an unlawful act, for the purpose of injuring another." Section 1962, Code Civ.Proc. This conclusive presumption precedes all rebuttable presumptions, implications and inferences which may be drawn from facts proved. Where a complaint pleads the deliberate commission of an unlawful act for the purpose of injuring another, it pleads the only facts necessary to put in play the conclusive presumption of a malicious and guilty intent. That the alleged burglary and petty theft of articles taken from plaintiffs' residence are unlawful acts within the meaning of section 1962 can not be questioned.

[11] The complaint was thus complete in alleging the malicious acts on the part of the defendant which entitled plaintiffs to sue for exemplary damages under the code section. This is in accord with the rule stated in Davis v. Hearst, 160 Cal. 143, 167, 116 P. 530, 541: "The only presumption of our law touching malice in fact is that announced in section 1962, Code of Civil Procedure, which declares as a conclusive presumption 'the existence of a malicious and guilty intent from the deliberate commission of an unlawful act for the purpose of injuring another.' But before this presumption arises, the jury is to find as facts (1) the commission of an unlawful act; (2) that its commission was deliberate; and (3) that it was committed with the deliberate purpose of injuring another. In these three findings it will be noted are all the elements of malice in fact." In harmony with this is Clark v. McClurg, 215 Cal. 279, 284, 9 P.2d 505, 507, 81 A.L.R. 908, where the supreme court states: "The law presumes that general damages follow from the utterance or publication of matter slanderous or libelous per se. Hence where, as here, the publication is slanderous or libelous per se, and is false and unprivileged, a cause of action for actual or compensatory damages is conclusively established." (Citing cases)

[12, 13] "A malicious motive or intent will be presumed or implied in law from the intentional commission of a wrongful act which causes injury to another." 34 Am. Jur. p. 685. And though it may appear that the party acted without hatred or revenge "if he acted wantonly, doing what any man of reasonable intelligence must have known to be contrary to his duty, and purposely prejudicial and injurious to another, the law will imply malice." 34 Am.Jur. p. 683.

[14] Hence legal malice means no more than the wrongful intention to do harm which the law always presumes as accompanying a wrongful act, without any proof of malice in fact. Star Pub. Co. v. Donahoe, Del., 58 A. 513, 65 L.R.A. 980.

[15] We have heretofore said that the demurrer to the jurisdiction is not well taken. It should be added that respondent supports her plea on this assignment with the argument relating to her special demurrer on the allegations supporting plaintiffs demand for exemplary damages. It is argued that since the complaint is ambiguous in this respect the amount in controversy appears to be less than $1,000, and hence that the superior court did not have jurisdiction within the provisions of section 112 of the Code of Civil Procedure. But the complaint is not vulnerable to the general demurrer. It pleads a cause of action within the jurisdiction of the superior court, and the special demurrer for ambiguity can not affect the question of the court's jurisdiction. This is so because all the grounds urged in that special demurrer might be waived as was done in Avakian v. Noble, supra. In respect to the amount in controversy the jurisdiction of the superior court as against that of an inferior court is to be determined by "the demand" made in the complaint. Constitution Article VI, Section 5; Section 112, Code of Civil Procedure. Hence, when the question of jurisdiction is raised by demurrer to the complaint is must be determined upon the amount of "the demand" and not upon what may then be deemed to be the probable recovery.

Though the complaint is unusually brief it states the facts "in ordinary and concise language" sufficient to entitle plaintiffs to go to trial on the issues raised within the provisions of section 426 of the Code of Civil Procedure.

The judgment is reversed.

STURTEVANT and GOODELL, JJ., concur.

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71 Cal.App.2d 1

PEOPLE v. DAY.

Cr. 2338.

District Court of Appeal, First District,
Division 2, California.
Sept. 27, 1945.

1. Criminal law 🔑517(4)

Generally, foundation for introduction of a confession is sufficient if commission of the crime is established and proof of the corpus delicti need not connect defendant with the crime.

2. Criminal law 🔑517(4)

Even if proof of corpus delicti as to defendant would require a showing of his connection with crime because he was not present when it was committed, proof that defendant, who had been employed in office where robbery occurred, was seen in front of office shortly before robbery, and that thereafter one of women employees received a telephone call from one whose voice she identified as defendant's to get only man who was in office away, sufficiently established corpus delicti, so as to authorize introduction of a confession.

3. Criminal law 🔑517(4)

Only slight proof which prima facie establishes the corpus delicti is required as foundation for admission of defendant's confession.

4. Criminal law ⚷1159(4)

Argument as to credibility of testimony was for triers of facts and not for an appellate court.

5. Criminal law ⚷1159(4)

Although appellate court will not uphold a judgment based upon evidence inherently improbable, testimony which merely discloses unusual circumstances does not come within that category.

6. Criminal law ⚷1159(4)

To warrant rejection of statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions.

7. Criminal law ⚷1159(3, 4)

Conflicts and even testimony which is subject to justifiable suspicion do not justify reversal of a judgment, since it is exclusive province of trial judge or jury to determine credibility of witness and truth or falsity of facts upon which a determination depends.

8. Robbery ⚷24(1)

In robbery prosecution, testimony of one of women employees in office where robbery occurred that, a short time before robbery, she received a telephone call from one whose voice she identified as defendant's, calling only man who was in office away, was not required to be rejected as inherently improbable.

9. Criminal law ⚷538(3)

Where defendant did not take stand and defense rested without producing any evidence, jury was entitled to consider defendant's written confession upon proof of corpus delicti, with other proof, in determining whether defendant's guilt was established beyond a reasonable doubt.

10. Robbery ⚷24(1)

Evidence supported conviction of first-degree robbery. Pen.Code, § 211a.

11. Robbery ⚷27(5)

Where crime proved, because of use of a deadly weapon, was first-degree robbery, and it was shown that defendant was guilty as a principal in helping to plan the robbery, though not present at time it was committed, failure to instruct jury that it might bring in a verdict of second-degree robbery as to defendant was not error. Pen.Code, §§ 31, 211a, 971.

Appeal from Superior Court, Contra Costa County; Harold Jacoby, Judge.

Lewis J. Day was convicted of first-degree robbery, and he appeals.

Affirmed.

Edward E. Craig, of Berkeley, for appellant.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

DOOLING, Justice pro tem.

The appellant Day and one Miramontes were convicted of first degree robbery. The evidence showed that on August 9, 1944, during the noon lunch hour Miramontes entered the office of the Housing Authority in the city of Richmond and at the point of a pistol compelled the two women employees then present to give him the cash on hand in the office. The only evidence connecting appellant with the robbery, other than his confession introduced over the objection that there was no proof of the corpus delicti as to him, is here recited:

Day had up to some time in July, 1944, been employed in the office of the Housing Authority; shortly before the robbery occurred Day was seen in front of the office and a few moments later one of the two women in the office received a telephone call; this witness identified the voice of the man who made this call as that of Day and testified that Day, simulating a Spanish accent, told her that he was locked out of his apartment, giving the address of an apartment which the witness knew was not occupied by Day, and asked to have some one sent from the office with a key to admit him; there were then present in the office the two women and one man; in response to the telephone call the man left the office with the key to the apartment mentioned leaving the two women alone; a few minutes later Miramontes entered and, although he was only slightly acquainted with the office as a tenant of the Housing Authority, directed the women to get the key to the safe from the cash register and to open the safe, which was in a back room and not visible from the outer office; and some days after the robbery the manager of the Housing Authority met Day and said to him that the robbery was well planned but poorly executed, whereupon Day turned pale and walked away.

[1] The fact that the robbery occurred was testified to positively and in detail by the two women present. It is the general rule that the foundation for the introduction of a confession is sufficient if the commission of the crime is established and the proof of the corpus delicti need not connect the defendant with the crime. People v. Fierro, 58 Cal.App.2d 215, 220, 136 P.2d 94; People v. Meyers, 7 Cal.App.2d 351, 354, 46 P.2d 282; 8 Cal.Jur. 236.

[2, 3] Assuming, without deciding, that in this case, because the proof of the crime itself affirmatively showed that Day was not present when it was committed, proof of the corpus delicti as to him would require a showing of his connection with it, the facts above outlined were sufficient for that purpose. Only slight proof which prima facie establishes the corpus delicti is required as foundation for the admission of a defendant's confession. People v. Jones, 123 Cal. 65, 68, 69, 55 P. 698; People v. Bollinger, 196 Cal. 191, 200, 231 P. 25; People v. Kaye, 43 Cal.App.2d 802, 809, 111 P.2d 679; 8 Cal.Jur. 235. The jury could reasonably infer from the preliminary proof that Day, who was familiar with the office and had had an opportunity a few moments before to observe who was present therein, put in the telephone call to get the only man who was there at the time away from the office so that Miramontes would have only the two women to deal with when he entered for the purpose of committing the robbery.

[4-8] Appellant argues that the testimony of the witness that she recognized his voice over the telephone is inherently improbable. We quote from appellant's brief:

"If she had recognized Day's voice over the telephone and knew that he did not live at the address given where the lockout was, she certainly would have called it to his attention over the phone and she certainly would not have sent her superior on a wild goose chase."

This is an argument as to the credibility of the testimony for the triers of the facts to weigh and decide, and not for an appellate court. "Although an appellate court will not uphold a judgment or verdict based upon evidence inherently improbable, testimony which merely discloses unusual circumstances does not come within that category. Kidroski v. Anderson, 39 Cal.App.2d 602, 603, 103 P.2d 1000. To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. Back v. Farnsworth, 25 Cal.App.2d 212, 219, 77 P.2d 295; Lufkin v. Patten-Blinn Lumber Co., 15 Cal.App.2d 259, 262, 59 P.2d 414; Agoure v. Spinks Realty Co., 5 Cal.App.2d 444, 451, 42 P.2d 660; Hughes v. Quackenbush, 1 Cal.App.2d 349, 354, 355, 37 P.2d 99; Powell v. Powell, 40 Cal.App. 155, 158, 159, 180 P. 346. Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. Hicks v. Ocean Shore Railroad, Inc., 18 Cal.2d 773, 781, 117 P.2d 850." People v. Huston, 21 Cal.2d 690, 693, 134 P.2d 758, 759. Cf. People v. Stephens, 66 Cal.App.2d 755, 152 P.2d 1019.

[9, 10] The appellant's written confession was complete and circumstantial. He stated that he planned the robbery, persuaded Miramontes to commit it, put in the telephone call concerning the fabricated lockout, and afterwards received a share of the stolen money from Miramontes. Neither defendant took the stand and the defense rested without producing any evidence. The jury was entitled to consider the confession, with the other proof, in determining whether appellant's guilt was established beyond a reasonable doubt. People v. Selby, 198 Cal. 426, 439, 245 P. 426. Upon the whole case they could not very well have entertained any reasonable doubt of appellant's guilt. This being so the claimed misconduct of the prosecution in the closing argument requires no extended comment. It was not aggravated and probably did not go beyond the scope of legitimate argument, a question which we need not pass upon because under the facts of this case appellant cannot show that it prejudicially influenced the jury.

[11] The failure to instruct that the jury might bring in a verdict of second degree robbery as to appellant was not error. The crime proved, because of the use of a deadly weapon, was first degree robbery, Pen.Code, Sec. 211a, and appellant was guilty as a principal, Pen.Code, secs. 31, 971. The proof furnished by appellant's confession leaves no doubt that he contemplated the use of a deadly weapon in the commission of the crime. We quote: "I had made the remark it would be easy to

stick the place up. * * * I suggested to Charles (Miramontes) that it would be easy to hold the place up * * *."

Judgment and order denying appellant's motion for new trial affirmed.

NOURSE, P. J., and GOODELL, J., concur.

70 Cal.App.2d 833

GAZZERA et al. v. CITY AND COUNTY OF SAN FRANCISCO.

Civ. 12833.

District Court of Appeal, First District, Division 2, California.

Sept. 25, 1945.

1. Evidence 🔑570

The weight to be given to the opinion of an expert depends on the reasons he assigns to support it.

2. Evidence 🔑574

Trial court was justified in adopting and following opinions of experts who had assigned what appeared to be sound reasons for their opinions against opinion of expert who gave no reasons for his opinion.

3. Municipal corporations 404(6)

In action against city for damage to real property by hill slide as alleged result of excavation and grading of street and removal of drain pipes, findings for defendant were sustained by the evidence.

4. Municipal corporations 🔑404(6)

Burden was on plaintiffs to prove that hill slide damaging their property was caused by alleged negligence of city.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by Steve Gazzera and Mary Gazzera against City and County of San Francisco for damages to real property. From a judgment for defendant, the plaintiffs appeal.

Judgment affirmed.

John D. Harloe and Joseph A. Brown, both of San Francisco, for appellants.

John J. O'Toole, City Atty., and John F. Moran, Deputy City Atty., both of San Francisco, for respondent.

STURTEVANT, Justice.

Action for damages to real property. Plaintiffs appeal from a judgment for the defendant city rendered by the court sitting without a jury.

Plaintiffs' house and property are situated on the northeast corner of the intersection of Kirkwood Avenue and Mendell Street, facing Kirkwood Avenue. The house and lot immediately adjacent on the northwest was owned by Thomas T. Shoaf and was occupied by Mrs. Margaret MacArtney, his daughter. Mendell Street was graded and paved in 1917 but no paving was laid in the intersection as Kirkwood was unimproved. In 1930 pursuant to a request of Mr. Shoaf, the city excavated and graded a temporary roadway twelve feet wide on Kirkwood Avenue easterly from Mendell Street. The cut was from five to ten feet deep with sloping sides. Water seeped from the upper side of the cut and pipes were laid to carry it off. These pipes were removed when the intersection was paved.

In February, 1940, ten years after the excavation, there was a series of heavy rain storms. After one of these storms a section of the hill slid into the Kirkwood and Mendell intersection and plaintiffs' house was destroyed. Plaintiffs presented a claim to the city but payment thereof was refused. They then brought suit claiming the excavation and grading of Kirkwood removed the lateral support of the hill and this, coupled with the subsequent removal of the drain pipes, was the proximate cause of the slide.

Before proceeding it should be noted that the maps show commencing on the north, Newhall, Mendell, Lane and Keith Streets run from east to west and that they are crossed by Innes, Jerrold, Kirkwood, La Salle and McKinnon which run from north to south.

Mendell Street, from Jerrold Avenue to Kirkwood Avenue, was graded, curbed and paved in 1917, and from Kirkwood Avenue to La Salle Street said Mendell Street was graded, curbed and paved in 1918. At the time of the grading, curbing and paving of Mendell Street, as above set forth, the intersection of Mendell Street and Kirkwood was not done.

At the time of the grading, paving and curbing of said Mendell Street in front of plaintiffs' property, said property was, by reason thereof, left eight or ten feet above the grade line of said Mendell Street, and at the time of the grading, curbing and paving, plaintiffs and their predecessors in interest were notified to, and did, shore up their property by the erection of a good and substantial concrete bulkhead.

The plaintiffs claimed the street work was so done as to injure their property. They alleged:

"That on the 6th day of December, 1929 * * * a temporary roadway twelve feet wide was graded out of the middle of Kirkwood Avenue; that no notice to plaintiffs or to any other property owners fronting on Kirkwood Avenue at said place was given and that in grading said temporary roadway, the sides of Kirkwood Avenue were left in a sloping condition;

"That the grading of Kirkwood Avenue in the manner in which it was done, * * * made it impossible for plaintiffs as well as other property owners fronting on Kirkwood Avenue, to shore up their property.

"That by reason of the grading of Kirkwood Avenue, there was considerable seepage of water and in order to carry off said water, pipes were installed; that in the month of November, 1930, the crossing of Kirkwood Avenue and Mendell Street, which had theretofore been left undone, was graded, curbed and paved. That at the time of the grading, curbing and paving of the crossing, the pipes which had theretofore been installed for the draining off of the water from Kirkwood Avenue, were blocked and prevented from draining off the water.

"That by reason of the blocking and stopping of said drain pipes, the water percolated and seeped in, around and under the foundation of plaintiffs' property; that by reason of the grading of the temporary roadway in Kirkwood Avenue, that land which was left on the sides thereof, was caused to and did, on or about the 2nd day of March, 1940, shift and slide into the center of said roadway on Kirkwood Avenue.

"That said land, in shifting and sliding took with it the foundation under plaintiffs' property, causing the said foundation to slip and break away from the retaining wall which had theretofore been erected along Mendell Street, causing the property to sink and to become untenantable.

"That said damage to plaintiffs' property was caused by the failure of the City and County of San Francisco to properly grade the entire width of Kirkwood Avenue, and that by reason of the shifting and sliding of said land and taking with it the foundation of plaintiffs' property, plaintiffs have been damaged in the sum of Seventy-five Hundred Dollars ($7500.00)."

In its answer the defendant denied each charge of negligence. The trial court made findings in favor of the defendant on all of said charges. In their briefs the plaintiffs contend the findings should have been in their favor. We think the trial court was warranted in making said findings as written.

In discussing the plaintiffs' contention we will take up first the charge that the excavation on Kirkwood was the cause of the slide. The evidence is not clear but there are passages that indicate the ground slid toward Mendell and not toward the cut in Kirkwood.

Steve Gazzera, the plaintiff, testified regarding the presence of seeping waters. From 1916 he visited the premises about once a month to collect his rent. Nearly every visit he saw water running out of the slope on Kirkwood and down Kirkwood. From time to time he saw other slides that had occurred. Two pepper trees were uprooted. He saw water every time he passed Kirkwood. On February 28, 1940, the witness was notified by his tenants that the slide complained of had occurred. He went immediately to the property. An examination disclosed a crack in the ground that circled from Kirkwood to Mendell. In places it was a foot wide. It went down the witness did not know how deep.

Thomas V. Reeves, a mining engineer and geologist called by the defendant, testified that he was familiar with the property and had visited it before February, 1940. On May 20, 1940, acting upon the request of the defendant, the witness again visited the property. He proceeded to examine the conditions relating to the slide that had recently occurred. In reply to a question propounded by the defendant the witness testified that the cut in Kirkwood had nothing to do with the slide. He based his opinion, he said, "on the several rock formations. The general underlying formation is a series of shale and sandstone strata. Overlying that, coming up in a slight inclination from the north, is a body of serpentine. Intruded in the above, through the sandstone and serpentine, is another formation, a diabase, surrounding both the serpentine and the diabase. The other formations, the sandstone and the shale, have been broken and cracked. The slide was caused by an infiltration of water into this crushed stone until the material gave way and moved on the side hill. It was infiltration into that cracked formation that caused the slides. The water oozing out of the cut would lessen the possibility of a slide. The removal of any support would affect the stability of any ground that was above but in this case the cut was not sufficiently close to the house to remove the support to the extent that the house would be affected by it. When the slide occurred there was no movement toward Kirkwood Street at all. On the hill there are other cracks, some a block away, that extend down between Jerrold and Innes Streets. One of the older scars extends right around the present scar. There is a series of these scars that extend up the side of the hill. I am satisfied that if nobody had ever lived on those hills that nevertheless these slides would have occurred from time to time in that sort of formation. You can see such scars in similar formation just outside of Vallejo. In the instant case the old slide extended below the level of Mendell Street and can be seen on the other side. Water flows out of a garage at 1011 Mendell Street. It comes from the same crack. The crack is an extensive thing. It is concentric with the ones that extend up the hill above it." After making an extended study over a period of eighteen days it was his opinion that the making of the cut on Kirkwood was in no way responsible for the slide complained of.

Mr. Irvin H. Danenhower, an employee in the engineering department of the defendant, gave substantially the same testimony as did Mr. Reeves. However he based his opinion on the following facts. The plaintiffs' house slid toward Mendell and not toward Kirkwood. The distance from the foundation wall facing Kirkwood to the center line of the cut in that street is fifty-seven feet. The cut was made in 1929. The house stood eleven years after that before any slide occurred and then the slide was "definitely" toward Mendell Street.

[1-3] Mr. F. Chace was called as an expert by the plaintiffs. He testified that he had formed a different opinion and that the excavation on Kirkwood in his opinion caused the slide. He gave no reasons for his opinion. No other witness testified on the subject. It is settled law that the weight to be given to the opinion of an expert depends on the reasons he assigns to support that opinion. Barker v. Gould, 122 Cal. 240, 243, 54 P. 845. The witness Reeves assigned what appear to be sound reasons for his opinion. So did the witness Danenhower. Chace assigned no reasons to support his opinion. The trial court was therefore justified in adopting and following the opinions of Reeves and Danenhower. Moreover the trial court went to the property and made a personal examination of the conditions. Under these circumstances the adverse findings made by the trial court were supported by the evidence and are controlling on appeal. Bellon v. Silver Gate Theatres, Inc., 4 Cal.2d 1, 13, 14, 47 P.2d 462.

Taking up the subject of the pipes the witness Shoaf was examined at length on the subject of the placing of certain drain pipes and the removal thereof. However a most careful reading of the record does not disclose that said pipes were improperly placed, nor that they became clogged, nor that they were negligently removed. Moreover there is much in the evidence showing that the pipes were drains for certain springs which during some seasons flowed the entire year both before any street work was done and thereafter. Furthermore there is no evidence that pipes placed in Kirkwood Avenue below the lands where the slide occurred could in any manner either cause or prevent the slide complained of.

A large number of exhibits were used at the trial and have been brought up. They clearly sustain the theory of Mr. Reeves. The cut on Kirkwood was about 200 feet long. It was made through a ridge. It was deepest at a point in about the middle of its length and it was not deep at either end. It extended through the middle of Kirkwood running north and south from Mendell toward Lane, the next street on the south. Photographs show that the slide pressed heavily into Mendell Street where no cut had been made and also toward the north end of the cut on Kirkwood. The break was circular. On Exhibit "J" the break in the ground is shown extending from a point near the north side of the plaintiffs' house and running north under Mr. Shoaf's house it curves toward Kirkwood, crosses it almost at right angles, and continues toward the south. The scars of former breaks are concentric with the scar made in February,

1940. One scar is approximately sixty feet toward the east and the other is about ninety feet. Both of the latter scars are old and, as stated by two witnesses, may be fifty or one hundred years old. The breaks in Kirkwood are pronounced at the surface and indicate a parting rather than a lateral pressure. If the cut caused the slide we would expect the side of the cut adjacent to the slide to slough as a part of the slide. The photographs do not show such sloughing, but they do show heavy pressure toward Mendell and a sloughing for twenty feet or more back from Kirkwood. Plaintiffs' Exhibit 13, a photo taken while the slide was on, strongly supports the proposition last stated. It shows that not even the grass on the east bank of the cut (the side on which the slide occurred) was disturbed. Defendant's Exhibit "A," a photo taken April 26, 1940, shows the same facts. Mr. Danenhower testified that as a result of the slide plaintiffs' house and its foundation slid toward Mendell.

The record discloses that the neighborhood consists of seepy ground. Numerous springs are mentioned by the witnesses. Some of those springs are permanent. Some of them are of such capacity that the waters are collected and sold as mountain spring water. The facts recited in this and the preceding paragraph strongly reinforce the opinions stated by Mr. Reeves and Mr. Danenhower. Therefore we think it is clear that the trial court did not err in making findings in accordance with the opinions expressed by said witnesses.

From time to time the property owners complained to the public officials of seepage on the lots of such owners and of the water discharged by some of the springs above mentioned. There was evidence that the city authorities did nothing regarding those complaints. Counsel do not set forth any authorities showing that it was the duty of the city to enter on private property and cut off the flow of seepage water or springs located thereon.

The plaintiffs cite and quote the entire decision, Gove v. Lakeshore Homes Ass'n, 54 Cal.App.2d 155, 128 P.2d 716. That case involved an appeal from a judgment of nonsuit. It is a splendid exposition of the law on that subject. But the instant case is an appeal from a judgment in an action to recover damages which denied the plaintiffs any relief. As stated above the findings fully support the judgment. The cited case is not helpful. It contains nothing that is at variance with anything we have said.

[4] If the alleged cut made by the defendant in Kirkwood Avenue was not the cause of the alleged slide, then the defendant was not liable. Whether the cut on Kirkwood was properly made or negligently made the question presented by the plaintiffs was, did said cut cause the slide which injured plaintiffs' property. The burden rested on the plaintiffs to prove an affirmative answer to that question. 19 Cal.Jur. 557, Negligence, sec. 10; Union, etc., Co. v. San Francisco Gas, etc., Co., 168 Cal. 58, 62, 141 P. 807; Dull v. Atchison, T. & S. F. Ry. Co., 27 Cal.App.2d 473, 476, 81 P.2d 158. The findings are that neither the cut on Kirkwood nor the handling of the drainage pipes was the cause of the slide. It follows the plaintiffs were not entitled to recover.

The judgment appealed from is affirmed.

NOURSE, P. J., and GOODELL, J., concur.

70 Cal.App.2d 763

PEOPLE v. JACKSON.

Cr. 3896.

District Court of Appeal, Second District, Division 3, California.

Sept. 18, 1945.

Hearing Denied Oct. 18, 1945.

1. Robbery 🔑3

Where motorist was robbed by two persons he had picked up on highway, it was immaterial whether the intent to rob arose before or after such persons entered the automobile.

2. Robbery 🔑24(1)

Evidence sustained conviction of defendant as a principal in robbery. Pen. Code, § 31.

3. Robbery 🔑27(1)

In prosecution for robbery of motorist by two persons he had picked up on highway, court properly instructed that all persons concerned in the commission of a crime, whether they directly committed the act constituting the offense, or knowingly and with criminal intent aided and abetted in its commission, should be prosecuted, tried, and punished as principals, and are equally guilty. Pen.Code, § 31.

4. Criminal law ⚷1038(3)

Where record failed to disclose that defendant requested an instruction on the subject of alibi, he could not for the first time, on appeal, urge the omission to instruct jury as reversible error.

5. Criminal law ⚷824(4)

Where no request for instruction on alibi is made, no error is committed in failing to give such instruction.

◆

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Edward Isiac Jackson was convicted of second-degree robbery, and he appeals.

Judgment affirmed.

Alexander L. Oster, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Walter L. Bowers, Asst. Atty. Gen., for respondent.

DESMOND, Presiding Justice.

The defendant Jackson and his co-defendant Hoover were convicted by a jury of second degree robbery. Jackson appeals upon the grounds that the evidence was insufficient to sustain the judgment, that the court committed error in instructing the jury and also failed to instruct the jury sua sponte on the law pertaining to alibi.

The complaining witness Henry M. Strand testified that around midnight of July 12, 1944, while he was driving home in his automobile from Los Angeles to Lynwood on Atlantic Avenue, he noticed two sailors standing on the street corner in front of a market; that he pulled up to the curb, stopped and offered them a ride. He identified the two defendants as the persons who accepted his invitation. Hoover took his place in the front seat of the automobile, sitting next to Strand, Jackson sitting on the outside next to the door. After proceeding south along Atlantic Avenue for approximately two and one-half miles, the defendants told Strand to pull over to the curb. Strand did not pull over to the curb but did pull off the center of the highway and stopped. Hoover said: "Now, you get out; we are going to take your car." Strand then shut off the motor, unlatched the door, stuck his left foot out on the running board and grabbed the ignition keys. Hoover told him to leave the keys, and grabbed his arm; but Strand snapped the ignition key in two and dropped the bunch of keys on the floor. Hoover then ordered Strand to hand over his wallet, but the latter refused and started to get out of the car. Hoover grabbed him and pressed him against the wheel, whereupon Jackson started beating Strand over the head with his fists. After a somewhat lengthy struggle in which Strand was beaten and bloody upon his head and almost rendered unconscious, he finally said: "I give up; I will give it to you, let go of this hand so I can get it." Jackson, however, said, "Use your other hand," and thereupon Strand tossed the wallet into their laps. (He testified that the wallet contained $14 in currency, being a $5 bill and nine $1 bills). Strand then left his automobile and ran into a nearby building, seeking the aid of workmen who were there employed and returned with them to the automobile. The defendants left the scene, escaping in the darkness. They were picked up by police officers on Atlantic Boulevard half a mile south of where the robbery took place, about 1:30 that morning. They presented a disheveled appearance with blood stains on their jackets, mud on their shoes and one of them had a cut under his chin and dried blood on his face. The officers took the $14 in currency from the person of Hoover. Both defendants denied at their trial that they participated in the robbery and claimed that at the time it was committed they were on North Main Street in Los Angeles several miles from the scene of the crime and at that time and place engaged in a controversy with three marines, one of whom was with Prudence Baca, claimed by Hoover as a friend. They produced no witness to substantiate the claimed alibi and Prudence Baca, taking the stand, denied their story in toto.

[1] In support of his claim that the evidence was insufficient to sustain the judgment, appellant asserts that there is nothing in the record to show that he attempted to take the automobile or that he tried to take the wallet. He argues that all the conversations about the keys, the car, and the wallet came from his co-defendant Hoover. He claims that there was no evidence produced from which an in-

ference could be drawn that he entered the automobile with intent to deprive the owner of it or of his wallet. It is altogether immaterial whether the intent arose before he entered the automobile or after he entered. The fact that Hoover ordered Strand to get out of the car, stating, "we are going to take your car," and then while he held Strand, Jackson proceeded to beat their victim, certainly shows criminal intent on the part of each. In addition, we note from the record that this appellant was down on the floor of the car looking for the ignition keys, demanding to know where they were, then found them and then grabbed Strand. Also, that when Strand finally gave up and said he would give him the wallet if they would let go of his hand so he could get it, the appellant instructed him, "Use your other hand."

[2, 3] Appellant also contends that he was not sufficiently identified as a participant in the robbery, pointing out that the night was quite dark and that the defendants were dressed in the uniform of sailors which might easily cause a mistake in identification because of the number of sailors travelling upon the public highways. But the matter of identification was one to be passed upon by the jurors and, considering all the facts of this case, we do not question the accuracy of their judgment. Among these facts may be noted the opportunity which Strand had to observe the features of his assailants at close quarters, the amount and denominations of the currency found upon Hoover when the officers arrested the two defendants and the bloodstains then found on the jackets of each. In view of the incidents cited it is clear that the jury was justified in finding both defendants guilty as principals and that the instruction which appellant Jackson claims was erroneous was altogether appropriate. It is based on section 31 of the Penal Code and reads as follows:

"The Court further instructs the jury, that it is the law of this State, that all persons concerned in the commission of a crime, whether they directly committed the act constituting the offense, or knowingly and with criminal intent aided and abetted in its commission, shall be prosecuted, tried and punished as principals, and are equally guilty."

The appellant contends that an instruction in substantially the same language was held to be reversible error in People v. Delgado, 1938, 28 Cal.App.2d 665, 667, 83 P.2d 512. One needs only to read the comment of the court in the Delgado case, appearing in item [2] at page 668, of 28 Cal.App.2d, at page 514 of 83 P.2d, and summarized in the second paragraph of the syllabus, to see that the language of the instruction was not substantially the same as used in the instant case.

[4, 5] The claim of appellant that prejudicial error arose when the court permitted the case to go to the jurors without instructing them on the law pertaining to alibi, even though no such instruction was requested, rests upon the decisions in People v. Warren, 1940, 16 Cal.2d 103, 117, 104 P.2d 1024, and People v. Putnam, 1942, 20 Cal.2d 885, 890, 129 P.2d 367, 370. In the first of these cases the Supreme Court reversed the conviction of Warren and remanded the cause for a new trial for the reason that the court failed to instruct the jury on the subject of what constitutes an accomplice and the necessity for corroboration of the testimony of an accomplice. No request was made of the trial judge for instruction on these points which, under the circumstances of the case, impressed the Supreme Court as vital on the question of the sufficiency of the evidence to sustain the conviction. We note in this connection the comment of the court that failure to advise the jury on the technical rule relative to accomplice testimony negatives the view that the court fully and fairly charged the jury upon the law appertaining to the facts of the case. In the Putnam case, supra, the defendant was convicted of lewd conduct with a minor and his motion for a new trial denied, but the Supreme Court reversed the judgment and order, holding that under the circumstances a proper cautionary instruction should have been given by the court on its own motion, when rejecting one improperly drafted which defendant had requested. In that opinion it is pointed out that "An instruction is necessary if it is vital to a proper consideration of the evidence by the jury" and a number of cases involving various types of crime are cited as instances where the necessity for an instruction sua sponte existed. Among them we find none involving a claimed alibi and see no reason, under the facts of the instant case, to inaugurate a departure from the settled rule cited by respondent that "where the record fails to disclose that defendant

requested an instruction on the subject of alibi, he may not for the first time on appeal urge the omission to instruct the jury on such defense as reversible error; and where no request for such instruction is made no error is committed in failing to give such an instruction. People v. Jori, 99 Cal.App. 280, 283, 278 P. 250; People v. Tracy, 18 Cal.App.2d 444, 446, 64 P.2d 166; People v. Ramirez, 21 Cal.App.2d 466, 467, 468, 69 P.2d 913; People v. Keilly, 54 Cal.App.2d 764, 767, 129 P.2d 939."[1]

The judgment is affirmed.

SHINN and PARKER WOOD, JJ., concur.

COIT v. JEFFERSON STANDARD LIFE INS. CO.*

Civ. 12862.

District Court of Appeal, First District, Division 2, California.

Sept. 19, 1945.

Rehearing Denied Oct. 19, 1945.

Hearing Granted Nov. 15, 1945.

1. Insurance 🔑146(3)

Ambiguous policy is construed most strongly against insurer.

2. Insurance 🔑438

A provision in life policy exempting insurer from liability for death from any cause while insured was serving outside the United States in military service of any country at war did not create an absolute exemption because of military service per se, but set up only a partial exemption, the limitation being geographical in character.

3. Insurance 🔑438

Under life policy excluding insurer's liability if death of insured occurred "from any cause" while serving in the military forces outside the United States, death of insured in the military forces in Alaska resulting from an embolism following an appendectomy was not within the coverage of the policy; the quoted phrase meaning without regard to the cause.

See Words and Phrases, Permanent Edition, for all other definitions of "From Any Cause".

4. Insurance 🔑146(3)

Where there is no ambiguity in insurance policy, courts will indulge in no forced construction against insurer, and policy will be interpreted according to intention of parties as expressed in policy in light of circumstances surrounding its execution.

◆

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by George A. Coit, as administrator of Jean Miriam Parks, deceased, against Jefferson Standard Life Insurance Company, a corporation, to recover face amount of life policy. From a judgment awarding only the return of premiums plus interest, plaintiff appeals.

Affirmed.

H. F. Chadbourne and Anthony S. Devoto, both of San Francisco, for appellant.

Keesling & Keil, of San Francisco, for respondent.

GOODELL, Justice.

The appellant sued on a policy of life insurance for the sum of $2500, the face of the policy. The court awarded judgment only for the return of the premiums plus interest, amounting to $71.48.

On January 19, 1942, Charles T. Parks, then a sergeant in the United States army, made application to the respondent for insurance in the sum of $2500. On February 1, 1942, the policy was issued with the insured's wife, Jean M. Parks, named as beneficiary. On October 22, 1942, while serving with troops, the insured died in an army hospital in Alaska of an embolism following an appendectomy. On December 6, 1942, the insured's wife died. The insurer made a tender of $71.48, claiming that under the policy's war risk exclusion rider no more than that was due. The tender was rejected and the administrator of the beneficiary brought this action. The prayer of the complaint was for the reformation of the insurance contract and for $2500, with interest, but at the trial the pursuit of the remedy of reformation was abandoned and the plaintiff stood, and now stands, on the policy as issued.

The rider, which was part of the policy when it was issued, provides that the "policy is issued and accepted upon the express agreement that the liability of the

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[1] See People v. Whitson, 25 Cal.2d 593, 154 P.2d 867.

* Subsequent opinion 168 P.2d 163.

Company shall be limited to the amount specified below if the death of the Insured occurs: * * * (2) From any cause while the Insured is serving outside the states of the United States, the District of Columbia, and Dominion of Canada, in the military, naval or air forces of any country at war (declared or undeclared) or within six months after the termination of such service if death be caused from any wounds, injuries or disease received or suffered while in such service; * * *. In event the insured's death should occur under any of the conditions defined above, the Company's liability under this policy shall be a single sum equal to the premiums actually paid on this policy with compound interest at the rate of 3 percent per annum * * *."

[1] The trial judge decided that the insured's death from natural causes while serving in Alaska was not a risk assumed by the insurer. The appellant attacks this conclusion and contends that it was the meaning and intent of the contract to insure against death caused by ills common to everyone, whether in the service or not, and that the exclusion or exemption applies only in case of death from a cause connected with war and its hazards and perils. He argues that: "The words 'From any cause' when read in connection with the heading of the rider attached to the policy—'Aviation and War Risk Exclusion Rider' mean no more than that the liability of the insurer shall be limited when the death of the insured is occasioned by, incidental to or proximately caused by military activities, and not where it has been due to natural, ordinary or accidental causes." Further, that such an interpretation is consistent with the universal rule (37 C.J. 546) that where the language of an insurance contract is ambiguous, it is to be construed most strongly against the insurer, who is presumed to have drawn the policy and caused the uncertainty to exist. That rule, of course, is well settled in this state. 14 Cal.Jur. 443, sec. 24; Bayley v. Employers' Liability Assurance Corp., 125 Cal. 345, 352, 58 P. 7; Clarke v. New Amsterdam Casualty Co., 180 Cal. 76, 81, 179 P. 195; Blackburn v. Home Life Ins. Co., 19 Cal.2d 226, 229, 120 P.2d 31.

The question is new in this state. A score of cases have been cited by the appellant and several by the respondent, most of which came before the courts of other states after World War I and arose because of deaths from pneumonia during the widespread influenza epidemic in 1918–1919, with a few cases of deaths by accident not caused by the perils of war or combat. It is agreed by both sides and recognized in the decisions that there is a diversity in the holdings, arising not because one group of states follows one line of decision and another group follows another, but because of the difference in the wording of the policies themselves. The cases fall, broadly, into two groups, one holding that the *status* of the insured as a soldier or sailor is determinative, the other that the *cause of death* is determinative. There is unanimity, however, on the rule that ambiguities in the policy are to be resolved in favor of the insured and against the insurer and in most of the cases relied on by the appellant that rule will be found to have played an important part in reaching the decision. See, generally, 29 Am. Jur., p. 695, sec. 911; 137 A.L.R. 1263, also 147 A.L.R. p. 1294; 150 A.L.R. p. 1414; 151 A.L.R. p. 1452, and 152 A.L.R. p. 1449.

[2, 3] We are satisfied from a reading of paragraph 2 by itself that it is free from any ambiguity or uncertainty, and that it means precisely what it says. In the first place, it does not attempt to create an *absolute* exemption because of military or naval service per se; it sets up only a partial exemption, the limitation being geographical in character. It is only "while the Insured is serving outside the states of the United States, the District of Columbia, and Dominion of Canada" that the exemption is operative. Even while serving in time of war *within* that area the insured seemingly would be covered whether death results from natural causes or, for instance, from wounds or injuries received in maneuvers while training or in actual combat. This seems to be the plain and natural meaning of the language. Secondly, the use of the words "From any cause" makes it doubly clear that death from injuries received in combat, or as a consequence of actual warfare, could not possibly have been contemplated as the sole ground of exemption. Those words show a studied attempt to get away from the constricted meaning for which the appellant contends. No broader or more comprehensive phrase could well have been chosen. Moreover, as will presently appear, these words, "From any cause" or words of similar import, are not found in any of the policies involved in the authorities relied on by the appellant. Aside then, from

whatever light is shed on the present problem by authorities from other jurisdictions, the language, in our opinion, when read by itself means just what the trial judge held it to mean, namely, that death "from *any* cause," however remote from, or unrelated to, actual hostilities is within the limitation of liability if it occurs under the conditions named.

The respondent cites and strongly relies on the recent case of Bending v. Metropolitan Life Ins. Co., 74 Ohio App. 182, 58 N.E.2d 71, 72, where the clauses in the policy were held to be clear and unambiguous and to make the *status* of the insured *in* the military or naval service, and not his *activities* therein, the ground of exemption. The clauses there read: (a) "provided * * * that death shall not have resulted from bodily injuries * * * sustained while the insured is in the military or naval service in time of war" and (b) "the insurance under this * * * contract shall be suspended * * * while the insured is in the military or naval service in time of war." That case is well reasoned. The language of the policy therein subjected to examination is comparable with that under examination herein (but nowhere nearly so explicit, because of the words herein "from any cause"). The opinion discusses the entire subject and cites most of the authorities with care and discrimination. For these reasons we adopt the discussion therein of the cases on which the appellant herein chiefly relies. In those cases the insured persons died, while in the service, from causes common to all humans, in most cases from influenza or pneumonia (in a few cases by accident) and in most instances at training camps or other places far removed from combat areas. In the Bending case the court says:

"The apparent conflict is due in a great measure to the difference in phraseology of the exemption clauses, but the courts in many of these cases, adhering to the well settled rule that in construing an insurance contract which by reason of ambiguities is capable of two reasonable interpretations, that interpretation will be adopted which is most favorable to the insured, have gone to some length in taking a particular word or phrase in the military clause, construing the same as ambiguous, then resolving that ambiguity as meaning activity of a military nature and not status, and holding the insurer liable.

"One of those words is 'engaged' and it occurs in clauses of which the following is typical: 'If within five years from date hereof the death of the insured shall occur while engaged in the military or naval service in time of war, without previously having obtained from the company a permit therefor, the company's liability shall be limited * * *.' Boatwright v. American Life Ins. Co., 191 Iowa 253, 180 N.W. 321, 11 A.L.R. 1085.

"The court in that case reasons that the word 'engaged' connotes 'resulting from' or 'in consequence of' etc. Consequently the clause was not intended to exempt the company from liability by reason of the soldier's mere status of being in the military service, but the exemption only applied where death occurred from activities of a purely military nature which were not common to soldiers and civilians alike. In that case the insured died in camp of influenza. To the same effect are the cases of Benham v. American Central Life Ins. Co., 1919, 140 Ark. 612, 217 S.W. 462; Long v. St. Joseph Life Ins. Co., Mo.App. 1920, 225 S.W. 106; Rex Health & Accident Ins. Co. v. Pettiford, 1920, 74 Ind. App. 507, 129 N.E. 248; Myli v. American Life Ins. Co. of Des Moines, 43 N.D. 495, 175 N.W. 631, 11 A.L.R. 1097; Kelly, Adm'x, v. Fidelity Mutual Life Ins. Co. of Philadelphia, 169 Wis. 274, 172 N.W. 152, 4 A.L.R. 845; Barnett v. Merchants' Life Ins. Co., 87 Okl. 42, 208 P. 271.

"The use of the word 'risk' in those clauses has also been used as the basis of the construction of the clause as involving 'activities' and not 'status.' The case of Atkinson, Adm'r, v. Indiana National Life Ins. Co., 194 Ind. 563, 143 N.E. 629, 630, is illustrative of this type of construction. The policy there provided: 'After one year from the date of issue this policy shall become incontestable if the premiums have been duly paid, except in case of self-destruction within two years, whether sane or insane, and except that military or naval service in time of war without a permit from the company, is a risk not assumed under this policy at any time.'

"Due to the use of the word 'risk' that clause was held to be ambiguous in that it might mean either activities or status and was therefore resolved against the insurer which was held liable for the death of the insured in a motorcycle accident while on leave of absence from duty."

Each of the cases discussed in the foregoing quotation is relied on by the appellant herein. In addition thereto he has cited a number of cases most of which fit into the same category (to quote from the Bending case) putting "emphasis on the phrases 'resulting from,' 'in consequence of,' and 'active service' in arriving at a similar construction."

Those cases, with parenthetical quotations from their exemption clauses, are as follows: Gorder v. Lincoln National Life Ins. Co., 46 N.D. 192, 180 N.W. 514, 11 A.L.R. 1080 ("in consequence of such service"); Starr v. Great American Life Ins. Co., 114 Kan. 315, 219 P. 514, 515, ("in consequence of such service"); Johnson v. Mutual Life Ins. Co., 154 Ga. 653, 115 S. E. 14, 15 ("as a result of military or naval service in time of war, * * * nor if such death be caused directly or indirectly, wholly or partly, by * * * war, or any act incident thereto"); Nutt v. Security Life Ins. Co., 142 Ark. 29, 218 S.W. 675 (military or naval service in time of war are "risks not assumed"); Malone v. State Life Ins. Co., 202 Mo.App. 499, 213 S.W. 877, 880 ("the death of the insured while so engaged * * * as a result of such service"); Farmers' National Life Ins. Co. v. Carman, 76 Ind.App. 700, 132 N.E. 697, decided, without setting forth any facts, on the authority of the Rex case, supra; Stephen v. Prairie Life Ins. Co., 113 Neb. 469, 203 N.W. 626, 627 ("if the insured * * * engage in military or naval service in time of war * * * and death shall occur during such engagement or as a result thereof"); Arendt v. North American Life Ins. Co., 107 Neb. 716, 187 N.W. 65, 66 ("death occurring in any part of the world and in any occupation, or from any cause, except military or naval service in time of war"); Illinois Bankers' Life Ass'n v. Jackson (2 cases), 88 Okl. 133, 211 P. 508 ("if the insured engages in military or naval service"); Illinois Bankers' Life Ass'n v. Davaney, 102 Okl. 302, 226 P. 101, 103 ("death while in the service in the army or navy of any government in time of war is not a risk covered * * *"). Also Welts v. Connecticut Mutual Life Ins. Co., 48 N.Y. 34, 8 Am.Rep. 518, where the policy provided that the insured was not protected against death from any of the casualties or consequences of war or rebellion, or from belligerent forces in any place where he may be. He was a civilian engineer building a bridge for the Union army thirty miles behind the Union lines, and was killed by four hold-up men who were not soldiers in either the Union or Confederate armies. In the cases last cited (just as in the eight cases reviewed in the Bending case) a recovery of the full face of the policy was allowed on the theory that the insured's death from causes not related to hostilities, was not within the terms of the policy's exemption.

The appellant also cites several cases which do not appear to fit into this category. They are: Railey v. United Life & Accident Ins. Co., 26 Ga.App. 269, 106 S. E. 203, where the insured a soldier, was killed in the collision with another troopship of the troopship on which he was being transported to the combat area in Europe. It was held to be squarely within the exemption. American Nat. Ins. Co. v. Turner, Tex.Civ.App., 226 S.W. 487, simply involved the question whether the beneficiary could collect attorney fees. The insured, a marine, was killed in battle in France, a risk clearly within the exemption.

In the Bending case the court says: "The court in many of the cases above referred to, while holding that the particular clause under consideration was ambiguous and therefore to be construed against the insured, specifically recognized the proposition that a clause might be written making status the ground for exemption and it would be valid." As an example the court quotes from the Myli case, supra, where it is said: "For instance, it might well have been stated, 'If within five years from date the insured shall enlist or become inducted into the military or naval service without having obtained a permit therefor; etc., then status would clearly have been the test." A year later, in the Gorder case, 46 N.D. 192, 195, 180 N.W. 514, 11 A.L.R. 1080, supra, Justice Birdzell, the author of the opinion in the Myli case, said: "There is a vast difference between a death *in* the active military service [citations] and a death *in consequence of such service* [citations]." See also Olson v. Grand Lodge, 48 N.D. 285, 290, 184 N.W. 7, 15 A.L.R. 1270, where the same court discusses the Myli case. In Long v. St. Joseph Life Ins. Co., Mo.App., 225 S.W. 106, 107 (affirmed, Mo.Sup., 248 S.W. 923), supra, the court says: "The insurance company has the right to decide the kind of contract it will enter into. * * * If it chooses, it can say to the insured: 'During the period you are an enlisted soldier or sailor I will not be liable for the insurance, should you die in that period, no matter whether such service caused it or not.'" In Johnson v. Mutual Life Ins. Co., 154 Ga. 653, 656, 115 S.E. 14, supra, it is said: "Provisions in policies of life insurance, that the insurer does not assume risk of death which shall occur while the insured is engaged in military service, * * * have been held to exempt the insurer from liability, notwithstanding the fact that death did not result from any hazard peculiar to such service. [Citations.] * * * Under such provisions, when the insured is engaged in military service * * * and he dies in such service, *from any cause,* these authorities hold that there cannot be any recovery. * * * If the insurer had intended that it was not to be liable for this double indemnity if the insured died while in the military service *from any cause whatsoever,* it would have been an easy matter to have written such a stipulation in the policy. Such a provision would have made the insured's status in the military service, at the time he met his death, and not the cause of his death, the ground of the insurer's exemption from liability." [Emphasis ours.]

The quotations just given are all taken from cases relied on herein by the appellant.

A number of authorities which support the decision of the trial court and the position of the respondent herein, construe policies where the language is quite similar to the language employed in the cases upon which the appellant relies. Notably, among such cases, is Bradshaw v. Farmers' & Bankers' Life Ins. Co., 107 Kan. 681, 193 P. 332, 11 A.L.R. 1091, where the limitation was "If * * * the insured shall engage in military or naval service in time of war, the liability of the company, in event of the death of the insured while so engaged * * * will be limited * * *." The court held that the *status* of the insured as a member of the armed forces was alone sufficient to bring the exemption into operation. Other cases where an exemption is created if the insured shall *engage in* the military or naval service (or equivalent language is used) are Huntington v. Fraternal, etc., Ass'n, 173 Wis. 582, 181 N.W. 819; Olson v. Grand Lodge, 48 N.D. 285, 184 N.W. 7, 15 A.L.R. 1270, supra; Field v. Western Life Ind. Co., Tex. Civ.App., 227 S.W. 530; Mattox v. New England Life Ins. Co., 25 Ga.App. 311, 103 S.E. 180; and Sandstedt v. American Central Life Ins. Co., 109 Wash. 338, 186 P. 1069. In these cases the courts reached conclusions opposite to those reached in the Benham, Boatwright and Long cases, supra, and held that the words "engage" or "engaged in" were simply descriptive of the *status* of the insured, and that the insurer's liability was limited. The same result was reached in Ruddock v. Detroit Life Insurance Co., 209 Mich. 638, 177 N. W. 242, 243, where the exemption read: "This policy * * * shall be incontestable * * * except for naval or military service in time of war, without a permit, which are risks not assumed * * *." And likewise in Miller v. Illinois Bankers' Life Ass'n, 138 Ark. 442, 212 S.W. 310, 7 A.L.R. 378, where the language was: "* * * death while in the service in the army or navy of the government in time of war is not a risk covered * * *."

In McQueen v. Sovereign Camp, 115 S. C. 411, 106 S.E. 32, the exemption read: "* * * In the event the holder of this certificate shall die while serving in any branch of the United States Army or Navy, either as an officer or enlisted man, outside the boundaries of the United States" the liability of the insurer would be limited. This language is closer to that in the policy involved herein than that of any case we have been able to find. It contains also a geographical limitation. The court held the liability was effectively limited.

In addition to the Bending case the respondent also relies on the recent cases of Life & Casualty Ins. Co. v. McLeod, 70 Ga.App. 181, 27 S.E.2d 871, and Lindsey v. Life & Casualty Ins. Co., 70 Ga.App. 190, 27 S.E.2d 877. In both cases the clause read: "Should the insured die while enrolled in such [military or naval] service in war time without such permit, the company's liability will be restricted to the net reserve of this policy." The clause was held in both cases to preclude a recovery of the face of the policy, and to fasten only limited liability on the insurer.

From the foregoing discussion it will be seen that the cases on this subject may be grouped about as follows: (1) Those holding that language such as "death in consequence of" or "death resulting from" military service means that death from natural causes while in the service is not within the exemption; (2) those holding that death "while engaged in" the service has the same meaning (as group 1); (3) those holding that death "while engaged in" the service means no more than *while enlisted in,* or *enrolled in,* the armed forces, hence such death, even from natural causes, *is* within the exemption, and (4) those cases where the war risk clause contains no such language as is found in (1), (2) or (3) but simply states the condition, namely, military or naval service.

The clause in this case (as in the Bending, McLeod, Lindsey and McQueen cases) is in the fourth category.

It is interesting to note, however, that the third paragraph in the war risk rider now before the court *does* contain language somewhat similar to that discussed in group (1). That paragraph is designed to limit the insurer's liability if death occurs: "(3) Within two years after the date of issue of this policy as a result of war (declared or undeclared), or any act incident thereto occurring while the Insured is traveling, residing or stationed outside the states of the United States, the District of Columbia, and the Dominion of Canada." The words "as a result of war" and "any act incident thereto" are in sharp contrast to the language of paragraph 2, here involved, and would indicate that two distinct forms of coverage were intended. Paragraph 3 of course is not before the court in this case.

[4] The phrase "from any cause" which would seem to mean "without regard to the cause" (see Bohrnstedt v. Travelers' Ins. Co., 123 Or. 539, 259 P. 419, 262 P. 938, 939) in our opinion leaves little or no room for argument in the instant case. "Because contracts of insurance are not the result of negotiation and are generally drawn by the insurer, any uncertainties or ambiguities therein are resolved most strongly in favor of the insured. * * * Where there is no ambiguity, however, courts will indulge in no forced construction against the insurer, and the insurance policy, like any other contract, is to be interpreted according to the intention of the parties as expressed in the instrument in the light of the circumstances surrounding its execution. * * *." Blackburn v. Home Life Ins. Co., 19 Cal.2d 226, 229, 120 P.2d 31, 32, supra.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, Justice pro tem., concur.

SUTTER et al. v. GENERAL PETROLEUM CORPORATION et al. *

Civ. 14948.

District Court of Appeal, Second District, Division 2, California.

Sept. 17, 1945.

Hearing Granted Nov. 15, 1945.

1. Fraud ⚷41

In action for damages for fraudulently inducing plaintiff to take over oil lease and steel island by means of corporation organized for that purpose, allegation that because of such fraud plaintiff received no compensation for his services, but that he expected and intended to be compensated therefor out of profits of the corporation which profits were to be brought about by plaintiff's efforts, showed no right of action by plaintiff, where it was not alleged that plaintiff was a stockholder in the corporation or had any contract with corporation to compensate him for his services. St.1937, p. 262, § 3002.

2. Corporations ⚷202

If a wrong is primarily against a corporation, redress must be sought by the corporation, and a stockholder or body of stockholders cannot sue as an individual or individuals in their own names, and such rule applies although the injury to the corporation may incidentally result in the destruction or depreciation of value of the stock of the corporation, but an exception to the rule is that a derivative action by stockholder is allowable.

3. Corporations ⚷202

Alleged refusal of defendants to comply with contract with corporation and commission of other wrongful acts against such corporation did not entitle stockholders of corporation to maintain action for damages against defendants.

◆

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Action by Austin P. Sutter and others against General Petroleum Corporation and others for alleged fraud. From a judgment dismissing plaintiffs' complaint on ground that it failed to state a cause of action, the plaintiffs appeal.

Judgment affirmed.

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* Subsequent opinion 170 P.2d 898.

Haight, Trippet & Syvertson, of Los Angeles, for appellants.

Martin J. Weil and J. M. Jessen, both of Los Angeles, for respondent General Petroleum Corporation.

Mortimer Kline, of Los Angeles, for respondents J. W. Pauson and Pauson Bros., Inc.

McCOMB, Justice.

From a judgment of dismissal predicated upon the sustaining of defendants' objection to the introduction of evidence on the ground that the complaint as amended failed to state a cause of action, in a suit to recover damages for alleged fraud, plaintiffs appeal.

The complaint contains 27 causes of action seeking damages caused by the alleged fraud of the defendants. Plaintiffs summarize the allegations of the first cause of action in substance as follows:

A corporation known as the Rincon Oil Company had for several years prior to 1942 been the lessee of certain tidelands from the State of California under a lease known as Oil and Gas Lease No. 82. The land leased was submerged in the Pacific Ocean and located in the Rincon Oil Field, Ventura county. In 1932 the Rincon Oil Company constructed a steel island structure and derrick upon the leased property about one-half mile west of the shore line for the purpose of drilling for oil. The island was entirely artificial, and the Rincon Oil Company and the General Petroleum Corporation had certain drilling equipment and tanks located thereon.

In 1938 plaintiff Sutter was interested in developing certain other oil property in the same oil field, and defendants learned of this fact. Pursuant to a common plan to induce Mr. Sutter to take over the adjacent lease and steel island the defendants represented that the island had been constructed according to certain plans and specifications shown to Mr. Sutter. They also represented that the engineers of General Petroleum Corporation had recently made a thorough inspection of the island and that it was in good condition, properly designed and constructed to support the equipment necessary for the drilling of additional wells. They further represented that the lease held by the Rincon Oil Company could be assigned. Defendant General Petroleum Corporation promised that it would rent to a corporation to be organized by Mr. Sutter the drilling equipment located on the island for $25 per day, and that no charge would be made while the equipment was not being used; also that General Petroleum Corporation would purchase all of the oil produced from the property and supply all water which might be necessary to operate the property. It was further represented that General Petroleum Corporation would furnish Mr. Sutter with all available engineering and geological information that it had concerning the oil field. All of these things were essential to the successful operation of the field. This was especially true so far as the renting of the equipment was concerned, because the cost of buying equipment would have been so great as to render the venture impracticable.

The aforementioned representations and promises were relied upon by Mr. Sutter and were made for the express purpose of inducing him to abandon his other project, organize a new corporation to take over the above-mentioned lease and to purchase the steel island structure and equipment owned by Rincon Oil Company. All of the representations were false and the promises were made with no intention of performing them. The island structure was not constructed in accordance with the plans exhibited to Mr. Sutter and was not properly and safely designed; but on the contrary the under-water portion was constructed of short pieces and scraps of steel welded together in an unsafe and unsound manner, which facts defendants knew. In addition, the girders were partially eroded and cut where they entered the ocean floor. Mr. Sutter could not with reasonable diligence have discovered the true state of facts for the reason that the under-water portion of the structure was covered with marine growth, and defendants told Mr. Sutter that the marine growth should not be removed. They also stated to him that an examination was unnecessary because one had recently been made by defendant General Petroleum Corporation. Mr. Sutter, who was unfamiliar with the design and construction of steel structures of the type here involved, relied upon the representations of defendants.

Prior to 1939 and unknown to Mr. Sutter a portion of the steel island had collapsed into the ocean and had been reconstructed and restored by defendants. At that time defendants learned that the structure had been weakened but concealed this fact from

Mr. Sutter, who did not learn of the prior collapse of the structure until April 15, 1939.

Because of the above representations and promises Mr. Sutter organized a California corporation known as Rincon Development Company for the purpose of taking over the lease above mentioned and purchasing the island and equipment hereinbefore described. Subscriptions were taken for stock in the new corporation, which took possession of the island and commenced drilling operations January 8, 1939. Rincon Development Company entered into a contract with Rincon Oil Company for the purchase of the island and equipment on January 16, 1939, and a contract was entered into with General Petroleum Corporation for the rental of the drilling equipment on February 1, 1939. Although the defendants had promised to procure the consent of the State of California to the assignment of the aforesaid oil lease, on February 8, 1939, the State refused to consent to such transfer. As a result of this refusal Rincon Development Company was unable to proceed with drilling operations or to issue its capital stock.

Since Rincon Development Company did not have a lease, defendants promised to and did deliver to Mr. Sutter all of the stock of the Rincon Oil Company and agreed with him that this stock should be reissued to the subscribers to stock of the Rincon Development Company and to the general public. Certain assets of the Rincon Oil Company were then transferred to defendants Pauson Bros., Inc., and resold to Rincon Oil Company. General Petroleum Corporation promised that it would enter into the same contractual relations with Rincon Oil Company as it had theretofore promised to enter into with Rincon Development Company. Thereafter the stock of Rincon Oil Company was reissued to the subscribers for stock in Rincon Development Company and to the general public. New officers and directors were elected by the Rincon Oil Company and drilling operations were continued on the lease. On April 9, 1939, an oil well was brought in and placed on production. Prior to this date and during the drilling of such well Rincon Oil Company called upon the General Petroleum Corporation to furnish the engineering and geological assistance which it had promised, but the latter failed so to do. Also, during said period Rincon Oil Company requested General Petroleum Corporation to enter into agreements for the rental of drilling equipment, furnishing of water and the purchase of oil, but the corporation refused to enter into any of said agreements, as it had promised.

On May 5, 1939, General Petroleum Corporation offered to purchase oil on a day-to-day basis, and because of the location of the steel island Rincon Oil Company was unable to dispose of its oil other than through defendant General Petroleum Corporation. On May 16 1939, General Petroleum Corporation in violation of its promises, gave notice that its drilling equipment would be removed from the island unless purchased by Rincon Oil Company. Since Rincon Oil Company was financially unable to purchase other equipment it was compelled to and did purchase the equipment on May 18, 1939. On May 16, 1939, General Petroleum Corporation canceled and repudiated its contract to purchase oil and thereafter refused to purchase any oil from or supply any water to Rincon Oil Company.

On January 8, 1940, because of its defective condition as described above, the steel structure together with the derrick, tanks, machinery and equipment collapsed into the ocean and became a total loss. Rincon Oil Company employed salvage crews and divers to remove the wreckage from the ocean floor, at which time Mr. Sutter first learned that the structure was not properly and safely designed and constructed, as represented by defendants, but was in fact constructed in an inferior and unsound manner. Because of the collapse of the steel structure Rincon Oil Company was prevented from fulfilling the terms of Oil and Gas Lease No. 82 and the same was terminated by the State of California on January 14, 1942.

The steel structure had at all times appeared to be stable, sound and safe, and Mr. Sutter in reliance upon the representations and promises of the defendants devoted all of his time to the development of the property for a period of eighteen months from and after January 8, 1939. The reasonable value of Mr. Sutter's services is the sum of $500 per month, and he expected to be compensated therefor out of the profits of the Rincon Oil Company; but by reason of the alleged fraud of defendants Mr. Sutter was prevented from obtaining any compensation whatever, to his damage in the sum of $9,000.

At all times above mentioned defendants J. W. Pauson and Pauson Bros., Inc., were stockholders in the Rincon Oil Company. Each plaintiff in the other 26 causes of action was an investor in the Rincon Oil Company. It was also alleged in each of the other causes of action that the defendants entered into a plan and conspiracy to induce each plaintiff by fraudulent means to purchase stock in a corporation to be organized by Mr. Sutter, which corporation was to be organized for the purpose of purchasing the oil and gas lease, the structure, derrick, machinery and equipment described in Count 1 of the complaint. Also, that plaintiffs relied upon the fraudulent representations, statements and promises made by defendants and were induced to and did invest in the stock of Rincon Oil Company because of such representations; and that by reason of the collapse of the structure and the cancellation of the lease the investment of each plaintiff was rendered worthless and of no value, all to the damage of each in the amount he had invested.

There are two questions presented for our determination which will be stated and answered hereunder seriatim:

First: *Was the allegation in the complaint that plaintiff Sutter received no compensation for his services "but expected and intended to be compensated therefor out of profits" of the corporation which profits were to be brought about by his efforts a sufficient allegation of damages to permit him to recover?*

[1] This question must be answered in the negative. There is not any allegation in the complaint that plaintiff Sutter (1) was a stockholder in Rincon Oil Company or (2) had any contract or agreement with the company to compensate him for his services. Hence the allegation relative to his alleged loss is entirely speculative, indefinite and uncertain and insufficient to support a judgment for damages. (See Ramsey v. Penry, 53 Cal.App.2d 773, 128 P.2d 399, 401.) In Ramsey v. Penry, supra, an action was brought for fraud growing out of an attempt to sell stock of a corporation which plaintiff had caused to be organized and to which he had assigned a contract giving him the exclusive right to purchase and operate certain soil renovators. The trial court originally awarded damages in favor of the plaintiff amounting to $7500 on the theory that defendant's fraud had destroyed the value of plaintiff's interest in the corporation. A motion for new trial was made, whereupon new findings were entered by the court which completely changed plaintiff's theory of the case. The trial judge, in an opinion on the motion for a new trial, stated: "Damages were allowed at the original trial upon the theory that plaintiff had been deprived of 7,500 shares of stock of the par value of $1.00 a share, and was damaged accordingly * * *. However, upon further consideration, on the motion for new trial herein, we are of the opinion that plaintiff's damage is more properly measured by his loss of time and money in his efforts to promote the enterprise, which the acts of the defendant have cut off. What profits plaintiff might have made are speculative and uncertain. The loss of time and money is both definite and certain, and we have found it to be $3,750.00." In reversing the decision of the trial court Mr. Justice Marks said, 53 Cal.App.2d at page 778, 128 P.2d at page 402:

"In considering the measure of damages applied here we must observe that plaintiff had no agreement with any one for repayment of any money spent by him in organization expenses or promotion of sales of stock in the corporation. Nor was he to be compensated for time spent in those activities by payment of anything for those services. The only way in which plaintiff could have been compensated for those expenditures of time and money was by receiving the stock placed in escrow for him under the permit of the Commissioner of Corporations.

"The hope of plaintiff to derive any profit from the venture is dependent on the happening of three major contingencies: (1) The sale of sufficient stock to cash purchasers so that $15,000 in cash could be deposited from such sales with the escrow holder. Before the deposit of such sum in escrow no money could be released to the corporation. (2) The successful operation of the soil renovators. (3) Sufficient contracts with agriculturalists for renovation of soil at prices that would return a profit to the corporation."

There is no allegation in the complaint to show that plaintiff Sutter was a "servant" or Rincon Oil Company, and therefore section 3002 of the Labor Code St.1937, p. 262, is not applicable to the present case.

Second: *Did the complaint or any count thereof state a cause of action in favor of any or all of the plaintiffs?*

[2] This question must likewise be answered in the negative and is governed by this general principle of law: If a wrong is primarily against a corporation redress must be sought by the corporation, and a stockholder or body of stockholders cannot sue as an individual or individuals in their own names. This rule applies although the injury to the corporation may incidentally result in the destruction or depreciation of the value of the stock of the corporation. There is an exception to the general rule where a derivative action by a stockholder is allowable. (Anderson v. Derrick, 220 Cal. 770, 774, 32 P.2d 1078; Difani v. Riverside County Oil Co., 201 Cal. 210, 215, 256 P. 210; Nighbert v. First National Bank of Bakersfield, 26 Cal.App.2d 624, 631, 79 P.2d 1105; American Trust Co. v. California, etc., Ins. Co., 15 Cal.2d 42, 66, 98 P.2d 497. See also 13 Fletcher Cyclopedia Corporations [1943], p. 268 et seq., sec. 5911, and 18 C.J.S. (1939) Corporations, p. 1272, § 559.)

Applying the foregoing rule to the facts in the present case, the only injuries alleged in the complaint may be summarized as follows:

1) Defendant General Petroleum Corporation refused to (a) furnish to Rincon Oil Company engineering and geological assistance, information and advice; (b) enter into an agreement for the rental of drilling machinery to Rincon Oil Company; (c) furnish Rincon Oil Company with all the water required for its operations; (d) purchase all oil produced by Rincon Oil Company, except on a day-to-day basis; (e) purchase after May 16, 1939, any oil from Rincon Oil Company;

2) Threatened to remove its drilling equipment from the lease unless the same was purchased by Rincon Oil Company; and

3) The steel structure, because of its unsound condition, collapsed on or about January 8, 1940, which resulted in the Rincon Oil Company being unable to perform the obligations of its drilling lease, with the consequent termination of same on January 14, 1942.

[3] It is clear that the gravamen of the alleged injuries was an injury to the corporation and not to any individuals or individual stockholder. Therefore, under the general rule stated above the cause of action, if any, was in the corporation and must be instituted by the corporation and in its name, and not by individual stockholders.

Plaintiffs concede that this is not a derivative action. Therefore it is not one that falls within any exception to the general rule.

Neither Pourroy v. Gardner, 122 Cal. App. 521, 10 P.2d 815, Whitten v. Dabney, 171 Cal. 621, 622, 154 P. 312, Turner v. Markham, 155 Cal. 562, 102 P. 272, nor James v. P. B. Steifer Mining Co., 35 Cal. App. 778, 171 P. 117, are applicable to the facts of the present case. In each of the cited cases the injury was one to the stockholder and not to the corporation; hence the stockholder was permitted to maintain the action.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., concurs.

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70 Cal.App.2d 759

ROBSON et al. v. UNION PAC. R. CO. et al.

Civ. 14906.

District Court of Appeal, Second District, Division 2, California.

Sept. 17, 1945.

Hearing Denied Nov. 15, 1945.

1. Trial 🔑178

A directed verdict for defendant is permissible only when, disregarding conflicting evidence, conceding as true all of plaintiffs' evidence, and indulging every reasonable inference favorable to plaintiffs which may be drawn therefrom, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiffs if such verdict were given.

2. Carriers 🔑286(1)

A railroad is not an insurer of the safety of its station premises, but is required to exercise only ordinary care as to invitees.

3. Carriers 🔑286(1)

The care required of carrier for protection of a passenger on its premises involves reasonable care to provide and maintain safe and adequate stations, platforms, walks, steps, and landings for use in waiting for, approaching and leaving trains or other means of conveyance in which the transportation is to be, or has been, furnished.

4. **Carriers** ⚷286(1)

A carrier is liable for injuries caused by defects which are known, or ought to be known, but not for those caused by mere depressions or irregularities or of which it has no knowledge as being of a dangerous character.

5. **Carriers** ⚷320(7)

Where there is no conflict in evidence and reasonable minds cannot differ as to conclusions to be drawn from such evidence, whether a defect in sidewalk at railroad station is trivial defect is a question of law for determination of trial judge and not a question of fact.

6. **Carriers** ⚷286(1)

A carrier is not liable for injuries resulting from minor defects in a sidewalk on its premises.

7. **Carriers** ⚷286(4)

Carriers were not liable to prospective passenger who fell when her heel caught in depression resulting from chipped tile in sidewalk in entry way of Union Station constituting a defect two inches in diameter and sloped from walk level on one side to a depth of one fourth of an inch for a distance of not over one inch on opposite side, since such defect constituted a minor defect in the walk as a matter of law.

◆

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Action by Mable L. Robson and Donald A. Robson against the Union Pacific Railroad Company and others to recover for injuries sustained by first-named plaintiff in a fall while in the act of entering the waiting room of railroad station. From a judgment on a directed verdict for defendants, plaintiffs appeal.

Affirmed.

William Dellamore and Joseph W. Pierce, both of Los Angeles, for appellants.

Jonathan C. Gibson and H. K. Lockwood, both of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of defendants predicated upon the granting of their motion for a directed verdict in an action to recover damages for personal injuries, plaintiffs appeal.

On December 17, 1942, at approximately five p.m., plaintiff Mable L. Robson, whose husband is her co-plaintiff, was in the act of entering the waiting room of the Los Angeles Union Station for the purpose of buying a ticket and then boarding a train from Los Angeles to San Bernardino. A portion of the floor of the premises immediately outside of the entrance to the station was surfaced with red Padre tile in blocks about six inches square. One of these tiles immediately adjacent to the sill of the door by which Mrs. Robson undertook to enter the building was chipped.[1] The diameter of the chip was approximately two inches. At its deepest point, which was adjacent to the sill of the door, it was one-fourth inch deep and approximately one inch wide. This chip in the tile had existed two or three months prior to the date of the accident hereinafter described. Plaintiff was wearing shoes with Cuban heels.[2] She stepped with her left foot upon the depression in the tile, then took one step into the doorway with her right foot, and while in the act of putting her left foot forward to take another step her foot was caught, which gave her a jerk causing her to fall.

The principal question in this case will be discussed in light of the following general rules which are here applicable.

[1] 1) A directed verdict is permissible only when, disregarding conflicting evidence, conceding as true all of plaintiffs'

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[1] It was stipulated at the time of the trial that defendants' Exhibit A which is attached hereto and made a part of this opinion was a true and correct representation of the portion of the floor of the Union Passenger Terminal upon which the plaintiff Mable Robson claimed to have stepped and have fallen on December 17, 1942.

[2] Attached hereto and made a part hereof is the left shoe of defendants' Exhibit E which is the shoe plaintiff Mable Robson was wearing at the time of the accident.

evidence and indulging every reasonable inference favorable to the plaintiffs which may be drawn therefrom, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff, if such verdict were given. (In re Estate of Yale, 214 Cal. 115, 124, 4 P.2d 153; In re Estate of Caspar, 172 Cal. 147, 150, 155 P. 631.)

[2] 2) A railroad is not an insurer of the safety of its station premises, but is required to exercise only ordinary care as to invitees. (Falls v. San Francisco, etc., R. R. Co., 97 Cal. 114, 119, 31 P. 901. See also Sanchez v. Pacific Auto Stages, 116 Cal.App. 392, 396, 2 P.2d 845; 44 Am.Jur. [1942] sec. 429, p. 648; 52 C.J. [1931], § 2165, p. 612.)

[3, 4] The rule is accurately stated in 10 C.J. [1917], § 1341, p. 916, as follows:

"The care required of the carrier for the protection of a passenger on its premises involves reasonable care to provide and maintain safe and adequate stations, platforms, walks, steps, and landings for use in waiting for, approaching, and leaving trains or other means of conveyance in which the transportation is to be, or has been, furnished; and it is liable for injuries caused by defects which are known, or ought to be known but not for those caused by mere depressions or irregularities of which it has no knowledge as being of a dangerous character." See, also, 13 C.J.S., Carriers, § 717.

[5] 3) Where there is not any conflict in the evidence and reasonable minds cannot differ as to the conclusion to be drawn from such evidence, it is a question of law for the determination of the trial judge, and not a question of fact, whether a defect in a sidewalk is or is not a trivial defect. (Whiting v. National City, 9 Cal. 2d 163, 165, 69 P.2d 990; Clarke v. Foster's, Inc., 51 Cal.App.2d 411, 414, 125 P.2d 60; Sischo v. City of Los Banos, 37 Cal.App.2d 717, 718, 100 P.2d 305.)

[6] 4) A defendant is not liable for injuries resulting from minor defects in a sidewalk. (Whiting v. National City, supra, 9 Cal.2d at page 165, 69 P.2d 990; Nicholson v. City of Los Angeles, 5 Cal.2d 361, 365, 54 P.2d 725.)

This is the specific question presented for our determination:

Did the defect in the tile in the doorway leading into the Union Station constitute a minor defect in the sidewalk?

[7] This question must be answered in the affirmative. The facts are undisputed. The defect in the sidewalk in the entryway to the Union Station is evidenced by defendants' Exhibit A. This exhibit discloses that the defect was only two inches in diameter and sloped from the level of the floor on one side to a depth of not to exceed one-fourth of an inch for a distance of not to exceed one inch on the opposite side of the depression. Hence it is apparent that reasonable minds could reach only one conclusion, to wit, that the defect in the sidewalk was a minor and trivial one and therefore it was the duty of the trial judge under rule 3, supra, to determine the matter as a question of law. Since the defect was a minor one, defendants were not liable under rule 4, supra, for the unfortunate accident which occurred and the trial judge properly granted their motion for a directed verdict.

This conclusion is further borne out by the fact that there is a total absence of any evidence that any accident caused by the defect occurred during the three months' period it is stipulated that the defect existed.

Our conclusion is fully supported by the decisions of our Supreme Court and Appellate Courts.

In Nicholson v. City of Los Angeles, supra, our Supreme Court reversed a decision in favor of plaintiff and held that a crack at one of the joints between the panels in a sidewalk, where the difference in grade at the break was not more than an inch and a half, constituted a minor and trivial defect for which the defendant was not liable.

In Whiting v. National City, 9 Cal.2d 163, 69 P.2d 990, a judgment in favor of plaintiff was likewise reversed by our Supreme Court, the court holding that where the defect consisted of a difference in elevation, between two contiguous squares in a sidewalk, of about three-quarters of an inch, such defect was a minor and trivial defect. Mr. Justice Shenk said, 9 Cal.2d at page 165, 69 P.2d at page 991:

"It is a matter of common knowledge that it is impossible to maintain a sidewalk in a perfect condition. Minor defects are bound to exist. A municipality cannot be expected to maintain the surface of its sidewalks free from all inequalities and from every possible obstruction to travel. Minor defects due to continued use, or action of the elements, or other cause, will not necessarily make the city liable for injuries caused thereby. What constitutes a minor defect is not always a mere question of fact. If the rule were otherwise the city could be held liable upon a showing of a trivial defect."

In Clarke v. Foster's, Inc., 51 Cal.App. 2d 411, 125 P.2d 60, the District Court of Appeal affirmed a judgment in favor of defendants, holding that a defect consisting of a bulge in the doors of a sidewalk elevator approximately six inches long and 7/16 of an inch in depth was a trivial defect.

In Van v. Teche Lines, Inc., 164 So. 267, the Court of Appeal in Louisiana, in affirming a judgment in favor of defendant, held that maintenance of the floor in a bus station with a difference in elevation of three inches between the floor of the dressing room and the floor of the station did not constitute negligence and defendant was not liable for injuries to plaintiff sustained therefrom.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., concurs.

Hearing denied; CARTER, J., dissenting.

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70 Cal.App.2d 827

FITCH et al. v. CARPENTER et al.

Civ. 14869.

District Court of Appeal, Second District, Division 3, California.

Sept. 21, 1945.

1. Principal and agent 🔑101(2), 173(3)

In shippers' action against motor carrier for loss of goods, evidence supported finding that plaintiffs' 16-year-old son had no authority to sign a contract for plaintiffs which purported to limit defendant's liability, and that plaintiffs did not ratify the son's act, so as to bar right to recover full value of goods. Civ.Code, § 2176.

2. Carriers 🔑108

Unless limited by a special contract, the liability of a common carrier for goods in his possession is that of an insurer. Civ. Code, § 2176.

3. Carriers 🔑161

Where plaintiffs did not accept a bill of lading or execute one at time goods were delivered to defendant carrier for transportation, provision of statute that the acceptance of bill of lading by consignor with knowledge of its terms constitutes an assent to limitation of liability was not available to carrier as a ground for limitation of liability. Civ.Code, § 2176.

4. Carriers 🔑152

Where plaintiffs had no knowledge that sum charged by defendant carrier for transporting plaintiffs' goods was at the rate fixed for shipment of goods at a valuation which would limit carrier's liability for loss, plaintiffs had right to assume that carrier was undertaking to transport goods at their true value, and payment of charges on basis of lower valuation did not amount to a contract on their part to a limitation of carrier's liability. Civ.Code, § 2176.

5. Carriers 🔑134

Evidence sustained finding fixing value of household goods lost by common carrier at $1950. Civ.Code, § 2176.

6. Pleading 🔑172

In action against motor carrier for loss of goods, court did not abuse its discretion in allowing plaintiffs to file an affidavit denying the genuineness and due execution of bill of lading after the expiration of five days from the filing of defendants' answer setting up the bill of lading as a partial defense. Civ.Code, § 2176.

◆

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Lester A. Fitch and Minnie F. Fitch against W. L. Carpenter, doing business under the firm name and style of Argonne Van Lines and Argonne Van & Storage Company, for the loss of household goods which defendant undertook to transport for plaintiffs. From a judgment for plaintiffs, and from order denying his motion for a new trial, defendant appeals.

Judgment affirmed and appeal from order denying new trial dismissed.

W. L. Carpenter, of Los Angeles, in pro. per.

Arthur C. Webb, of Los Angeles, for respondents.

SHINN, Justice.

Plaintiffs recovered a judgment in the sum of $1950 as damages suffered in the loss of their household goods which defendant W. L. Carpenter, doing business under the firm name and style of Argonne Van Lines and Argonne Van and Storage Company, a common carrier, undertook to transport from Mill Valley, California, to Los Angeles. The complaint alleged the contract of carriage, the payment of defendant's charges in the sum of $173.61, that defendant represented to plaintiffs that all goods carried by him were fully covered by insurance against loss by fire; that they were induced thereby to enter into the contract of carriage with him, that defendant was negligent in the handling of the goods, and that the goods were thereby wholly lost through fire while in possession of defendant. In a separate cause of action plaintiffs alleged breach of the contract of carriage by failure to deliver the goods as agreed, and in the third cause of action it was sought to recover the sum paid for the transportation charges. The goods were alleged to be of the value of $4,239.50.

In addition to denials, the answer alleged that plaintiffs instructed defendant to set the goods off at San Francisco until notified by plaintiffs that they were ready to accept delivery thereof; that this instruction was followed; that the goods were destroyed by fire while so set off, and it alleged the making of a special contract of carriage, by the terms of which defendant's liability was limited to a sum equal to ten cents per pound for the weight of the goods shipped, amounting in the aggregate to $528. The agreement pleaded by defendant as a limitation upon his liability consisted of a provision in a bill of lading that the value of the property did not exceed ten cents per pound. Floyd Fitch, 16-year-old son of plaintiffs, signed his own name to this declaration of value in the bill of lading. Plaintiffs filed an affidavit denying the authority of their son to enter into an agreement on their behalf and the due execution by them of the alleged agreement limiting defendant's liability.

The court found the allegations of the complaint to be true, with the exception of the amount of plaintiffs' damage, which was fixed at $1950. It was further found that plaintiffs did not execute the bills of lading and did not authorize their son to execute the same on their behalf and that they did not authorize the stopping of said goods in transit at San Francisco nor the unloading thereof by defendant. Although by finding the allegations of the complaint to be true the court found that defendant represented the goods to be covered by insurance, and was negligent in the handling of them, these findings are immaterial; the other facts found furnish a sound basis for the judgment.

Plaintiffs arranged for the shipment of their goods at defendant's San Francisco office during the week preceding January 4, 1943. They were present while the goods were being loaded at their home in Mill Valley on January 4, 1943. Shortly before defendant's van left, and while plaintiffs were in the house, their son Floyd Fitch, at the request of one of defendant's employees, affixed his own name to a bill of lading as the owner of the property and after the van left he told plaintiff Lester A. Fitch that he had signed some paper. No copy of the bill of lading was furnished to plaintiffs or their son at the time. After the van left, plaintiffs drove to San Francisco on their way to Los Angeles, paid defendant his charges of $173.71, received a receipt therefor, and requested a copy of the bill of lading. They were told that it would be mailed to them but this was not done and they had no knowledge as to its contents. The evidence was that the son had no authority to make any agreement for them and that they did not believe that he had affixed his name to anything more than a receipt which evidenced delivery of the goods. Plaintiffs denied that they had authorized the stoppage of the goods in transit or given any directions other than for their transportation directly to Los Angeles. There was evidence that it was defendant's custom to bring small loads of goods to his dock in San Francisco and to unload them there for the purpose of transfer to a larger van, thus combining the shipments of several owners into a single load for a long haul. This was done with the goods of plaintiffs. The dock was destroyed by fire, the cause of which was undisclosed, and plaintiffs' goods were thereby lost.

[1] Defendant, who is appearing in propria persona, lists 65 points of law or fact which, when assembled, constitute his argument that plaintiffs entered into a special contract for the shipment of their goods and are bound by the limitation of

liability therein declared. He contends that the court should have held plaintiffs to the agreement on the theory that their son had authority to make it or upon the grounds of ratification and estoppel. There was no evidence that the son had authority to act for plaintiffs or that they held him out as their agent. The uncontroverted evidence was that plaintiffs were present in their home at the time the loading was completed and that nothing was said to them concerning the issuance by defendant of a bill of lading. The finding that they did not execute the special contract is sustained by the evidence. The finding that plaintiffs did not ratify the act of their son is also supported by the evidence. They did not know he had signed a bill of lading; it was not furnished to them, although they asked for it, and the goods were destroyed on the following day. Being without knowledge of what their son had signed, plaintiffs did not ratify his act nor could they be held estopped under the circumstances to deny his authority.

[2, 3] There are no questions of law in the case which have not been decided contrary to appellant's contentions. Unless limited by the special contract, his liability was that of an insurer. American Fruit Distributors v. Hines, 1921, 55 Cal.App. 377, 385, 203 P. 821. It was held in McQueen v. Tyler, 1943, 61 Cal.App.2d 263, 142 P.2d 466, that a contract purporting to limit the liability of a carrier is not binding upon the shipper unless it is entered into freely and fairly, citing Donlon Bros. v. Southern Pacific Co., 1907, 151 Cal. 763, 91 P. 603, 11 L.R.A.,N.S., 811, 12 Ann.Cas. 1118. Although the shipper there had signed a freight bill which contained a limitation of liability similar to the one here involved, a finding of the jury that it did not constitute a contract fairly entered into by the parties limiting defendant's liability was held to be sustained by evidence that it was signed by the shipper upon a representation that it was an authorization to take the goods and without reading the paper and without knowledge that it contained a provision purporting to limit the liability of the carrier. Section 2176 of the Civil Code provides that the acceptance of a bill of lading by a consignor with knowledge of its terms constitutes an assent to a limitation of liability as to property carried in packages, trunks or boxes when the value is not stated, but that the consignor's consent to any other modification of the carrier's obligation contained in such instrument can be manifested only by his signature of the same. The court found, upon sufficient evidence, that plaintiffs did not accept a bill of lading and that they did not execute one. The provisions of section 2176, supra, are therefore not available to defendant as a ground for limitation of his liability.

[4] Defendant makes the further contention that plaintiffs elected to ship their goods at the rate applicable to a valuation of ten cents per pound and that they thereby necessarily limited his liability. The court found that plaintiffs did not make such an election. The finding is supported by the evidence. There was no evidence that plaintiffs had any knowledge that the sum charged by defendant was at the rate fixed for the shipment of goods at a valuation of ten cents per pound, nor was there any evidence that they had any knowledge whatever as to the basis of defendant's rates. Not having entered into or even discussed any agreement or arrangement to limit defendant's liability, they had a right to assume that defendant was undertaking to transport the goods at their true value and that he was charging his customary rate therefor. Although defendant's tariffs had been filed with and approved by the Railroad Commission and the charges which he made were in accordance therewith, and were applicable to the shipment of goods at a valuation not to exceed ten cents per pound, the payment by plaintiffs of the minimum rate did not constitute an agreement upon their part to a limitation of defendant's liability. That is a matter of contract and is governed by section 2176 of the Civil Code.

Defendant makes the further argument that the finding that the goods were worth $1950 results in his having agreed to ship goods of that value at a rate applicable to goods of far less value, that this would have amounted to giving plaintiffs a preferential rate, which the law does not allow, and that out of these facts there arose an implied agreement limiting the value of the goods so as to conform to the rate charged. Plaintiffs had no knowledge that they were receiving any preference. They were not shown to have been unwilling to pay a higher rate if it had been charged by defendant, and they cannot be held responsible for defendant's omissions or mistakes. The argument that as plaintiffs had the benefit of the lower rate they should bear the consequences which followed the acceptance of that rate is without force, inasmuch as there was no evidence that they had any knowledge that defendant's charges were based upon a restricted liability.

[5] There was ample evidence to sustain the finding as to the value of plaintiffs' goods; indeed a finding of a considerably higher value would not have been unjustified.

[6] The contention that the court was guilty of an abuse of discretion in allowing plaintiffs to file an affidavit denying the genuineness and due execution of the bill of lading after the expiration of five days from the filing of defendant's answer setting up the bill of lading is without merit. The record contains nothing to indicate that the order was not based upon valid grounds and a sufficient showing.

The judgment is affirmed. The attempted appeal from the order denying motion for new trial is dismissed.

DESMOND, P. J., and PARKER WOOD, J., concur.

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70 Cal.App.2d 816

INDEPENDENT LAUNDRY v. RAILROAD COMMISSION.

Civ. 12870.

District Court of Appeal, First District, Division 1, California.

Sept. 21, 1945.

Hearing Denied Nov. 19, 1945.

1. Action 🔑6

Actions for declaratory relief may be brought against sovereign bodies, depending on facts, in absence of specific expression of legislative intent to the contrary, but declaratory judgment statute does not enlarge jurisdiction of superior court as to parties and subject matter, so that, if governmental body or subject matter involved in the action is not within superior court's jurisdiction, such statute will not confer jurisdiction. Code Civ.Proc. § 1060.

2. Courts 🔑42(1)

The statute providing that no court except Supreme Court, to extent therein specified, shall have jurisdiction to review, reverse, correct, or annul any order or decision of Railroad Commission, or to suspend or delay execution or operation thereof, is a valid limitation on jurisdiction of courts of state. Gen. Laws 1943, Act 6386, § 67.

3. Action 🔑6

In lessor's action for declaratory relief as to rights and duties under lease and rule of Railroad Commission respecting resale charges by lessor to lessee for electric current purchased from electric company, if action develops into issues with which Railroad Commission is not directly concerned, but which are solely between lessor and lessee, commission is not a necessary party thereto. Code Civ.Proc. § 1060; Gen. Laws 1943, Act 6386, § 67.

4. Action 🔑6

If lessor's action for declaratory relief under lease provision and rule of Railroad Commission respecting resale of electric current purchased from electric company sought to restrain Railroad Commission from performance of its official duties or desired that order approved by commission should be annulled or modified, such proceeding could not properly be brought in superior court. Code Civ.Proc. § 1060; Gen.Laws 1943, Act 6386, § 67.

5. Action 🔑6

The scope of contract in lease giving lessee permission to install electric meter at own expense for purpose of consolidating current used by lessee, and providing that lessee should have full benefit of savings from the consolidated rate, could be determined in lessor's action for declaratory relief without making Railroad Commission a party. Code Civ.Proc. § 1060; Gen. Laws 1943, Act 6386, § 67.

6. Public service commissions 🔑24

The superior court may not require Railroad Commission to accept court's discretion instead of commission's discretion in enforcement of commission's regulations, notwithstanding section 69, providing that actions involving acts or orders of commission shall have preference over certain other civil causes, and section 75, authorizing commission's attorney in name of people to commence action by mandamus or injunction in superior court to stop violation of law or an order or rule of commission. Gen. Laws 1943, Act 6386, §§ 67, 69, 75.

7. Constitutional law ⇨24
Statutes ⇨159

Repeals by implication of constitutional provisions, as well as statutes, are recognized only where there is an irreconcilable conflict between existing statutes or constitutional provisions.

8. Constitutional law ⇨24

The 1928 constitutional amendment giving superior court jurisdiction of all such special cases and proceedings as are not otherwise provided for did not repeal constitutional provision giving Railroad Commission duty of regulation as to certain matters, since such matters, though constituting "special cases and proceedings", were "otherwise provided for" within the 1928 amendment. Const. art. 6, § 5, amended in 1928; art. 12, § 22, amended in 1911.

9. Action ⇨6

Even if lessor's action for declaration of rights under lease provision and rule of Railroad Commission relating to charges on resale of electric current purchased from electric company presented actual present controversy with a protectable interest in lessor, such as a lease, nevertheless such controversy was one which was required to be subject to action by the court wherein jurisdiction was claimed. Code Civ.Proc. § 1060; Gen. Laws 1943, Act 6386, § 67.

10. Action ⇨6

A lessor's action for declaratory relief against lessee, under conflicting lease provision and rule of Railroad Commission as to rates at which electric current could be resold by lessor to lessee, did not involve a present justiciable controversy between lessor and commission wherein superior court might determine validity of commission's regulation, since basis of the action was lease between lessor and lessee, but superior court in such action could interpret commission's regulation and declare whether it was applicable. Code Civ.Proc. § 1060; Gen.Laws 1943, Act 6386, § 67.

◆

Appeal from Superior Court, City and County of San Francisco; Peter J. Mullins, Judge.

Action for declaratory judgment by the Independent Laundry against the Railroad Commission of the State of California and others for a declaration of rights and duties of plaintiff and defendants Craig Carrier, doing business as Pacific Linen Supply Company, and Pacific Gas & Electric Company under a lease between plaintiff and defendant Carrier, and a rule and regulation of the defendant Electric Company. From a judgment that plaintiff take nothing from defendant Railroad Commission, following an order sustaining such defendant's demurrer to an amended complaint without leave to amend and granting of a motion for judgment on the pleadings, plaintiff appeals.

Affirmed.

Stanislaus A. Riley, of San Francisco, for appellant.

Everett C. McKeage, Roderick B. Cassidy, Wyman C. Knapp, Hal F. Wiggins, and John M. Gregory, all of San Francisco, for respondent Railroad Commission of California.

WARD, Justice.

Plaintiff brought this action for declaratory relief joining as defendants Craig Carrier, doing business as Pacific Linen Supply Company, Pacific Gas and Electric Company and the Railroad Commission of the State of California. The appeal is by plaintiff from a judgment that plaintiff take nothing of or from defendant Railroad Commission which followed an order sustaining said defendant's demurrer to an amended complaint without leave to amend and the granting of its motion for judgment on the pleadings.

The amended complaint set forth that plaintiff had leased to defendant Carrier, for the operation of a laundry and linen supply business 5124 square feet in a building owned and operated by plaintiff as a laundry. The sixth clause of the lease between the parties provided: "Said lessee is given permission to install an electric meter at his own expense for the purpose of consolidating the current of the Pacific Gas and Electric Co. to be used for the purposes of measuring the current used by said lessee, it being agreed that lessee shall have the full benefit of the saving secured on a consolidated rate for all current used by him." The amended complaint also alleged that the Railroad Commission under the Constitution and laws of the state of California regulates and supervises public utilities in the matter of fixing rates for gas, electricity and water; that the Pacific Gas and Electric Company is a public utility under the jurisdiction of the commission; that this company has been providing electric current to plaintiff on the premises, and plaintiff in turn has been supplying to defendant Carrier such portion of the current as was required in the operation of the linen supply business. It is further alleged that the defendant gas and electric company, with the approval of the defendant commission, has had in force and operation a rule and regulation reading as follows:

"Where the Company has adequate service facilities to supply separate premises such separate premises, even though owned by the same consumer, will not be supplied with electric energy through the same meter.

"Unless specially agreed upon, the consumer shall not re-sell any of the electric energy received by him from the Company to any other person or for any other purpose, or on other premises than specified in his application for service.

"Owners or lessees of apartment houses or other buildings may re-sell electric energy to tenants of such houses or buildings, provided either,

"(a) Such energy is resold at rates identical with the rates of the Company that would apply in the event that energy were supplied to the sub-consumer directly by the Company: or

"(b) The charge to the sub-consumer for such energy is absorbed in the rental charge for the premises occupied by him. In the event that such energy is resold otherwise than as provided in this paragraph, the Company shall have the right at its option, either to discontinue service to the consumer, or, to furnish electric energy directly to the sub-consumer."

Plaintiff further alleges that it charged defendant Carrier for electric current supplied at the rate charged by the company to plaintiff; "that the amount of current consumed and used by defendant Carrier caused an increase in the amount of current received by and charged to plaintiff and under the schedule of rates fixed by the Commission the charge to plaintiff for such increased consumption was substantially less than the charge would have been had it been computed upon the basis of such increase being separately supplied; during the period above mentioned plaintiff allowed defendant Carrier the benefit of the saving thereby effected." It was also alleged that plaintiff was unaware of the rule and regulation for some period after the execution of the lease, but subsequently notified and demanded of defendant Carrier that he pay the same rates as would be in effect were the energy supplied directly by the utility company to said defendant; that defendant Carrier refused to pay the rates applicable as a sub-consumer and has offered to pay the "lease" rates and no more. It is alleged that the company and the commission insist that payment be made in accordance with the rule. It is then alleged that plaintiff's business, operating for many years and rendering service to approximately thirty drivers, will be disrupted and that plaintiff, the drivers, etc., will be irreparably injured if the defendant gas and electric company exercises its right to enforce the rule by discontinuance of service. It is further alleged: "That in view of the conflict in the demands of defendants, namely, that of defendant Carrier that the provisions of Clause Sixth of the lease apply, and the demands of defendants Company and Commission that the provisions of said rule and regulation apply, it is necessary that a declaration of the rights and duties of plaintiff and the defendants under said lease and said rule and regulation be had." Defendant commission demurred upon the grounds that (1) the "complaint does not state facts sufficient to constitute a cause of action"; (2) "The Court has no jurisdiction of this defendant, or the subject of the action," and (3) there is a "misjoinder of parties." This demurrer to the amended complaint was sustained without leave to amend.

The appellant contends that none of the grounds of the demurrer is good. Respondent commission urges, mainly, lack of jurisdiction of the superior court to hear or determine any action such as this, so far as the Railroad Commission is concerned. Whatever is said by this court on this appeal is to be considered only in relation to the position of the commission, the lone respondent herein.

Irrespective of the fact "that the Railroad Commission has exclusive original jurisdiction and the Supreme Court exclusive reviewing jurisdiction," and that no appeal from the order of the commission was presented to the Supreme Court, it is appellant's position that the regulation of the commission must be taken as valid and that it supersedes and renders invalid the provisions of the lease. Appellant contends that the "status of all the parties can be determined only if and when the appellant, its lessee, Carrier, the Railroad Commission and the gas company are before the court in the same proceedings." Appellant argues that if the superior court does not have jurisdiction over the commission, there is no way of binding the Commission to an order that the superior court may make.

[1] Actions for a declaratory relief, Code Civ.Proc. sec. 1060, may be brought against sovereign bodies, depending upon the facts of the case, in the absence of a specific expression of legislative intent to the contrary. However, the section does not enlarge the jurisdiction of the superior court as to parties and the subject matter, so that if the commission or the subject matter of this action is not within the jurisdiction of the superior court, section 1060 will not confer such jurisdiction. Hoyt v. Board of Civil Service Com'rs, 21 Cal.2d 399, 132 P.2d 804; People v. Buellton Development Co., 58 Cal.App.2d 178, 136 P.2d 793; Imperial Mut. L. Ins. Co. v. Caminetti, 59 Cal.App.2d 501, 139 P.2d 693.

[2] Section 67 of the "Public Utilities Act," Stats. 1915, pp. 115, 161, amended by Stats. of 1933, pp. 1157, 1158; 2 Deering's Gen.Laws (1943), Act 6386, pp. 2464, 2522, provides in part:

"No court of this State (except the Supreme Court to the extent herein specified) shall have jurisdiction to review, reverse, correct or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the commission in the performance of its official duties; provided, that the writ of mandamus shall lie from the Supreme Court to the commission in all proper cases.

"In any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the Constitution of the United States, the Supreme Court shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the said constitutional question shall not be final." The provision that the Supreme Court only shall have jurisdiction to review an order of the commission is a valid limitation upon the jurisdiction of the various courts of this state. Pacific Telephone, etc., Co. v. Eshleman, 166 Cal. 640, 137 P. 1119; Marin M. W. Dist. v. North Coast W. Co., 178 Cal. 324, 173 P. 473.

[3, 4] In the present case appellant seeks to have the superior court declare the Railroad Commission's rights and duties under the lease and "said rule and regulation." If the declaration of rights develops into issues with which the commission is not directly concerned but which are solely between plaintiff and defendant Carrier, then the commission is not an essential or necessary party. If plaintiff seeks to restrain the commission in the performance of its official duties, or desires that the order approved by the commission should be annulled or modified, the proceeding has not been instituted in the proper tribunal.

[5] The only California case called to our attention wherein an attempt was made to make the Railroad Commission a party to a superior court action involving issues similar in any respect to those in the present appeal is Sexton v. Atchison, etc., Ry. Co., 173 Cal. 760, at page 763, 161 P. 748, at page 749, in which case the court said "that, by reason of said section [sec. 67, Public Utilities Act], no court of the state other than the Supreme Court has any power to review the orders of the commission, or to control its official action." It has been held in Truck Owners, etc., Inc., v. Superior Court, 194 Cal. 146, 228 P. 19, that the superior court has jurisdiction where the purpose of a suit is to enjoin a carrier which has not applied to the commission for a certificate, which certificate would in effect permit competition with the plaintiff who previously had received a certificate of public convenience and necessity to operate trucks for transportation purposes over a designated area. The proper court to determine the right of another company to operate over the same designated route was the superior court in the absence of action by the commission in assuming jurisdiction over the second trucking company. At page 153 of 194 Cal., at page 22 of 228 P., it was stated "that the superior court has no jurisdiction to compel the commission to act," and again 194 Cal. at page 156, 228 P. at page 23, that "We entertain no doubt that, when the commission has assumed and exercised its jurisdiction, the court would conform its orders and process agreeably to the action of the commission made within its jurisdiction." The prior action taken by the commission in the Truck Owners' case consisted in the issuance of one certificate applicable to the

holder thereof. In the present case it is the promulgation of a rule and regulation directed to all consumers of electric energy that such power should not be supplied to separate premises where the company has adequate service facilities to supply the additional consumer unless such energy is resold at rates identical with the rates of the company that would apply in the event that energy were supplied to the sub-consumer directly. In City of Oakland v. Key System, 64 Cal.App.2d 427, 149 P.2d 195, this court discussed questions involving the jurisdiction of the commission and the superior court. The views expressed in the City of Oakland case are in accord with the views expressed herein. However, here the issue, the scope of a contract between appellant and defendant Carrier, may be determined without the presence of the commission.

An interpretation of the rule and regulation in accordance with appellant's views might be of advantage in finally determining the dispute alleged in the amended complaint to exist between plaintiff and defendant Carrier. However, so far as the superior court is concerned its jurisdiction in the determination of the validity of a regulation of the commission has been restricted. Pacific Telephone, etc., Co. v. Eshleman, supra; Truck Owners, etc., Inc., v. Superior Court, supra; Allen v. Railroad Commission, 179 Cal. 68, 175 P. 466, 8 A.L.R. 249; People v. Hadley, 66 Cal.App. 370, 226 P. 836; Wallace Ranch W. Co. v. Foothill D. Co., 5 Cal.2d 103, 53 P.2d 929; Foothill D. Co. v. Wallace Ranch W. Co., 25 Cal.App.2d 555, 78 P.2d 215.

[6] Appellant points to sections other than section 67, which provide or intimate that the commission may, under certain circumstances, take part in court proceedings in which an order or act of the commission is involved. Section 4 provides merely for the appointment of an attorney to represent the commission in all actions involving an order or act of the commission. Section 69 provides that actions involving the acts or orders of the commission shall have preference over certain other civil causes. Section 75 authorizes the commission's attorney in the name of the people of the state of California to commence an action by mandamus or injunction in the superior court to stop or prevent a violation of law or of an order, rule, etc., of the commission. "The statute, instead of conferring upon the Commission the means of directly enforcing such orders, has provided (Public Utilities Act, § 75) for the institution by the Commission of court proceedings, or for the issuance of process by the court to carry out and make effective the orders of the Commission. As was said in Yolo Water & Power Co. v. Superior Court, 43 Cal.App. 332, 341, 185 P. 195, 199: 'The purpose and intent in enacting section 75 is obvious. The Public Utility Act invests the Board of Railroad Commissioners with large powers in the control of public utilities, and gives it powers to fine and punish for contempt. But the Commission is not a court and has not complete court machinery. It was seen that cases might arise where punishments for contempt and fine would not accomplish the objects sought, that writs of mandamus and injunction might be needed, and such writs the Commission has no power to issue. It might become necessary for it to avail itself of the equity powers of the courts. Without express authority granted by the Legislature to so do, the question of its right to bring suit might be raised in any litigation arising. Anticipating such contingency, express power was conferred upon the Commission to avail itself of court processes and writs, so that its power in this regard might not be questioned.'" Motor Transit Co. v. Railroad Commission, 189 Cal. 573, 582, 583, 209 P. 586, 590; see also, Kern County Land Co. v. Railroad Comm., 2 Cal.2d 29, 38 P.2d 401. Enforcing its orders through the offices of the superior court under a specific statute authorizing such appearance is entirely different from a forced appearance without statutory authorization. Hoyt v. Board of Civil Service Com'rs, supra. In brief, the superior court may not require the commission to accept the court's discretion instead of the commission's discretion in the enforcement of orders, rules and regulations. Sexton v. Atchison, etc., Ry. Co., supra.

[7, 8] In appellant's closing brief a new thought is injected which requires mention. Appellant does not argue nor present supporting authority but suggests that article VI, section 5 was adopted in 1928, some seventeen years after article XII, sec. 22 of the state Constitution and that the 1928 amendment is the latest expression of the will of the people upon the subject of jurisdiction. Appellant does not state that the 1928 amendment to article VI, sec. 5 repealed article XII, sec. 22, but such inference may be drawn from the language

used in the closing brief. Repeals by implication are only recognized where there is an irreconcilable conflict between existing statutes. Railroad Commission v. Riley, 192 Cal. 54, 218 P. 415; Penziner v. West Amerian Finance Co., 10 Cal.2d 160, 74 P.2d 252; Rexstrew v. City of Huntington Park, 20 Cal.2d 630, 128 P.2d 23. On three occasions sec. 5 of article VI has been amended. The purport of the original section and the first two amendments was to outline the jurisdiction of the superior court. Originally and in several amendments the superior court was given original jurisdiction in all cases of equity and all cases of law involving specified issues. In 1928 the section was amended without mention of "equity" or "law." In the original and amended sections it is made plain that the superior court has jurisdiction in special cases and proceedings not otherwise provided for. The 1928 amendment contains the following: "* * * and of all such special cases and proceedings as are not otherwise provided for." Article XII, sec. 22, and the following sections, provide the duty of regulation by the commission upon matters as are herein raised as issues in this case. Such matters are within the realm of "special cases and proceedings," but they are "otherwise provided for." With respect to the purpose of the proposed amendment to section 5, the sponsor, the Judicial Council, said: "The first paragraph has been reframed in an effort to eliminate, generally, concurrent jurisdiction in the superior and the inferior courts and to correct certain apparent inconsistencies between the provisions of that section and other provisions relative to the jurisdiction of inferior courts." (Appendix to Journals of Senate and Assembly (1927), Ex. C., First Report of the Judicial Council of California, p. 61.) Evidently there was no thought that the 1928 amendment should repeal any portion of article XII.

[9] Assuming that the amended complaint for declaratory relief presented an actual present controversy with a protectable interest in plaintiff (Dowd v. Glenn, 54 Cal.App.2d 748, 129 P.2d 964), such as a lease (Anway v. Grand Rapids R. Co., 211 Mich. 592, 179 N.W. 350, 12 A.L.R. 52, 82), still the controversy must be one subject to action by the court wherein jurisdiction is claimed.

[10] The basis of this action is the lease contract between plaintiff and defendant Carrier. There is no present justiciable controversy between plaintiff and defendant commission in which the superior court may determine the validity of the regulation. Merkley v. Merkley, 12 Cal.2d 543, 86 P.2d 89; Gillies v. La Mesa, etc., Irr. Dist. 54 Cal.App.2d 756, 129 P.2d 941. In brief, the superior court does not have jurisdiction as the facts are set forth in the amended complaint of the commission or the determination of the validity of the regulation referred to, even though the commission might intervene. However, the superior court in the action between plaintiff and defendant Carrier may interpret the "regulation" and declare whether it is applicable in view of the existence of clause sixth of the lease. In Henderson v. Oroville-Wyandotte Irr. Dist., 207 Cal. 215, at page 219, 277 P. 487, at page 488 it was held: "Again, the validity of the order of the Railroad Commission is not in question nor under review. The interpretation of that order at most is the only question before the court. The superior court is a court of general jurisdiction. It derives its powers from article 6, sec. 5, of the Constitution and section 76, subd. 3, of the Code of Civil Procedure. Yolo Water, etc., Co. v. Superior Court, 43 Cal.App. 332, 185 P. 195. Where a written instrument affects the title to real property, otherwise subject to the jurisdiction of the superior court, we can conceive of no reason why such an instrument may not be construed and its meaning declared, even though the document is final in its nature and is the result of action by either the legislative, executive, or judicial branch of a state government or of the government of the United States."

The judgment is affirmed.

PETERS, P. J., and KNIGHT, J., concur.

70 Cal.App.2d 675

PEOPLE v. HOROWITZ.

Cr. 3851.

District Court of Appeal, Second District, Division 2, California.

Sept. 5, 1945.

As Modified on Denial of Rehearing Sept. 18, 1945.

Hearing Denied Oct. 4, 1945.

1. Forgery ⚷44(2)
Obstructing justice ⚷16

Evidence sustained conviction of decedent's adopted son of forgery of will which he wrote over decedent's signature on blank paper, of causing forged will to be filed in office of county clerk, offering forged will in evidence, and preparing a false and antedated will. Pen.Code, §§ 115, 132, 134, 470.

2. Forgery ⚷12(4)

The crime of "forgery of a will" is complete when document has been so prepared that upon its face it will have the effect of defrauding one who acts upon it as genuine. Pen.Code, § 470.

See Words and Phrases, Permanent Edition, for all other definitions of "Forgery of a Will".

3. Forgery ⚷9

That accused did not execute signature of testatrix to will rendered it no less a forgery where he prepared contents of purported will above the signature after it had been written by testatrix on blank paper. Pen.Code, § 470.

4. Forgery ⚷5

Intent to defraud another constitutes the essence of crime of forgery and the fact of forgery may imply an intention to defraud. Pen.Code, § 470.

5. Forgery ⚷47

Whether accused prepared contents of purported will over signature of testatrix on blank piece of paper with intent to defraud another so as to be guilty of forgery was a question for jury. Pen.Code, § 470.

6. Criminal law ⚷1159(2)

Determination of what facts are established is the function of jury and verdict will not be reversed on appeal for insufficiency of the evidence unless it is made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in court below.

7. Forgery ⚷44

Evidence that husband survived decedent was sufficient to overcome adopted son's contention that it was impossible for him to defraud anyone by presenting forged will for probate. Pen.Code, §§ 115, 470.

8. Forgery ⚷4, 14

The felony of forging a will is not to be determined by whether decedent left an estate, but the crime is complete when instrument is uttered with intention of defrauding another. Pen.Code, § 470.

9. Forgery ⚷14, 15

Offense of procuring a forged will to be filed in office of county clerk was complete when forged instrument had been filed at behest of accused regardless of whether anyone was defrauded by filing of the forgery. Pen.Code, §§ 115, 470.

10. Obstruction of justice ⚷5

Accused who offered for probate a will forged by him and, in defending a contest filed by heir, knowingly offered forged will in evidence, was properly convicted of offense of offering in evidence a forged instrument. Pen.Code, §§ 115, 132, 470.

11. Forgery ⚷20

Adopted son was properly convicted of offense of preparing a false and antedated will with intent to produce it for a fraudulent purpose, though he had a power of attorney from testatrix authorizing him to exercise the broadest authority over her property including power of disposition. Pen.Code, § 134.

12. Principal and agent ⚷97

Power of attorney to exercise broadest authority over principal's property, including power of disposition, was merely authority to represent principal, and could not be construed as a deed of gift.

13. Criminal law ⚷481, 1153(2)

The qualification of an expert to testify upon a subject requiring scientific knowledge is committed to the sound discretion of trial court which is not restricted by any specified limitations in determining such qualifications and exercise of its discretion will not be disturbed except when shown to have been abused.

14. Criminal law ⚷478(1)

A witness who exhibits an unusual skill and knowledge gained from study and experience not possessed by man on the street, is competent to testify as to an opinion.

15. Criminal law ⚷472

Testimony of handwriting experts that in their opinion body of will was written after testatrix had signed blank paper and that thereafter names of attesting witnesses were written under testatrix' signature was admissible in prosecution for forgery of will. Pen.Code, § 470.

16. Criminal law ⚷371(5)

Proponent's notice of intent to move for new trial of will contest and supporting affidavit of corroborating witness were admissible in prosecution of proponent for forgery of will and offering forged will for probate as competent evidence of proponent's intent to defraud decedent's husband of his share of estate, even though they tended to show proponent guilty of subornation of perjury. Pen.Code, §§ 115, 470.

17. Perjury ⚷32(3)

In prosecution for perjury, the judgment roll of the case in which the false swearing was committed is competent evidence.

18. Criminal law ⚷371(5)

In prosecution for forgery of a will and offering it for probate, the record of will contest in which forged will was introduced was admissible, even though it might tend to prove an altogether different crime or aid in disclosing the proponent's motive. Pen.Code, §§ 115, 470.

19. Witnesses ⚷255(6)

In prosecution for forgery of will and offering it for probate, trial court did not err in having counsel read aloud to witness, who could not see to read it, his affidavit which was filed in support of accused's motion for new trial of will contest, where affidavit was prepared from memorandum of imaginary events written by affiant as dictated by accused in order to refresh witness' memory. Pen.Code, §§ 115, 470.

20. Witnesses ⚷268(3)

Cross-examination of state's witness as to statements made by accused in conversation concerning which witness had testified in direct examination, was improper where defense counsel showed no definite, legal purpose in asking excluded questions.

21. Witnesses ⚷268(3)

Trial court has discretion to determine what portions of a conversation proved on direct examination may be excluded on cross-examination and cross-examiner must show a definite, legal purpose in asking the excluded question.

22. Witnesses ⚷255(9)

In prosecution for forgery of will and offering it for probate, permitting prosecuting attorney to refresh memory of attorney who filed will for probate at accused's behest and who had testified that will when delivered to him was folded as it appeared at criminal trial by use of attorney's testimony before grand jury was not error. Pen.Code, §§ 115, 470.

23. Witnesses ⚷254, 255(9)

A witness' memory may be refreshed by repeating to him his former declaration or testimony.

24. Witnesses ⚷236(1)

Exclusion of question propounded to hotel clerk as to whether people would come in and go to some room without clerk noticing them was not error, where clerk had testified that it was his business to know who entered hotel and that he paid attention to know that a large number were in and out.

25. Witnesses ⚷205

Inquiry of attorney as to whether client had said to him that signature on check was true signature of decedent was properly excluded as calling for a privileged communication where client had refused to waive privilege as to any conversations with attorney. Code Civ.Proc. § 1881, subd. 2.

26. Criminal law ⚷464

Objection that there was no proper foundation "that that was the kind and type and exact size of the envelope" did not state ground for excluding as an exhibit envelope which witness identified as of about the size of one he had mailed for decedent, since inquiry as to size of an object which witness has observed does not call for an opinion, for the expression of which a foundation must be laid.

27. Witnesses ⚷269(4)

On cross-examination of attorney who testified for state, trial court did not err in excluding inquiries as to what the witness had said to defense counsel whose name had not been mentioned on direct examination of the witness.

28. Witnesses 🔑267

Trial court is vested with a wide discretion in keeping cross-examination within reasonable bounds.

29. Criminal law 🔑1036(2), 1129(3)

Appellate court would not consider wholesale assignment of error that cross-examination of accused by prosecuting attorney was prejudicial, where accused did not set forth questions asked or statements made by such attorney and made no objections to such cross-examination in trial court.

30. Criminal law 🔑706

Cross-examination of accused as to whether person whom accused had attempted to show on direct examination was the cause of his criminal career had caused accused to commit crimes other than four robberies, was not error in absence of showing that prosecuting attorney asked questions solely for wanton purpose of creating a prejudice against accused or that his acts militated against orderly procedure.

31. Witnesses 🔑277(4)

Upon cross-examination accused cannot close the door to inquiry concerning the transactions which were suggested by his own direct examination.

32. Criminal law 🔑1170(3)

Accused could not predicate error on adverse rulings as to admissibility of certain testimony on his direct examination, where after a full statement by defense counsel of what he intended to prove, the objections were withdrawn and accused was permitted to give such testimony.

33. Criminal law 🔑730(3), 1037(1)

Prejudicial error could not be predicated on statement of prosecuting attorney as to nature and purpose of exhibit he was offering in evidence, where no objection was made either to exhibit or prosecutor's statement and jury was instructed to disregard any remark of counsel on either side.

34. Criminal law 🔑1144(15)

On appeal it must be presumed that jury obeyed instruction of trial court to disregard any remark of counsel on either side.

35. Criminal law 🔑464

Trial court had discretion to determine whether sufficient foundation was laid for admitting as an exhibit the envelope which witness selected from two presented by prosecuting attorney as being approximately the same size as letter which witness had testified he had mailed for decedent.

36. Witnesses 🔑240(2)

The matter of leading questions is largely within the discretion of trial court.

37. Criminal law 🔑1170½(1)

In prosecution for forgery of a will, overruling objection that inquiry as to whether anything was said on occasion of accused's second visit to witness' room about a will bearing a certain date was leading and suggestive, was not prejudicial error. Pen.Code, § 470.

38. Witnesses 🔑240(5), 255(2)

In prosecution for forgery of a will, inquiry by prosecuting attorney as to whether witness in memorandum which he had written at dictation of accused had stated that he resided at a certain address, was not objectionable as leading and suggestive or on ground that no foundation had been laid for using such memorandum for the purpose of attempting to get the purport of some other document, where memorandum was at the time in defense counsel's possession and had been used by accused in will contest.

39. Criminal law 🔑1035(3), 1166½(12)

Where prosecuting attorney in prosecution for forgery of a will had elicited testimony that at first meeting accused offered to buy witness a parking lot if witness would make false affidavit in support of accused's motion for new trial of will contest and next question as to whether promise was made before witness wrote memorandum from which affidavit was prepared was answered affirmatively after objection thereto that it was leading and suggestive had been overruled, trial judge's remark that such testimony was obviously from former testimony of the witness was not prejudicial and, having neglected to move to strike such remark, accused could not complain thereof on appeal. Pen.Code, § 470.

40. Criminal law 🔑1035(3)

Accused waived his right by neglecting to move to strike remark made by trial judge during the taking of testimony and could not complain thereof on appeal.

41. Criminal law 🔑1036(2)

Where accused did not object to witness for state on ground of his mental incompetency, reversible error could not be predicated on trial court's action in permitting such witness to testify, even if prosecuting attorney knew of witness' mental incompetency before producing him as a witness.

42. Witnesses 🔑39, 79(1)

Mental competency to qualify as a witness cannot be determined on the basis of any prescribed standard but in each instance is confided to the discretion of the trial judge.

43. Witnesses 🔑41

A previous commitment for insanity is not conclusive of lack of mental competency to qualify as a witness at a later date.

44. Witnesses 🔑79(1)

Determination of the qualification of a witness is almost wholly in discretion of trial judge.

45. Witnesses 🔑255(6)

Where prosecuting attorney was by accused denied the use of memorandum written by state's witness and in accused's possession to refresh witness' memory as to contents thereof, prosecuting attorney was properly permitted to refresh witness' memory by reading to him affidavit which was based on memorandum and signed by witness. Code Civ.Proc. § 2047.

46. Criminal law 🔑723(1)

Record did not sustain contention that accused was denied a fair trial by determined persistent effort to influence jury by appeals to their passions, and to play upon their prejudices by sneering at and belittling accused's counsel and by wanton disregard of fundamental principles of right and justice.

47. Criminal law 🔑553

That witness may have been mistaken or may have falsified would not warrant conclusion that her testimony was inherently improbable and could not have been believed by jury had not jury been unduly influenced by passion and prejudice.

48. Criminal law 🔑553

Testimony is not inherently improbable merely because it discloses unusual circumstances.

49. Criminal law 🔑1159(4)

Where testimony is such that within the knowledge of reasonable men it cannot be true, appellate court may assume such knowledge and hold the testimony legally insufficient, but to do so, court must act on what is equivalent to judicial notice.

50. Constitutional law 🔑268

Presence of decedent's widower at trial for forgery of will by which accused allegedly intended to defraud widower of his share of decedent's estate, did not constitute denial of accused's right to due process of law, though widower was a sickly, legless, old man in a wheel chair. Pen.Code, § 470.

51. Criminal law 🔑1035(3)

Error could not be predicated on presence of decedent's widower at trial for forgery of will by which accused allegedly intended to defraud widower of his share of decedent's estate, where accused did not object to widower's presence at time of trial or in motion for new trial specify any irregularity of prosecuting attorney or court by reason of such presence. Pen. Code, § 470.

52. Criminal law 🔑728(2, 5)

Defense counsel should object to improper argument by prosecuting attorney, move to strike harmful matter and request court to admonish counsel, even though he believes court has indicated that it will disregard all objections or assignments of the defense.

53. Criminal law 🔑720(6)

"Misconduct" implies a dishonest act or attempt to persuade jury by vicious measures, and drawing erroneous inference in argument to jury from a fact proved, would not constitute misconduct of prosecuting attorney.

See Words and Phrases, Permanent Edition, for all other definitions of "Misconduct".

54. Criminal law 🔑1038(3)

Error could not be predicated on alleged misconduct of prosecuting attorney in making certain specified statements in argument to jury, even if such statements were prejudicial, where accused failed to lay a proper foundation at trial by requesting an instruction to disregard such statements.

55. Criminal law ⚷1173(2)

Refusal of requested instruction to disregard all testimony of named witness if jury believe he had been an inmate of state hospital for insane and released therefrom but never declared sane was not prejudicial error, where neither his competency to testify, nor his testimony were challenged on ground of mental incompetency, and he was not shown to be incompetent as a witness.

56. Criminal law ⚷829(3)

In prosecution for forgery of a will and offering it for probate, refusal to give requested instruction not to consider a letter from decedent to her husband whom accused allegedly intended to defraud of his share of estate was not error, where court's charge included statute clearly stating the law applicable to the filing of forged instruments. Pen.Code, §§ 115, 470.

57. Criminal law ⚷829(3)

Trial court did not err in rejecting requested instructions directing acquittal if accused on trial for forgery of a will, offering it for probate and preparing a false and antedated will, had no intent to defraud and declaring he could have no such intent if he believed decedent desired and intended to leave her entire estate to him, where statutes stating law applicable to the offering in evidence of a forged instrument and the preparing of a false and antedated will were read to jury and jury was instructed with respect to specific intent to defraud and to produce a false instrument. Pen.Code, §§ 115, 132, 134, 470.

58. Criminal law ⚷814(17)

Trial court did not err in rejecting requested instruction that testimony of eyewitness is direct and positive testimony and that direct and positive testimony of one witness is sufficient to prove a fact at issue, where such instruction was not a correct application of the law to facts in issue and would have improperly excluded all circumstantial proof offered by state.

59. Criminal law ⚷806(1), 807(1)

Requested instruction that it was immaterial in so far as law of forgery was concerned whether body of will was written before or after decedent placed signature thereon, or when will was prepared or written if accused had authority to prepare such will was properly rejected as argumentative and repetitious.

60. Criminal law ⚷806(1), 807(1)

Requested instruction to consider relationship between accused and decedent whose will he allegedly forged, her attitude toward accused, her desire that accused have her property, and her desire to exclude any other person from any benefits under her estate and accused's knowledge of such facts was properly rejected as argumentative and repetitious.

61. Criminal law ⚷806(1), 807(1)

Trial court did not err in rejecting as argumentative and repetitious requested instruction concerning rights of inheritance of adopted child and adopting parent, and that if accused was adopted child of decedent whose will he allegedly forged and offered for probate and evidence failed to show any other legal heirs, accused would be entitled to whole estate and could not have intended to defraud which is an essential element of forgery. Pen.Code, §§ 115, 470.

62. Criminal law ⚷806(1), 807(1)

Requested instruction that in absence of proof that person whom accused allegedly intended to defraud by forging will and offering it for probate was legal husband of decedent at time of her death, jury must find there was no intent to defraud such person, was properly rejected as argumentative and repetitious. Pen. Code, §§ 115, 470.

63. Criminal law ⚷806(1), 807(1)

Trial court did not err in rejecting as argumentative and repetitious instruction to acquit decedent's adopted son on charge of forgery of will if decedent at time of death was not legally married to person whom accused allegedly intended to defraud. Pen.Code, § 470.

64. Criminal law ⚷806(1), 807(1)

Trial court did not err in rejecting as argumentative and repetitious requested instruction that prosecution would be bound by new matter brought out by prosecution on cross-examination but not brought out on direct examination.

65. Criminal law ⚷806(1), 807(1)

Requested instruction to acquit decedent's adopted son on charge of forgery of a will if deceased at time of death was not legally married to purported widower or had made a property settlement with him and accused was only known child of decedent, since in such event, accused would have succeeded to whole estate of decedent without a will and could not have intended to defraud estate or purported widower was properly rejected as argumentative and repetitious. Pen.Code, § 470.

66. Forgery 🔑5

Specific intent to defraud is an essential element of offenses of forgery of a will and of preparing a false and antedated will. Pen.Code, §§ 134, 470.

67. Forgery 🔑5
Obstructing justice 🔑5

The word "knowingly" as used in statutes stating the law applicable to the offenses of filing a forged instrument and offering it in evidence, refers to a knowledge of the essential facts which bring the act within purview of the Penal Code and does not make specific intent to defraud an essential element of such offenses. Pen.Code, §§ 115, 132.

See Words and Phrases, Permanent Edition, for all other definitions of "Knowingly".

68. Criminal law 🔑1172(1)

Instruction that intent to produce a false document did not constitute essence of the charge and that specific intent to defraud was essential only to crimes of forgery of a will and preparation of a false and antedated will as charged in Counts 1 and 5 of indictment, but not to crime of causing forged will to be filed and offering it in evidence as charged in Counts 2 and 3, contained no prejudicial matter. Pen.Code, §§ 115, 132, 134, 470.

69. Criminal law 🔑808½

Instruction in exact language of statute that intent is manifested by the circumstances connected with offense and sound mind and discretion of accused was not erroneous. Pen.Code, § 21.

70. Criminal law 🔑13

Statute providing that intent is manifested by circumstances connected with offense and sound mind and discretion of accused, and that all persons are of sound mind who are neither idiots or lunatics, nor affected with insanity, is not unconstitutional. Pen.Code, § 21.

71. Criminal law 🔑308

The rule that if evidence is susceptible of two interpretations, each of which appears reasonable, and one of which points to guilt of defendant and the other to his innocence, the interpretation admitting of defendant's innocence must be adopted is applicable only to cases in which there are two opposing interpretations each of which appears reasonable, and if one interpretation appears reasonable and the other unreasonable, the reasonable interpretation must be adopted.

72. Criminal law 🔑822(1)

Paragraphs of instructions which were a reasonable explanation of first paragraph of instruction which was not criticized, were themselves correct.

73. Criminal law 🔑822(1)

One portion of an instruction should not be considered separately from the entire instruction any more than a single instruction should be considered separate and apart from the entire charge.

74. Criminal law 🔑864, 1174(5)

Where jury after retirement requested bailiff to fetch certain designated exhibits and trial judge answered bailiff's inquiry by telling him that requested exhibits were a part of the evidence, there was not a communication with jury by court without presence of counsel, prejudicial to accused.

75. Criminal law 🔑858(3), 1174(6)

Jury's request for exhibits after retirement should be made to judge by bailiff and request along with objections by either party should be heard in open court, but delivery of such exhibits to jury by bailiff without hearing or notice to either counsel was not prejudicial to accused.

76. Criminal law 🔑858(3)

The jury is a constitutional part of court and they are privileged to take all or any of the exhibits with them when retiring to deliberate upon the verdict, but neither litigant has absolute right to have exhibits sent to jury unless jury demands them, nor is it mandatory upon court to deliver exhibits to jury in court room before they retire. Pen.Code, § 1137.

77. Criminal law 🔑1163(1)

Prejudice is not presumed to have been suffered because exhibits marked for identification were by mistake given to the jury.

78. Criminal law ⟾1186(4)

Injury is not presumed from error, but prejudice must appear affirmatively to the court after examination of the entire cause including the evidence, and appellant has burden of establishing prejudice. Const. art. 6, § 4½.

◆

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Harry Horowitz was convicted of forgery of a will, causing to be filed a forged will, offering in evidence a forged will, and preparing a false and antedated will, and he appeals.

Judgment affirmed.

Robert W. Kenny, Atty. Gen., for respondent.

Morris Lavine, of Los Angeles, for defendant.

MOORE, Presiding Justice.

Appellant was accused by indictment of having committed five felonies, to wit: forgery of a will, Penal Code, sec. 470, altering a public document, Government Code, sec. 6200, St.1943, p. 992, causing to be filed a forged will, Penal Code, sec. 115, offering in evidence a forged will, Penal Code, sec. 132, preparing a false and antedated will, Penal Code, sec. 134. As a part of the same indictment it was alleged that appellant had been convicted of four distinct felonies in the state of Illinois and that he had served a term of imprisonment therefor in the state prison. The indictment contained all of the essentials to constitute a valid accusation. Appellant was convicted on all of the counts except the second and was sentenced to be confined in the state prison for the term prescribed by law upon each of the four counts, the sentences to run concurrently. He grounds his appeal upon the insufficiency of the evidence, errors in admitting and rejecting evidence, misconduct of the prosecuting attorney, errors in giving and refusing instructions and misconduct of the court in communicating with the jury without the presence of counsel.

The Evidence Is Sufficient

Appellant is the adopted son of Esther Horowitz, whose will he was accused of forging. He lived in her home until he was 15 years of age when, according to his testimony, he left the home on account of his abuse by Morris Horowitz, the husband of decedent. Appellant was convicted of robbery for which he was sentenced to Joliet Penitentiary in 1926. Except for one parole granted him in 1934 he was confined until 1939. During his imprisonment his foster mother visited him and upon his release his life was marked by filial piety. He was her nurse and chauffeur, managed her properties, deposited her money, and acted as her bodyguard. When ill he took her to clinics and health resorts and whenever invalided he nursed her in the sanitarium. The last scenes of his devoted services were at Los Angeles in 1942. In July of that year he returned to Chicago. He there busied himself with caring for the properties of his mother and performed such other services as he was able to do in her absence. A portion of his time was consumed by his efforts to write a will for his benefactress.

In the late fall of 1942 Mrs. Horowitz resided in the sanitariums of Mrs. Nailor and Mrs. Drucker and for a while at the Merritt Jones Hotel in Ocean Park from which on December 30, 1942, she returned to the home of Mrs. Drucker where she expired on the following day.

One week later appellant called with his wife at the sanitarium of Mrs. Drucker and demanded possession of the belongings of his mother, and for the purpose of his identification exhibited to her a blank piece of paper bearing the signature of Esther Horowitz. Not having succeeded on his first mission he called upon Mrs. Drucker a second time, exhibited the same paper but containing then the forged will without attesting witnesses. He employed attorney Buchalter to probate the will but following a contest entered on behalf of Morris Horowitz probate was denied. In support of his motion for a new trial of the will contest appellant procured one Foley, a disabled veteran and former inmate of the state hospital for the insane, to make an affidavit. It contained averments corroborative of the testimony of appellant on the trial of the will contest. He obtained it by promising to buy a parking lot for the affiant. In anticipation of such affidavit appellant had Foley write out the statements dictated by appellant. He thereupon accompanied appellant to the office of Mr. Buchalter where the affidavit was prepared by the attorney and a notary. Needless to say, on the trial of the present action Foley denied the truth of all of the substantial contents of the affidavit.

After the will had been filed for probate on January 11, 1943, appellant called at the office of the county clerk, obtained possession of the will and sat at a table studying the document and comparing it with others. Messrs. John L. Harris and Clark Sellers, experts on questioned documents, gave testimony that four changes had been made in the attestation clause; that the 40 lines comprising the will were written after the paper had been folded, albeit the letter *H* in the name of the testatrix was written before the paper had been creased; that "Esther Horowitz" was the first writing on the paper containing the will; that it was subsequently folded and the body of the will was written in above the name of the testatrix. Beneath the words of the will are the names of Maria Matus and Emma Cordova as attesting witnesses. Both experts opined that the will was written at three different times and in the following order: the signature, the body of the will, the names of the witnesses. Both gave candid and complete technical explanations for their conclusions. Appellant's wife, Celia Chico, testified that she had requested Maria Matus to have some friend join her as a witness to the publication of the will which, they testified, was signed while the decedent resided at the Merritt Jones Hotel. However, neither the maid that cared for the room of decedent nor the elevator operators nor the manager of the hotel nor its clerk had ever seen either Maria or Emma in the hotel. While the purported will bequeathed all of the belongings of decedent to appellant, it was proved in the probate proceedings of the estate of Esther Horowitz that Morris Horowitz was her surviving husband and that she had left a surviving brother and sister.

[1] Evidence of the foregoing recitals was presented by witnesses deemed by the jury to be competent and reliable. Although it was contradicted by appellant and by the witnesses who testified in his behalf, it was sufficient if believed by the jury to establish the allegations of the indictment that a will was forged by appellant; that he composed and antedated the document; that he caused it to be filed for probate; and that he offered it in evidence in a judicial proceeding.

[2-5] To constitute a forged will the crime is complete when the document has been so prepared that upon its face it will have the effect of defrauding one who acts upon it as genuine. People v. McKenna, 11 Cal.2d 327, 332, 79 P.2d 1065. That appellant may not have executed the signature of the testatrix to the will renders it no less a forgery so long as he prepared the contents of the purported will above the signature after it had been written by the testatrix on the blank paper. Union Tool Co. v. Farmers' & Merchants' Nat. Bank, 192 Cal. 40, 52, 218 P. 424, 28 A.L.R. 1417. The intent on the part of the accused to defraud another constitutes the essence of the crime forgery, and the fact of forgery may imply an intention to defraud. People v. Baender, 68 Cal.App. 49, 59, 228 P. 536. While intent to defraud is of the essence of forgery the question of intent was one for the determination of the jury. People v. Pruitt, 55 Cal.App.2d 272, 275, 130 P.2d 767; People v. Borrego, 211 Cal. 759, 765, 297 P. 17.

[6] It is the function of the jury and of the trial court to determine what facts are established and no verdict will be upset on appeal for the insufficiency of the evidence unless it "be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below." People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, 780; People v. Perkins, 8 Cal. 2d 502, 510, 66 P.2d 631; People v. Tom Woo, 181 Cal. 315, 326, 184 P. 389.

[7] Appellant argues earnestly that because of the facts that his mother had oftentimes declared that it was her intention to bequeath to him all of her property and had evidenced such intention by having him named as the alternate beneficiary in Liberty bonds in the amount of $13,000; that she had relied upon him exclusively in her declining years to nurse and care for her; that she had selected him to manage her properties and to write her will—it was therefore impossible for him to defraud anyone by presenting the forged will for probate. But the answer to all such arguments is that in the will contest Morris Horowitz filed his "contest of the will" and also an "amended contest" and that in such pleadings he declared himself to be the surviving spouse of Esther Horowitz. These instruments were both received as exhibits at the trial and were read by the prosecuting attorney to the jury without ob-

jection by appellant. In addition to such evidence it was proved that in the petition of appellant for the probate of the will he set forth as an heir at law of the deceased the name of Morris Horowitz, husband, 63, beside that of Harry Horowitz, adopted son, 33. Moreover, a letter of decedent addressed to Morris as her husband was in evidence and appellant proved that Morris and Esther at one time lived together as man and wife, giving rise to the presumption of wedlock. Such proof was sufficient to overcome any doubt created by appellant's testimony which was nothing more than a legal conclusion.

[8] The question raised by appellant that there could be no fraud committed against such a nonentity as an estate cannot be taken seriously. The felony of forging a will is not to be determined by whether the decedent left an estate. The crime is complete the moment the instrument is uttered with intention of defrauding another. People v. Davidian, 20 Cal. App.2d 720, 724, 67 P.2d 1085. The requirements of the law are satisfied when it is established that if the evident intent of the accused had been carried out an innocent person would have suffered detriment. People v. Kuhn, 33 Cal.App. 319, 165 P. 26. If the forged instrument had been admitted to probate, Morris Horowitz would have lost at least one half of Esther's estate and he is a living person.

[9] Appellant was convicted also of procuring a forged instrument to be filed in the office of the county clerk. In support of this count the proof is complete that appellant employed attorney Buchalter to file the forged will for probate. As to that crime the law does not require proof that anyone has been defrauded by the filing of the forgery. People v. Standley, 126 Cal.App. 739, 747, 15 P.2d 180. It also was complete after the document had been filed at the behest of appellant. People v. Baender, supra.

[10] Similarly does appellant stand legally convicted of offering in evidence the forged instrument. He offered it for probate. He defended a contest filed by Morris. He knowingly offered the forged instrument in evidence, the crime denounced by section 132.

[11, 12] Likewise, in spite of appellant's own testimony and that of his witnesses, the contrary evidence was sufficient to warrant the jury in finding that appellant prepared a false, antedated will with the intent to produce it for a fraudulent purpose. His attempt to support his daring crimes as a lawful enterprise finds no support in reason or authority. He argues that he had a power of attorney from Esther authorizing him to exercise "the broadest authority over her property, including the power of disposition" and that such power should continue after her death. The instrument is an authority to "represent" her. It cannot be reasonably construed as a deed of gift. Each of the crimes of which appellant was convicted is a distinct crime from the others. Each was committed on a separate date; each is defined by a different statute and each required proof peculiar to that particular crime. In no respect was there a want of evidence for the purpose of establishing any of the judgments based upon the crimes alleged.

No Errors In Rulings On Evidence

[13-15] The second assignment is that the court erred in admitting certain evidence offered by the prosecution and in excluding certain evidence offered by the defense. His chief attack is made upon the handwriting experts who were allowed to testify to conclusions which he says should have been drawn by the jury. He contends that their qualifications lacked a knowledge of the chemistry of ink. The qualification of an expert to testify upon a subject requiring scientific knowledge is committed to the sound discretion of the trial court. It is not restricted by any specified limitations in determining such qualifications and the exercise of its discretion will not be disturbed except when it is shown to have been abused. People v. Salas, 17 Cal.App.2d 75, 78, 61 P.2d 771; People v. Rose, 119 Cal.App. 487, 489, 6 P.2d 963. If the witness exhibits an unusual skill and knowledge gained from study and experience not possessed by the man on the street he is competent to give an opinion. State v. Smails, 63 Wash. 172, 115 P. 82, 85. The equipment, training and experience of the expert on forged documents makes of him a special functionary for the illumination of facts which are not readily discernible by the non-expert. While the character of a handwriting may be distinguished by a peculiarity in the formation and union of letters, it is not readily noticeable by the non-expert; yet when analyzed by one who has devoted years to the study of questioned documents

such character may be quickly determined, and from his conclusions it may be established that a writing imputed to another may be shown to have been forged and the alterations or changes in a document may be made clear to the untrained eye. Sharon v. Hill, C. C. Cal., 26 F. 337, 357; State v. Smails, supra. The testimony of witnesses Harris and Sellers in explaining the effects of the folds in the paper, of the spreading of ink in the creases as contrasted with its non-spread on areas not folded, of the erasures of the dates of the execution and witnessing of the will and of the discovery by use of the microscope of the original date on the paper constituted evidence that could not have been produced by any but experts. Under proper instructions 1127b, Penal Code, the jury was not obliged to accept the opinions of the experts as the only evidence of the forgery or more than evidence. In addition to their testimony the forged document itself and magnified photostats thereof were before the jurors who were enabled to form some opinion of their own as to its genuineness. Rolland v. Porterfield, 183 Cal. 466, 469, 191 P. 913.

[16-19] Complaint is made of the receipt in evidence of the notice of intention to move for a new trial which had been prepared and filed by appellant in the will contest. He contends that it was irrelevant and that Foley should not have been permitted to refresh his memory from its contents. On the contrary, the affidavit of the witness Foley together with the notice of intention to move for a new trial were a part of the proceedings in the will contest and they were both proof of the offer of the forged will in that proceeding. If in a prosecution for perjury the judgment roll of the case in which the false swearing had been committed is competent evidence, People v. Bradbur, 155 Cal. 808, 815, 103 P. 215; People v. Reitz, 86 Cal. App. 791, 796, 261 P. 526, then the record of a will contest in which a forged will was introduced should be likewise received as proof of the proponent's alleged crime. But the fact that it may tend to prove an altogether different crime or aids in disclosing the proponent's motive makes it none the less admissible. People v. Pollock, 31 Cal.App.2d 747, 758, 89 P.2d 128. As to the court's ruling in allowing the prosecutor to refresh the memory of Foley by reading from the affidavit he had signed, the facts are: After Foley had penned a memorandum of imaginary events as dictated by appellant he accompanied the latter to the office of Buchalter. The attorney then dictated an affidavit based upon the memorandum for Foley's signature to be used in support of his motion for a new trial of the will contest. When Foley could not see to read the affidavit it was not error for the court to have counsel read it aloud to him. People v. Allen, 47 Cal.App.2d 735, 743, 118 P.2d 927. The fact that the exhibit tended to show appellant guilty of subornation was not a valid objection to its introduction. People v. Hansen, 62 Cal.App. 105, 107, 216 P. 399; People v. Burke, 18 Cal.App. 72, 98, 122 P. 435. Moreover, taken with Foley's testimony it was competent evidence of appellant's intent to defraud Morris Horowitz of his share of his decedent's estate.

[20, 21] Attorney Buchalter while under direct examination by the prosecution testified concerning his employment by and conversation with appellant. On cross-examination he was asked: "Did he also state that Mrs. Horowitz had not only had nothing to do with Horowitz, but had terminated all her relationship with Horowitz and had made some kind of a settlement with him?" Objection to this question as self-serving was sustained. This was not error for the reason that it was discretionary with the court to determine what portions of a conversation proved on direct may be excluded on cross-examination, and it is incumbent upon the cross-examiner to show a definite, legal purpose in asking the excluded question. People v. Kiser, 24 Cal.App. 540, 546, 141 P. 1078; Zibbell v. Southern Pac. Co., 160 Cal. 237, 250, 116 P. 513; Moore v. Re, 131 Cal. App. 557, 560, 22 P.2d 45. This will suffice to answer appellant's criticism of the other rulings upon kindred cross-questions by appellant's counsel.

[22, 23] In allowing the prosecution to refresh the memory of attorney Buchalter by the use of his testimony before the grand jury no prejudice was suffered. The attorney had testified that the will when delivered to him on January 6, 1943, was folded as it appeared at the trial of the present action. After he had read his testimony before the grand jury on December 22, 1943, he was asked: "Do you now say that it is as folded and as creased as it was when it first came into your possession?" Over objection that it had been answered the court allowed the witness to repeat his answer that the document was not as fully creased and as clearly shown as when it was first handed to him. This was not error. A witness may have his memory refreshed by having his former declaration or testimony repeated to him. People v. Curtis, 36 Cal.App.2d 306, 322, 98 P.2d 228.

[24] It was not error for the court to exclude the question propounded to the clerk of the Merritt Jones Hotel. Appellant had previously elicited the answer of the clerk that it was his business as clerk to know who entered the hostelry; that he paid attention to know that a large number were in and out. Thereupon it was argumentative to inquire whether people would come in and go to some room without the clerk's noticing them.

[25] Neither was it error to exclude the question propounded to the witness, attorney Duchowney. Mrs. Drucker had employed him to present her claim against the estate. After the witness had testified that his client had objected to his testifying as to any conversation with her and had declined to waive the privilege as to any such conversation, and that he had not presented the check bearing the purported signature of decedent in support of her claim because of his conclusion that it would be a simple procedure to predicate her claim upon her bills, the court properly excluded the inquiry whether Mrs. Drucker had said "to you that that was the true signature of Mrs. Horowitz," on the ground that it called for a privileged communication. Code Civ.Proc. § 1881, subd. 2.

[26] Appellant complains that he was prejudiced by the court's receiving in evidence exhibit 12, an envelope which the witness Foley identified as of about the size of one he had mailed for the decedent while living at the hotel. He now contends that the envelope should have been excluded as incompetent. The only objection was that "there is no proper foundation that that was the kind and type and exact size of the envelope." Such an objection was not pertinent to an offer to prove a fact by resorting to a visual demonstration to illustrate the witness' impression of the size of the object under inquiry. Foundations for opinions are required to be laid only in those cases where a witness is called upon to give his opinion. An opinion is not called for by asking the size of an object which had been observed by the witness. Such a question merely calls for testimony concerning a simple fact.

[27, 28] While he makes no specific assignment appellant contends that he was unduly restricted in his cross-examination of attorney Abrahams. There was no error in excluding the inquiries as to what the attorney had said to appellant's counsel. The latter's name had not been mentioned on Abrahams' brief direct examination. The court is vested with a wide discretion in keeping the cross-examination within reasonable bounds. East Bay Municipal Utility Dist. v. Kieffer, 99 Cal.App. 240, 261, 278 P. 476, 279 P. 178.

[29, 30] Appellant complains that he was prejudiced by his cross-examination administered by the prosecuting attorney. He sets forth 28 questions asked and two statements made by counsel. There is no authority for assigning errors in wholesale lots. Such method was condemned in People v. Keyes, 103 Cal.App. 624, 641, 284 P. 1096, 1105. In the Keyes case to every question included in the assignment objection had been made. But in the case at bar, with a single exception, no objection was registered to any matter of which appellant complains. By reason of this neglect to register his disapproval of the numerous questions which he now assigns as error and thus afford the trial judge opportunity to correct the conduct of the prosecutor, we need not now indulge in further discussion of the extended remarks of appellant. People v. Wong Toy, 189 Cal. 587, 594, 209 P. 543; People v. Garcia, 83 Cal.App. 463, 469, 256 P. 876. The record reveals that each question by the state's counsel was a logical sequitur to what had preceded it. Appellant's counsel had undertaken by the direct examination to show that Morris Horowitz was the cause of appellant's criminal career. Much of the cross-examination was directed to an attempt to prove that such was not the fact. The inquiry whether Morris had caused him to commit the crimes other than the four robberies which he had charged to the latter was pertinent to appellant's accusing statements. The inquiry as to his having committed other crimes was a preliminary to the question as to whether he was convicted of grand larceny of an automobile on April 10, 1925.

[31] The cross-examination was not at all similar to that exercised in People v. Braun, 14 Cal.2d 1, 92 P.2d 402, cited by appellant. No attempt was made to discredit appellant by showing that he held out in resorts where ex-convicts assembled. Neither does the case of People v. Derbert, 138 Cal. 467, 470, 71 P. 564, 565, apply. The questions propounded to the witness in that case by the district attorney were objected to and exceptions were taken to his remarks throughout the examination and such objections and exceptions were the grounds urged for reversal. In that case the questions were asked by the district attorney "in face of the rulings of the court, and certainly, with the knowledge that the court would not permit them to be answered." That district attorney by forbidden questions got before the jury that Derbert had committed crimes of terror and should be convicted on general principles. No such conduct is shown to have been a part of the cross-examination of this appellant. In the absence of a showing that the prosecutor asked questions solely for the wanton purpose of creating a prejudice against the prisoner or that his acts militated against a fair and orderly procedure, it cannot be said that his conduct was prejudicial or offensive. People v. Wilson, 76 Cal.App. 688, 702, 245 P. 781. Upon cross-examination appellant cannot close the door to inquiry concerning the transactions which had been suggested by his own direct-examination. People v. Selk, 46 Cal.App.2d 140, 151, 115 P.2d 607; People v. Masolini, 107 Cal.App. 192, 195, 290 P. 77. Hence there was no error. People v. Martinez, 59 Cal.App. 121, 123, 210 P. 61.

[32] Appellant complains at length of adverse rulings made at the time of his attempts to prove that his leaving the home of his mother was due to the acts of Morris Horowitz. Upon a full statement of his counsel of what he intended to prove the objections were withdrawn and appellant testified to his heart's content.

[33, 34] In offering exhibit 22 the prosecutor stated: "It is a declaration on the part of Esther Horowitz exactly and entirely contrary to the express testimony of some 25 or 30 witnesses here in this court room as to her intentions and her feelings towards Morris Horowitz, her husband." The exhibit was a note written by decedent to her husband while she was in Chicago in August, 1942. Appellant was at the time present with her. It advised Morris that "if you want to come home I have some money yet. * * * Your Wife." Such evidence was a fair offer to rebut the imputation theretofore created by the testimony of appellant that Morris was not the widower of decedent. No objection was made to either the exhibit or the prosecutor's statement. Moreover, in view of the instruction to the jury to disregard any remark of counsel on either side it must be presumed that the jury obeyed such instruction. Therefore no harm could have been suffered by appellant. People v. Amer, 8 Cal.App. 137, 142, 96 P. 401; People v. Bradbury, 151 Cal. 675, 679, 91 P. 497.

No Misconduct In Producing Foley As A Witness

[35] Appellant asserts that the production of Foley as a witness was marked by the gravest misconduct on the part of the prosecutor and persistent error on the part of the court. In November or December 1942 Foley had mailed a letter for decedent. He testified that he did not so carefully inspect it as to ascertain its dimensions. Thereupon the people's advocate selected two envelopes of different sizes and asked the witness whether the letter which he had mailed was like either. The witness selected the larger of the two as being approximately the size of the letter he had mailed. The only objection made to the introduction of the envelope was that "there is no proper foundation that that was the kind and type and exact size of the envelope." Under the circumstances it was within the discretion of the court to determine whether sufficient foundation was laid for the admission of the exhibit which was merely a material embodiment of Foley's recollection of the size of the packet he had mailed.

[36, 37] Objection was made as leading and suggestive to a question asked of Foley whether anything was said on the occasion of appellant's second visit to Foley's room "about a will bearing such a date of December 8, 1942." The matter of leading questions is largely within the discretion of the trial court. No prejudicial error resulted here.

[38] A series of questions was propounded to Foley of which appellant now makes unwarranted complaint. With one exception he made no objection at the time. That objection was to the inquiry whether Foley, in the document that he had written

at the dictation of appellant, in substance said that he resided at 116 Marine Street, Ocean Park, California. The objection was based upon the ground that it was "leading and suggestive"; that "he has laid no foundation for using this document for the purpose of attempting to get the purport of some other document." Such objection had nothing to commend it, since at the moment of its utterance appellant's counsel had possession of the very document Foley had written, and it had been used by appellant in the will contest.

[39, 40] Criticism is made of the trial judge's remark as follows: "Well it is obvious that it was from the former testimony given by the witness." The prosecutor had asked Foley when appellant promised to buy him a parking lot to which the answer was that it was at their first meeting. When this was followed by the inquiry whether it was before the writing of the memorandum the objection followed that it was leading and suggestive. After an affirmative answer the court interrupted with the quoted remark. No prejudice was caused. The observation made by the judge was a fair comment and a reasonable interposition to expedite the trial. But having waived his right by neglecting to move to strike the court's remark he cannot now complain. People v. Brazil, 53 Cal.App.2d 596, 128 P.2d 204.

[41-45] The contention that prejudice was suffered by the court's permitting Foley to testify because the prosecutor "knew the man's mental incompetency before he produced him" cannot be taken seriously. No objection was made to the witness on the ground of his incompetency and for that reason the assignment if of value could not be the basis of a reversal. People v. Rulia Singh, 182 Cal. 457, 484, 188 P. 987. There is no prescribed standard of mental competency to qualify one as a witness. It is well known that out of the mouths of babes oftentimes the truth is spoken. Since there is no standard, each instance is confided to the discretion of the trial judge. In re Mazuran, 88 Cal.App. 272, 277, 263 P. 339. However, no criticism of the court in permitting Foley to testify appears to be justified by his testimony in print. The fact that he had once been committed for insanity is not conclusive at a later date. The determination of the qualification of a witness is "almost wholly in the discretion of the trial judge." People v. Harrison, 18 Cal. App. 288, 295, 123 P. 200, 203. Criticisms of Foley's qualifications for testifying come with poor grace from appellant. When he was in the depths of despair at the denial of the probate of the forged will he was both zealous and bold in employing Foley to come to his rescue. Not until the shadows of his freedom had merged into eventide did he scorn as mentally deficient him whose averments appellant had once erected as a refuge. He was unhesitant in calling him to the stand to aid in effecting the defeat of the judgment in the will contest. Since the state's counsel was by appellant denied the use of the memorandum to refresh Foley's memory, no unfairness appears to have been committed by allowing his memory to be refreshed by reading to him the contents of the affidavit he had signed and which attorney Buchalter proved to have been based upon the contents of the same memorandum. Should the prosecution be foreclosed by so strict an interpretation of section 2047, Code Civil Procedure, as contended for by appellant, justice would be at the mercy of every person accused who should be so fortunate as to sequester a fatal memorandum prepared at some time by a pivotal witness. The cases cited by appellant to establish error in the court's permitting the examination of Foley are not pertinent. McEwen v. New York Life Ins. Co., 187 Cal. 144, 201 P. 577; Kearney v. Bell, 160 Cal. 661, at page 670, 117 P. 925; Richmond v. Denny, 47 Cal.App. 745, 191 P. 554; People v. Tufts, 167 Cal. 266, 139 P. 78; People v. Mohr, 157 Cal. 732, 109 P. 476; People v. Derwae, 155 Cal. 592, 597, 102 P. 266; People v. Davenport, 13 Cal.App. 632, 110 P. 318; People v. Valliere, 127 Cal. 65, 59 P. 295; People v. Wells, 100 Cal. 459, 34 P. 1078; People v. Hail, 25 Cal.App. 342, 358, 143 P. 803; Viereck v. United States, 318 U.S. 236, 63 S.Ct. 561, 87 L.Ed. 734, 741; Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314; People v. Lee Chuck, 78 Cal. 317, 328, 20 P. 719; People v. Yokum, 118 Cal. 437, 442, 50 P. 686; People v. Derbert, 138 Cal. 467, 470, 71 P. 564. They treat of a variety of means by which the prosecuting attorney may illegally prejudice the prisoner on trial. It is true that many a person tried for crime has suffered prejudice at the hands of the prosecutor, but to regale us with a recital of such cases is a far cry from showing by objections, exceptions, assignments of error or motions to strike that the People's coun-

sel in the instant case abused his office to the detriment of appellant.

A Fair Trial Was Not Prevented By Misconduct Of The Prosecutor

[46-51] Appellant contends that he was denied a fair trial by (1) the hostile atmosphere created in the course of the trial by the prosecution and (2) the argument of state's counsel. He asserts that there was "a determined persistent effort to influence the jury by appeals to their passions, and to play upon their prejudices by sneering at and belittling appellant's counsel and by a wanton disregard of fundamental principles of right and justice." We find nothing in the record answering the description of the conduct referred to and will confine our discussion to the occurrences and characters specified. Appellant says Mrs. Drucker's testimony was so inherently incredible that the jury could not have believed it had they not been unduly influenced by passion and prejudice. The lady testified that when appellant first called on her he displayed the blank sheet of paper bearing decedent's autograph and at a subsequent time displayed the same paper with the will above the signature. Appellant says it is "unthinkable that he would forge an instrument above that signature and then present the same paper to the person to whom the signature had originally been exhibited." The stupid follies committed by persons about to embark upon crime are not unthinkable—to the actors. Possession of the knowledge that criminals undertake such ill-conceived ventures is the factor that enables the crime detector at the threshold of an investigation to suspect and even to reenact the successive steps of the offense of which the accused is suspected. Of course Mrs. Drucker might have been mistaken; indeed she might have falsified. But the jury were impaneled to determine that question. Neither possibility is sufficient cause for concluding that her testimony was inherently improbable. For it to be so it is not sufficient that it disclose unusual circumstances. "Where the testimony is such that within the knowledge of reasonable men it cannot be true the appellate court might assume that knowledge and hold the testimony legally insufficient, but to do so the court must act on what is equivalent to judicial notice." People v. Jackson, 63 Cal. App.2d 586, 588, 147 P.2d 94, 96. Such equivalent does not here appear. The presence at the trial, "with the tacit approval of the court," of the widower of decedent, a sickly, legless, forlorn, old man sitting in a wheel chair either in the presence of the jury during the proceedings or in the corridor traversed by them, is not a denial of appellant's right of due process of law. There is no doubt that the ghostly form of the helpless man had hovered over the dreams of appellant many a night as the latter schemed to gain possession of the wealth to which the husband was entitled. For this reason it is startling to learn that his counsel made no protest at the presence of the intended victim of appellant's aborted chicanery. But since objection was not recorded to his haunting the purlieus of the temple, no advantage thereof may be taken on appeal. 8 Cal.Jur. 506, sec. 520. Furthermore, in his motion for a new trial appellant failed to specify any irregularity of the district attorney or of the court by reason of the presence at the trial of Morris Horowitz. He was an interested spectator, in fact the complaining witness, and was entitled to be present. Therefore his presence cannot be said to have violated appellant's right of due process of law.

No Misconduct In Prosecutor's Argument

[52-54] It is contended that appellant was prejudiced by a number of statements of the People's counsel and that the court "indicated" that it would disregard all objections or assignments of the defense. If appellant's attorney was thus impressed at the trial he should nonetheless have made his objections; should have moved to strike the harmful matter and have requested the court to admonish counsel. He now specifies 28 remarks of the prosecutor in the course of his argument and assigns them as grounds for reversal. In the 81 pages of such argument appear but two interruptions by appellant's counsel. At one time a statement of the law as to the extent of the power granted by a power of attorney was challenged; at another when the prosecutor said of decedent, "That woman was not right mentally," appellant's counsel assigned it as "erroneous; it is an unfair inference." Such a criticism is directed at the correctness of the logic of the prosecutor. If he had erred in drawing an inference from a fact proved it may not for that reason be said that he is guilty of misconduct. Misconduct implies a dishonest act or attempt to persuade the jury by vicious measures. But having laid no foundation at the trial for the other 26 statements list-

ed in his brief as constituting prejudicial error by requesting an instruction to disregard them, appellant is in no position to take advantage of them even if they had been prejudicial. People v. Ramirez, 21 Cal.App.2d 466, 69 P.2d 913.

No Error On Giving Or Refusing Instructions

[55] Appellant assigns as error the refusal by the court of a number of instructions requested by him. All of the instructions—the rejection of which is assigned as error—are set forth in the margin hereof.[1] As to No. 2 Foley was not proved to be insane. He was not challenged on taking the stand. In response to a question propounded by appellant's counsel he testified that he had been cleared of his insanity. He was not shown to have been incompetent as a witness. Neither was his testimony challenged on the grounds of his incompetency. No objection was made to it, nor was motion made to strike it. Refusal of No. 2 was not prejudicial.

[56] There was no error in rejecting No. 4. The exhibit referred to was the letter of decedent to her husband. Such an instruction would have been an attempt

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[1] Defendant's Rejected Instructions, Refusal of Which Constitutes the Grounds of His Assignments.

2. You are instructed that if you believe Leo Foley was an inmate of a state hospital for the insane and that he has been released but never declared sane, you must disregard all of his testimony as being that of an incompetent person.

4. You are instructed to strike from the evidence People's Exhibit 22 and not to consider it in your deliberations in this case. This document is a purported letter written by the deceased to Morris Horowitz.

6. You are instructed that the gist of the crime of forgery is the specific intent to defraud, and in reaching your verdict on whether or not the defendant had a specific intent to defraud the estate, you must consider whether he believed that he was to be the sole beneficiary of the estate, and if he so believed it was the intention of the testator that he was to be the sole beneficiary of the estate, there could be no intent to defraud the estate, and in that event it would be your duty to acquit the defendant of the crime of forgery.

7. You are instructed that the essence of the crime of forgery is the intent to defraud, and if you find from the evidence in this case that the defendant Harry Horowitz had no such intent you must acquit him.

In determining whether he had any such intent it is your duty to take into consideration any and all other wills or documents that Mrs. Esther Horowitz had executed or prepared and which Harry Horowitz knew she had executed or prepared, leaving him the entire estate, and if you find that he believed it was her desire or intent to leave him the entire estate, regardless of whether he presented People's Exhibit 9 in evidence for filing or not, then you must find that he had no intent to defraud the estate, and in that event your verdict must be not guilty.

8. You are instructed that the testimony of an eye witness is direct and positive testimony. The direct and positive testimony of one witness is sufficient to prove a fact at issue.

10. You are instructed that it is immaterial, insofar as the law of forgery is concerned, whether the body of the will was written before or after the signature of Esther Horowitz was placed thereon. If you believe that Harry Horowitz had authority to prepare the will from Esther Horowitz it would be immaterial when the will was prepared or written in, so long as Harry Horowitz had such authority.

11. You are instructed that you have a right and a duty to take into consideration in reaching your verdict the relationship between Harry Horowitz and Esther Horowitz, her attitude toward him during her lifetime, her desire that he have her property, and all of the things which she said and did in respect thereto. You also have a right and a duty to consider her desires in excluding any other person or persons from her estate or any benefits thereunder and his knowledge of those facts.

12. You are instructed that an adopted child succeeds to the estate of one who has adopted him, the same as a natural child, and the person adopting succeeds to the estate of an adopted child the same as a natural parent. An adopted child does not succeed to the estate of a natural parent.

If you find in this case that Harry Horowitz was the adopted child of Esther Horowitz, the decedent, he would be entitled to succeed to the estate of Esther Horowitz the same as a natural child and if the evidence fails to show any other legal heirs he would be entitled to the whole estate and in that event there could be no intent to defraud which is an essential element of the crime of forgery.

17. You are instructed that count one of the indictment charges an intent to defraud Morris Horowitz, the husband of Es-

to improve upon section 115 of the Penal Code which was included in the court's charge and states clearly the law applicable to the filing of forged instruments.

[57] There was no error in rejecting defendant's requested instructions No. 6 and No. 7. These instructions were attempts to improve upon the statement of the law as declared in sections 132 and 134 of the Penal Code which were read to the jury. They would have been a repetition of the court's instruction with respect to specific intent to defraud and a specific intent to produce a false instrument. As further reason why No. 7 should have been given appellant states that the testimony showed that Morris Horowitz was not married to decedent and that this left appellant as her sole surviving beneficiary and therefore he could not attempt to defraud anyone. That has been discussed above with finality. The law of forgery was fully explained in the court's instructions 11 and 12.

[58] It was not error to reject defendant's instruction No. 8. It was not a correct application of the law to the facts in issue. The jury were correctly instructed on the subject there mentioned in the general instructions. To have given the rejected instruction would have been to outlaw all of the circumstantial proof offered by the People.

[59-65] There was no error in rejecting defendant's requested instructions 10, 11, 12, 15, 17, 18, 19, and 20. The proposed instructions are argumentative and repetitious. People v. Jones, 61 Cal.App.2d 608, 626, 143 P.2d 726. The jury decided the issue of decedent's marriage to Morris Horowitz upon all of the evidence contrary to appellant's contention.

[66-68] The court's instruction 17 is criticized in that it told the jury that the intent to produce the false document "did not constitute the essence of the charge" and also that there need be a specific intent to defraud only in the crimes charged in counts I and V but not as to those charged in III and IV. The instruction fairly applies the principles and language of sections 470 and 134. Both require the finding of a specific intent. People v. Standley, 126 Cal.App. 739, 747, 15 P.2d 180. In this they differ from sections 115 and 132, both of which, appellant asserts, make the same requirement. He bases this contention upon the word "knowingly" which occurs in both 115 and 132. That word does not impart the idea of intent but merely refers to a knowledge of the essential facts which bring the act within the provisions of the code. People v. Murphy, 17 Cal.App.2d 575, 585, 62 P.2d 592; People v. McCalla, 63 Cal.App. 783, 793, 220 P. 436. The instruction contains no prejudicial matter.

[69, 70] The court's instruction No. 18 is in the exact language of section 21 of the Penal Code, by the enactment of which the legislature in no respect transcended its constitutional limitations. It is a fair embodiment of the law. People v. Breuer, 15 Cal.App.2d 745, 60 P.2d 162; People v. McCarthy, 25 Cal.App.2d 667, 669, 78 P.2d 252.

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ther Horowitz. If you find in this case that there is no proof beyond a reasonable doubt or any proof that Morris Horowitz was the legal husband of the deceased at the time of her death there can be no intent to defraud Morris Horowitz and you must so find.

18. You are instructed that an adopted son, if the only child, would succeed to the entire estate of the deceased, even without a will, if Esther Horowitz was not legally married to Morris Horowitz, at the time of her death, and if you so find you must acquit the defendant of the charge of forgery in count one of the indictment.

19. You are instructed that a party is bound by new matters brought out on cross-examination of a witness, and if you find that the people have brought out new matters on cross-examination not brought out on direct examination you must find that they are bound by these matters.

20. You are instructed that an adopted child, if the only known child of the deceased, would succeed to the whole of the estate of Esther Horowitz, even without a will if Esther Horowitz was not at the time of her death legally married to Morris Horowitz or if she had made a property settlement with him so that he was no longer entitled to any part or portion of her estate and if you find that Harry Horowitz was the adopted child of Esther Horowitz and that Morris Horowitz was either not legally married to her or that he had made a property settlement with her you must find that the defendant could not intend to defraud the estate of Esther Horowitz or Morris Horowitz and your verdict must be not guilty as to the charge of forgery in the indictment.

[71] The court's instruction No. 5 directs the jury as follows:

"If the evidence in this case, as to any particular count, is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the defendant, and the other to his innocence, it is your duty, under the law, to adopt that interpretation which will admit of the defendant's innocence and reject that which points to his guilt.

"You will notice that, in this instruction, this rule of law is made applicable to cases in which there are two opposing interpretations, each of which appears to you to be reasonable.

"This rule of law does not apply in a case where there are two opposing constructions sought to be placed upon the evidence, one of which appears to you to be reasonable and the other to you appears to be unreasonable.

"In the latter case it would be your duty, under the law, to adopt the reasonable construction and reject the one which, in your judgment, appears to be unreasonable."

[72, 73] Appellant's only criticism of this instruction is directed against the last three paragraphs. But since they are a reasonable explanation of the first paragraph they are themselves correct. No portion of an instruction should be considered separately from the entire instruction any more than a single instruction should be considered separate and apart from the entire charge. People v. Tolmachoff, 58 Cal.App.2d 815, 824, 138 P.2d 61; People v. Newland, 15 Cal.2d 678, 684, 104 P.2d 778.

The jury were given the orthodox instructions, including all fundamental doctrines necessary for the proper conduct of a criminal trial as well as the statutes involved in the five accusations made. They were instructed fully upon the general duties of a jury and they were told that they must find the defendant guilty beyond a reasonable doubt of each of the offenses charged. We find no prejudicial error in the instructions given or in the rejection of instructions proposed.

No Prejudice Caused By The Judge's Communicating With Jury

[74-76] Appellant contends that he suffered prejudice by the court's sending four exhibits to the jury room. After the jury had retired the foreman asked the bailiff to fetch exhibits 9, 13, 14 and 15. The judge did not communicate with the jury. Neither did he advise the bailiff as to what exhibits he should deliver to them. The only participation of the judge was his answering the inquiry of the bailiff by telling him that the requested exhibits were a part of the evidence. The deputy informed neither counsel of the foreman's request. This does not constitute a communication with the jury by the court as condemned in the cases cited by appellant. It was nothing more than the foreman's extending his hand into the courtroom and obtaining physical possession of documents which were already before the jury and to the possession of which they were entitled. State v. Beal, 48 N.M. 84, 146 P.2d 175. Technically, the procedure followed was not strictly correct. The exhibits should have been obtained by the foreman's request to the judge by the bailiff, and a hearing of the request in open court along with any objections by either party. But no prejudice could possibly have been suffered by reason of this variance. If the jury were entitled to take with them all of the exhibits, People v. Balestieri, 23 Cal.App. 708, 711, 139 P. 821, they could not have been prejudiced by sending the officer for any part they had neglected at first to take with them. It is the absolute right of neither litigant to have the exhibits sent with the jury unless the latter demand it. People v. Dunlop, 27 Cal. App. 460, 470, 150 P. 389. Nor is it mandatory under section 1137, Penal Code, upon the court to deliver the exhibits to the jury in the court room before they retire. People v. Willis, 70 Cal.App. 465, 474, 233 P. 812. The jury is a constitutional part of the court and they are privileged to take all or any of the exhibits with them. State v. Beal, supra.

[77, 78] In People v. Alcalde, 24 Cal.2d 177, 188, 148 P.2d 627, 632, the foreman of the jury sent to the judge a sheet of paper with the inscription, "May we render a decision of life imprisonment and not eligible for parole?" on which the judge made the answer in writing, "No." It was held that since the court could not have responded by any other answer than that they should follow the instructions already given, the episode was not prejudicial. Prejudice is not even presumed to have been suffered because exhibits marked for identification have been by mistake given to the jury. People v. Horiuchi, 114 Cal.App. 415, 437,

300 P. 457. Injury is not presumed from error. Prejudice must appear affirmatively to the court after an examination of the entire cause including the evidence. The burden of establishing prejudice is upon appellant under the Constitution of this state. Sec. 4½, Art. VI; 8 Cal.Jur. 599, secs. 590, 591; People v. Nolan, 126 Cal. App. 623, 14 P.2d 880; People v. Alcalde, supra. The authorities cited by appellant, State v. Beal, supra, 146 P.2d 175; Outlaw v. United States, 5 Cir., 81 F.2d 805; Little v. United States, 10 Cir., 73 F.2d 861, 96 A.L.R. 889; Henderson v. State, 18 Okl.Cr. 611, 197 P. 720; Ah Fook Chang v. United States, 9 Cir., 91 F.2d 805, 810, with one exception are not pertinent. In most of them the judge conferred alone with the jury or its foreman. The Beal case arose in New Mexico where the rule prevails that the state has the burden of showing that no prejudice resulted from an irregularity. Such is not the law of this state as above shown. 8 Cal.Jur. p. 599, secs. 590, 591.

The judgment is affirmed.

McCOMB, J., concurs.

PEOPLE v. MENDEZ.

Cr. No. 4609.

Supreme Court of California.

Sept. 25, 1945.

Rehearing Denied Oct. 25, 1945.

1. Criminal law ⚿273

Where, from an examination of the defendant, the court was satisfied that he had advised with counsel and that plea of guilty to charge of murder which defendant wished to substitute for plea of not guilty was free and voluntary, the court's acceptance of plea was not prejudicial to defendant's rights. Pen.Code, §§ 187, 1018, 1192.

2. Indictment and Information ⚿59, 110(17)

An information, charging that defendant on or about a certain date in specified county within the state willfully, unlawfully, and feloniously and with malice aforethought murdered a named person, a human being, substantially in language of section defining murder, was sufficient, and the degree of murder was not required to be included in the charge. Pen.Code, §§ 187, 952.

3. Homicide ⚿282

The degree of murder is an issue of fact for the jury under plea of not guilty. Pen.Code, §§ 187, 1041, 1042.

4. Criminal law ⚿980(2)

The degree of murder together with penalty to be imposed is a matter which must be determined by the court on competent evidence before passing sentence under a plea of guilty. Pen.Code, §§ 187, 1192.

5. Homicide ⚿250

Evidence sustained conviction of first-degree murder. Pen.Code, § 187.

6. Criminal law ⚿1159(2)

The weight of the evidence is for the trial court, and, where there is no reasonable basis for a declaration that the evidence is insufficient as a matter of law to meet the applicable standard, an affirmance must follow.

In Bank.

Appeal from Superior Court, Los Angeles County; Newcomb Condee, Judge.

Antonio Santiago Mendez was convicted of first-degree murder, and he appeals.

Judgment affirmed.

Walter L. Gordon, Jr., of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

SHENK, Justice.

Defendant was convicted of first degree murder on his plea of guilty and sentenced to pay the extreme penalty. This appeal is automatic pursuant to section 1239(b) of the Penal Code.

The information charged that the defendant, "on or about the 11th day of July, 1944, at and in the County of Los Angeles, State of California, did willfully, unlawfully and feloniously, and with malice aforethought, murder one Maude Pearl Farrington, a human being." At his arraignment the defendant appeared without counsel and the public defender was appointed to represent him. Thereupon a plea of "not guilty" was entered. At the time the case was called for trial his counsel stated to the court that the defendant desired to withdraw his plea of not guilty and enter a plea of guilty. The following then took place:

"The Court: Mr. Mendez, you have considered that matter carefully, have you?

"The Defendant: Yes, I have, your Honor.

"The Court: You have advised with your attorney, Mr. Hill?

"The Defendant: I did talk it over with him.

"The Court: You feel, because you are guilty, that you want to plead guilty, and that you want the court to hear evidence to determine the degree of your guilt; is that correct?

"The Defendant: That is correct, your Honor.

"The Court: You have been fully advised, so the District Attorney may rearraign you."

Upon his rearraignment the defendant pleaded guilty. The court proceeded to take evidence to determine the degree of the crime and to fix the penalty. Pen.Code, § 1192. It considered all of the evidence including the defendant's pre-trial statement and his testimony on the stand. As a witness the defendant admitted that the homicide was by his hand but sought to refute the circumstances strongly pointing to premeditated murder by an attempted demonstration that the killing was accidental. The trial court discredited his explanation, found him guilty of murder in the first degree, and imposed the death penalty.

The defendant makes two preliminary contentions. The first is that the court erred prejudicially in accepting his plea of guilty without admonishing him of the gravity of such a plea and the possible consequences thereof.

[1] There is no statutory requirement in this state that any special admonition be given by the court when accepting a plea of guilty. Section 1018 of the Penal Code provides, for the defendant's protection, that a plea of guilty "can be put in by the defendant himself only in open court." Further protection is afforded by the same section in the provision that the court may, at any time before judgment, permit the plea of guilty to be withdrawn and a plea of not guilty substituted; and by section 1192 of the Penal Code which provides that the court on a plea of guilty before passing sentence must determine the degree of the crime. From an examination of the defendant the court was satisfied that he had advised with counsel, and that the plea was free and voluntary. Cases cited by him indicate that more was not required. See State v. Johnson, 21 Okl. 40, 96 P. 26, 22 L.R.A.,N.S., 463, and cases cited in note. The court's acceptance of the plea after such examination cannot be deemed to have prejudiced the defendant's rights.

Furthermore, the defendant did not ask to be relieved of his plea of guilty. He made no contention that he was given any inducement or promise by anyone. He does not now assert that his plea of guilty was not in accordance with his free and voluntary desire or that it was made without a realization that the law must take its course should his explanation be discredited. The cases he relies on do not help him. In People v. Gilbert, 25 Cal.2d 422, 154 P.2d 657, it appeared that the defendant's plea of guilty was induced by his counsel's representation of a supposed "guarantee" from the trial judge that he would impose only life imprisonment. This court recognized that the sentence of death, once pronounced, is a solemn judgment which cannot lightly be vacated or modified; that while the court will not enforce a judgment which has been procured by fraud, duress, or any force operating to preclude the defendant's free will, neither will a schemer be permitted to trifle with its processes; that the defendant may gamble only at his own risk on the result of a plea of guilty when it is entered through the exercise of his judgment unaffected by fraud, duress, or similar motivating influence; and that if he claims such overreaching he must establish it by proof. It is not urged that there is any evidence which would meet that burden in this case.

Neither is the situation involved in People v. Griggs, 17 Cal.2d 621, 110 P.2d 1031, presented here. There the defendant sought to withdraw his plea of guilty to a charge of murder. His application was denied and the death penalty was imposed. The refusal to grant the permission sought was held to be an abuse of discretion in view of the circumstances in evidence which were consistent with either accident or murder. Here it must be said that the defendant's version of an accidental happening is not consistent with the physical facts. The only motive of the defendant in pleading guilty was that he hoped the court would believe his story and that therefore he would be treated with leniency. There is no circumstance disclosed by the record which would indicate that he would have fared differently had he decided to leave his fate with a jury under the plea of not guilty. See People v. Forbes, 219 Cal. 363, 26 P.2d 466; People v. Lennox, 67 Cal. 113, 7 P. 260.

The defendant's second contention is that the charge as worded in the information foreclosed a finding of anything more than second degree murder. His theory is that the court could not convict him of first degree murder unless the information so specified, that is, that the language defining first degree murder—willful, deliberate and premeditated—must appear as part of the charge of murder.

Murder is defined by section 187 of the Penal Code as the "unlawful killing of a human being, with malice aforethought." The degrees of murder are defined by section 189. First degree murder is all murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary or mayhem. All other kinds of murder are of the second degree.

[2, 3] The charge, which was substantially in the language of section 187 defin-

ing murder, was sufficient. Pen.Code, § 952; People v. Witt, 170 Cal. 104, 148 P. 928. The degree of the murder was not required to be included in the charge. It is an issue of fact for the jury under the plea of "not guilty". Pen.Code, §§ 1041, 1042. It is a matter, together with the penalty to be imposed, which must be determined by the court on competent evidence before passing sentence under a plea of "guilty" Pen. Code, § 1192; People v. Bellon, 180 Cal. 706, 182 P. 420; People v. Gilbert, 22 Cal.2d 522, 140 P.2d 9; People v. Paraskevopolis, 42 Cal.App. 325, 183 P. 585. Under the charge as worded in the information either the jury or the court, exercising their respective functions, could find that the defendant was guilty of first degree murder if the evidence warranted that finding.

The principal contention of the defendant is that the evidence was insufficient to justify a finding of first degree murder.

About 6:15 a.m. on Tuesday, July 11, 1944, the lifeless form of Maude Pearl Farrington was found lying near a dump of tin cans, and some brush and trees, about five or six feet off El Segundo Boulevard, 600 feet west of Central Avenue in the city of Los Angeles, an unilluminated intersection. There was jewelry on her person and the body was clothed except that the dress was drawn up around the neck and shoulders, leaving the lower portion of the body exposed. Death was caused by either of two gunshot wounds. One bullet entered the right temple near the ear inside the hair line and lodged in the brain. The other entered the skull through the left ear lobe, missed the ear canal, and made an exit through the top of the head. There were powder burns at each entrance wound. A test indicated the presence of spermatazoa in the vaginal vault.

Maude Pearl Farrington, familiarly known as "Jean," was a member of the white race and forty-four years of age. She had been employed as a saleswoman in a Los Angeles department store. She was married but was separated from her husband and lived in a home for women on West 25th Street in Los Angeles.

The defendant, forty-four years of age, and of mixed Spanish and Negro blood, at one time a professional dancer, was employed as an elevator operator at the same department store. He resided with his wife, a colored woman, in a house on West 36th Street.

Upon his apprehension at his residence at 7:30 p.m. on July 12, 1944, after he had returned from his employment, the defendant admitted that he was acquainted with Jean Farrington, but denied that he was away from his home during the night of July 10th, that he had talked with Jean on the telephone, had seen her on that evening after 5 o'clock, or that he had possessed a gun. He was taken into custody and confronted with a refutation of his denials, which in part was furnished by a white girl named Marion. He asked to talk with Marion. After a private conversation with her and on the officers' assurance that Marion would not be booked, he admitted the ownership of a gun and that bullets from the gun, while it was in his hands, killed Jean Farrington on the early morning of July 11th. But he claimed that the gun was accidentally fired. He directed the officers to a storm drain at 36th and Normandie Streets where a .32 Colt automatic had been hidden. Caught in the recoil mechanism of the barrel were some strands of hair which matched the decedent's hair. There were six live cartridges remaining in the gun which was capable of holding nine. The deceased's rolled up coat, and the defendant's wadded bloodstained trousers, shirt and shorts were recovered from inside other storm drains. The deceased's purse and a robe taken by defendant from his home on the evening of July 10th were not found. There were blood marks on the defendant's car and evidence of his having used water to clean it on his return home at 3 o'clock on the morning of July 11th. On that day he instructed his wife, if inquiry be made, to say that he had remained at home the previous night.

Marion lived on West 37th Street. On an evening in the latter part of February or early March, 1944, the defendant's car, a black 1937 Pontiac two door sedan, was parked near the home of Dr. Guenther, a physician, at 3879 West Vernon Avenue, a section of Los Angeles known as "View Park." From the doctor's home on a hillside and the place where defendant's car was parked, looking toward the east, there is a view of the city. There were some vacant lots and open fields surrounding the residence. Mrs. Guenther had noticed a car similarly parked on several previous occasions. She had had some difficulty with prowlers and on this occasion she walked out to the curb and flashed a light on the defendant's car. The defendant backed it up to where she was standing and the two engaged in a conversation during which the defendant introduced himself as "Tony" and his companion as a "friend of mine, Marion," stating that for the last year or year and a half they had parked there two of three times a week to sit and look at the view. He offered to help Mrs. Guenther if she had any more trouble. The defendant learned that Dr. Guenther resided in that home on the hillside. On the opposite side of the house there is a drop past some vacant lots into Presidio Drive and Kenway resulting in a dead-end pocket formation.

On the night of July 10th, Dr. Guenther arrived home at fifteen minutes to twelve and retired. Between 1:15 and 1:30 Mrs. Guenther heard two shots coming in rapid succession from the direction of the Kenway dead-end. About ten seconds later she heard a third shot. Ten minutes later she heard a motor running. She went to the window and saw an automobile with gleaming headlights proceeding away from the hill along Kenway. She reported the matter to her husband the following morning.

The defendant pointed out to the officers the spot on Presidio near Kenway where he and the deceased had sat and talked in his parked automobile on the night of July 10th. He made a statement which was recorded in stenographic notes and transcribed. His statement was substantially the following: He had known the deceased for about four months. They had been intimate and on several occasions prior to July 10th had occupied a hotel room in the late afternoon after working hours. His purpose in taking Jean for a drive at night for the first time was to inform her that their relationship must be terminated because it was causing complications in his life. They had theretofore discussed the matter. After they arrived at View Park they talked in a friendly manner for a while in the front seat. He then opened the glove compartment, and the fully loaded .32 Colt automatic fell forward. He usually kept the gun at home under the mattress, but since the previous 4th of July weekend it had been in his car. Each of them reached for the gun, but he obtained it and put it in his jacket pocket. Neither of them had been drinking. They retired to the rear seat, continued their conversation, and engaged in an act of sexual intercourse. When he told her their relationship should cease, she became angry, and he discovered that she was holding the gun which she had taken from his pocket while pressing close to him. She pointed the gun at him and he fought with her for its possession. They struggled on the floor between the front and back seats. He seized the stock and the gun fired accidentally while it was pointed toward the left side of her head. Her head jerked and he realized the bullet had struck her. He turned on the light and called her by name. He then sat in the driver's seat and lighted a cigarette. He started to drive away. He heard a movement in the car. He made a "U" turn at the intersection, headed back toward the same location and stopped the car. He sat in the rear of the car and lighted another cigarette. His hand touched the gun which was lying on the back seat. He started to throw it out the window when he noticed it was jammed, so he began pulling the top slide back and forth. He hit it a certain way between his knees and it fired again, accidentally he said, and must have hit Jean in the head. He drove away without seeking aid. At El Segundo and Central, which is more than eleven miles traveling distance from Presidio and Kenway, he decided to take Jean's body out of the car. He touched her wrist, found no pulse, and placed her body where it was found that morning. He then drove toward home, stopping on the way to take off his trousers, shorts and shirt, which were wet with blood and which he threw out of the window of the car. Along the way he also threw out Jean's coat and purse. He placed the gun in a culvert at 36th and Normandie where, at his direction, the officers found it. When he arrived home he cleaned the inside of the car with a hose and water before he went to bed. He arose that morning about 7:15 and after breakfast took his wife to her employment and went to work as usual. That night he gave the inside rear floor of the car a second coat of "walnut" varnish. He had given it the first coat on the previous Sunday and left the carpet off the floor.

In his testimony at the hearing to determine the degree of murder and to fix the penalty the defendant attempted to reconcile inconsistencies between the facts as he related them to the officers and as they appeared from the physical facts. Some of his explanations will be noted.

In the statement to the officers he said that Jean took the gun from his jacket pocket while nestling up to him on the back seat. On the stand he stated that he had placed his jacket across the back of the front seat with the gun in it, that he stepped out to rearrange his clothing after the act of sexual intercourse, and when he reentered he saw Jean's right hand rise and point toward him with an object in it which in the dark he instinctively felt was the gun; that there was a seven to ten minute struggle for possession of the gun which fired while both had hold of it; that the description in his prior statement was incorrect.

In his statement to the officers he had said that while he still had hold of the gun after it fired, he turned the light on in the car and saw that Jean was bleeding from the head; that he got into the front seat; that the gun was on the back seat; that after he made the "U" turn he stopped the car and returned to the back seat, his hand touched the gun, which he started to throw out the window, when he noticed it was jammed; that the gun had some grease on it and the second shot fired while he was trying to work it out of the jam. On the stand, after he heard the testimony concerning the strands of hair caught in the recoil mechanism, he testified that the gun was not lying on the back seat, but that it had caught in Jean's hair; that when he changed to the front seat he left it near her head, partially on the back seat; that by "jam" he meant that the gun was caught in Jean's hair, and that it was while he was trying to disengage it from her hair that the gun "went off" striking her again—this time through the right side of the head.

In his statement to the officers he also said that he knew Jean was alive after the first shot and that he didn't seek medical aid for her because of his confused mental state. On the stand his testimony was that the "movement" he heard in the car as he first drove away from the scene was merely the shifting of the body with the motion of the car.

He corrected his statement that he "threw" his trousers "out the window" by stating he would not deny that he secreted them in a storm drain; that he knew he threw them out of the car but how or why, he didn't know, with the same explanation of his prior statement that he also threw his shorts and shirt out the window.

On the stand on cross-examination the defendant testified that conversations concerning the termination of their relationship had commenced before June 17th and that Jean had requested an explanation. He denied that he loved Jean or had ever communicated to her that he loved her. He changed his testimony when he was confronted with two letters dated respectively June 11 and June 17, 1944, in his own handwriting, addressed and delivered to Jean, in which he spoke only of his love for her, of the happiness of the moments spent with her, of his desire to be with her and of his hope of what the future would hold for him, with no hint of any rift in their relations.

The defendant relies on several recent decisions of this court to support his contention that the evidence is insufficient to sustain a conviction of murder in the first degree. But the record herein discloses facts which render the conclusions in those cases inapplicable.

In People v. Howard, 211 Cal. 322, 295 P. 333, 71 A.L.R. 1385, the court reduced to second degree murder, a judgment of conviction entered on a jury's verdict of first degree murder without recommendation. In that case the defendant confessed that he struck the decedent, his employer, with his mechanic's hammer in a struggle ensuing after decedent had upbraided him for remaining away from his night duties at the automobile rental garage, and wherein the defendant after discovering the decedent's semiconscious condition, had notified the authorities.

The defendant herein relies on language in that case to the effect that if the confession be disregarded the record was destitute of evidence tending to establish the circumstances and conditions actually existing prior to and at the time of striking the fatal blow and from which it might reasonably be concluded that there was murder wilful, premeditated and intentional. He contends that in his case likewise the court should have found the crime to be that of murder in the second degree.

[4] We cannot so determine. The physical facts and circumstances here disclosed furnish ample evidence from which the court could conclude beyond a reasonable doubt that the defendant's murderous dispatch of the decedent was wilful, premeditated and intentional. Instead of taking her, as he had taken Marion, to converse and look at the view on the east side of the hill in View Park, he parked his car in a somewhat isolated pocket on the opposite side of the hill. There was a gun in the car; but even more inexplicable, if the defendant's version could be credited, is the fact that he had the gun on or near his person while he intimately embraced her, a sit-

uation indicated by the condition of the decedent's body. A witness heard the shots from that gun, and the number and succession of the shots as heard do not tally with the story told by the defendant nor with any theory of accidental firing. His companion was supposedly in need of medical aid and the defendant knew that a doctor resided in the locality, but he made no effort to obtain aid. Instead he fired the gun a second time and then drove a considerable distance away from a place where he was known to another and far distant isolated section where he deposited the lifeless body among some trash and brush in a position and attitude as though it had been subjected to an act of rape followed by murder. He attempted concealment of all telltale evidence, even to coating the rear floor of his car with varnish both before and after the homicide. He gave instructions to his wife, which, if followed, would tend to establish an alibi. These facts and circumstances do not lend credence to the defendant's story of accidental shooting in a struggle to dispossess the decedent of a gun assertedly pointed by her for his own destruction following their intimate embrace, nor to his claim of confused mental processes after the so-called "accident." Without the defendant's assertions of accidental shooting, the circumstances point to murder in the first degree. Coupled with his assertion that Jean was causing complications in his life and that their relationship must be terminated, the court was justified in finding a motive for the murderous intent.

Unlike the situation in the Howard case, therefore, the circumstances are not consistent with the defendant's explanation of the homicide. Other cases relied on are distinguishable on similar grounds. In People v. Holt, 25 Cal.2d 59, 153 P.2d 21, this court reduced to second degree murder a judgment entered on a jury's verdict of guilty of first degree murder without recommendation. It was the opinion of the majority of the court that the record as a matter of law did not justify the application of the statutory standard and that to warrant imposition of the penalty for first degree murder the circumstances must show a wilful, deliberate and premeditated intent to take life. Such a situation was, by the majority of the court, deemed to exist in the case of People v. Thomas, 25 Cal.2d 880, 156 P.2d 7, so as to render prejudicially erroneous certain instructions to the jury on the degrees of murder.

[5, 6] In this case, the state of the record justifies the trial court's declared opinion that the story told by the defendant was neither candid nor truthful. As recognized in People v. Thomas, and in People v. Holt, the weight of the evidence is for the trial court; and where, as here, there is no reasonable basis for a declaration that the evidence is insufficient as a matter of law to meet the applicable standard, an affirmance must follow.

The judgment is affirmed.

GIBSON, C. J., and EDMONDS, CARTER, SCHAUER, TRAYNOR, and SPENCE, JJ., concurred.

27 Cal.2d 7

PEOPLE v. SARAZZAWSKI.

Cr. 4605.

Supreme Court of California.

Sept. 25, 1945.

1. Criminal law 🔑1186(4)

Where a defendant has been denied any essential element of a fair trial or due process, even broad saving provisions of constitutional provision placing burden on defendant to show prejudicial error cannot remedy the vice, and the judgment cannot stand. Const. art. 6, § 4½.

2. Criminal law 🔑1186(4)

The constitutional provision placing burden on defendant to show prejudicial error was not designed to abrogate the guaranties accorded persons accused of crime by other parts of Constitution or to overthrow all statutory rules of procedure and evidence in criminal cases. Const. art. 6, § 4½.

3. Criminal law 🔑633(1)

The question of guilt or innocence must be determined by an orderly legal procedure, in which substantial rights belonging to defendant shall be respected.

4. Criminal law 🔑959

Defendant had no absolute right to have motion for new trial heard at convenience of his counsel.

5. Criminal law 🔑304(1)

Supreme Court will take judicial notice of fact that it is common practice for a motion for new trial to be formally made or stated on one date and for argument thereon to be postponed to a later date.

6. Criminal law 🔑1156(1)

A trial judge's conclusion on motion for new trial on ground of prejudicial misconduct of district attorney will not be disturbed by appellate court unless in the circumstances it is plainly wrong.

7. Criminal law 🔑1156(5)

A motion for new trial on ground of misconduct of jury presents a question of fact, and, if evidence of asserted misconduct is conflicting, decision of trial judge is conclusive on appeal.

8. Criminal law 🔑1159(2)

Appraising weight of evidence is exclusively the province of trial court, and Supreme Court may review evidence only for its legal sufficiency.

9. Criminal law 🔑935(1)

Defendant tried by jury is entitled to two decisions on evidence, one by jury and another by trial judge in passing on motion for new trial.

10. Criminal law 🔑935(1)

On motion for new trial, in considering sufficiency of evidence to support jury's verdict, trial court is not bound by conflicts in evidence, and must consider credibility of witnesses, their manner and appearance in testifying, and weight to be accorded evidence.

11. Criminal law 🔑959

Verdict of jury should not lightly be vacated on motion for new trial, but court should pass on motion only after reviewing cause.

12. Criminal law 🔑911, 1156(1)

A trial judge has broad discretion in passing on motion for new trial on ground that verdict is contrary to evidence, and his action, whether in denying or in granting the motion, will not be disturbed on appeal unless it clearly appears that he abused such broad discretion.

13. Criminal law 🔑1159(2)

An appellate court cannot order a new trial on ground of insufficiency of evidence if there is any substantial evidence by which verdict can be supported.

14. Criminal law 🔑935(1)

A trial court can grant a motion for new trial where evidence is legally sufficient and even where only evidence is that of the prosecution.

15. Criminal law 🔑1186(4)

Fact that evidence amply supported verdict would not justify Supreme Court in sustaining judgment, where it appeared that judgment was pronounced after a denial of essential elements of a fair trial or due process in presentation and argument of motion for new trial. Const. art. 6, § 4½.

16. Criminal law 🔑905

A motion for a new trial is a legislatively established procedure which it is the right of any convicted defendant to invoke.

17. Criminal law 🔑959

Although due process of law does not require that Legislature provide for a hearing on motion for new trial, when it has been provided, a defendant may not arbitrarily be deprived of the right to pursue it.

18. Criminal law 🔑959

The hearing and disposition of a motion for new trial is a "trial", and defendant's counsel has a right to reasonable opportunity to prepare for the hearing.

See Words and Phrases, Permanent Edition, for all other definitions of "Trial".

19. Criminal law 🔑959

Where trial judge at conclusion of trial fixed October 6 as date for formal presentation of motion for new trial, and insisted that matter would be continued to October 16 for argument, despite protests of defendant's counsel against that date, and thereafter defendant's counsel in reliance on trial judge's insistence was not prepared to argue motion on date of its formal presentation, trial judge's refusal to continue hearing on the motion justified grant of new trial to defendant on ground of deprival of substantial statutory right and was not a mere error of procedure. Pen.Code, § 1202; Const. art. 6, § 4½.

20. Criminal law 🔑959

Although in some circumstances a trial judge in exercise of his discretion may refuse defendant's request to orally argue a motion for new trial, such action should be sustained only where it is apparent that party has not thereby been deprived of a substantial right. Pen.Code, § 1202.

21. Criminal law ⟹1186(4)

The constitutional provision placing burden on defendant to show prejudicial error does not contemplate situation where defendant without fault has been denied an opportunity to determine whether he has been prejudicially injured. Const. art. 6, § 4½.

22. Criminal law ⟹1186(4)

An instruction that if any juror, subsequent to being sworn, innocently discovers that he has made a mistake in his answers on voir dire examination or remembers that he did not say something, it is juror's secret, and he should not say anything more about it, was prejudicial error notwithstanding there was no showing that any juror subsequent to being sworn discovered that he was disqualified. Pen. Code, § 1120; Const. art. 6, § 4½.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Newcomb Condee, Judge.

Jan Francis Sarazzawski was convicted of murder, and he appeals.

Reversed.

Leola Buck Kellogg and Montgomery G. Rice, both of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

PER CURIAM.

Defendant appeals from a judgment imposing the death sentence and from an order denying his motion for a new trial. He was charged with the murder of Marion Berger and three prior convictions of felony. He pleaded not guilty and not guilty by reason of insanity and admitted the prior convictions. The jury found that he was guilty, made no recommendation as to penalty, and found that he was sane at the time the offense was committed. The defendant endeavored to present a motion for a new trial and the minutes of the court recite that such a motion was made, argued, and denied. Judgment of death was imposed.

[1-3] There is no question that the evidence amply supports the verdict and judgment but, regrettably, we find in the record several incidents which should not have occurred in a fair and orderly trial. At least two of such incidents are matters of such grave moment as to amount to substantial departures from the established elements of a fair trial, to which every person charged with crime, no matter how rich or poor, virtuous or debased, is entitled. When a defendant has been denied any essential element of a fair trial or due process, even the broad saving provisions of section 4½ of article VI of our state Constitution cannot remedy the vice and the judgment cannot stand. People v. Mahoney, 201 Cal. 618, 627, 258 P. 607; People v. Adams, 76 Cal.App. 178, 186–187, 244 P. 106; People v. Gilliland, 39 Cal.App.2d 250, 264, 103 P.2d 179; People v. Duvernay, 43 Cal.App.2d 823, 829, 111 P.2d 659. That section was not designed to "abrogate the guaranties accorded persons accused of crime by other parts of the same Constitution or to overthrow all statutory rules of procedure and evidence in criminal cases. When we speak of administering 'justice' in criminal cases, under the English or American system of procedure, we mean something more than merely ascertaining whether an accused is or is not guilty. It is an essential part of justice that the question of guilt or innocence shall be determined by an orderly legal procedure, in which the substantial rights belonging to defendants shall be respected." People v. O'Bryan, 165 Cal. 55, 65, 130 P. 1042, 1046, opinion of Mr. Justice Sloss; People v. Wilson, 23 Cal.App. 513, 524, 138 P. 971. The two incidents above referred to are hereinafter depicted.

Two days were spent in voir dire examination of prospective jurors, ten days were spent in trial of the issue of guilty, and one day was spent in trial of the issue of sanity. On Tuesday morning, October 3, 1944, the jury returned with their verdict that defendant was sane. After the jury were discharged the following proceedings took place:

The trial judge stated, "I will now put the matter down for sentence on Friday [October 6] at nine o'clock in the morning." Defendant's counsel, Mrs. Kellogg, replied, "I have a jury trial on the 6th." The judge assured her that "This is before any other hours. If you will be here two or three minutes before nine, we will handle this before I handle our regular probation calendar." Mrs. Kellogg sought to move for a new trial but the judge interrupted her, saying: "Not now. You can make it then [October 6], and it gives you more time. * * * You will be prepared then [October 6] with all the motions you wish to make, and *we will put it over for argument for about ten days from that date.*" (Italics added.) The record continues:

"Mrs. Kellogg: Ten days from that, which will be the 16th. I will be in Long Beach at that time and it will be impossible for me to be here on the 16th.

"The Court: It will have to be, I guess—the case starts down there on the 16th?

"Mrs. Kellogg: Yes, it is on the 16th I have to be there.

"The Court: A motion for new trial under these circumstances takes precedence. *You will have to be here and then go down.*" (Italics added.)

The judge's only reply to Mrs. Kellogg's repeated protest against the date of October 16 was to order an adjournment, but as subsequently shown in more detail, on October 6 he insisted that the argument be presented on that date and refused to postpone it to October 16 or to any date later than the 6th.

[4, 5] Defendant, of course, had no absolute right to have the motion for new trial heard at the convenience of his counsel. But, since the judge, at the conclusion of the trial on October 3, fixed October 6 as the date for formal presentation or statement of the motion and insisted that the matter would be continued to the 16th for argument, defendant's counsel, despite her protests against that date, was entitled to rely on that assurance and to arrange her work in accordance with it, at least until she received reasonable notice to the contrary. It does not appear from the record that she received such notice. This court will take judicial notice of the fact that it is common practice for a motion for new trial to be formally made or stated on one date and for the argument thereon to be postponed to a later date. Some time before 9 o'clock a. m. on October 6 defendant's counsel did receive a telephone message from the clerk of the trial judge directing her "to be prepared to argue" on the 6th. The record does not show exactly when this message was delivered.

Defendant's counsel on October 5 served and filed her notice that on October 6 defendant would move for a new trial on the grounds that the verdict was contrary to law and the evidence; that jurors were guilty of misconduct by which a fair expression of opinion on the part of some jurors was prevented; and that the deputy district attorney was guilty of prejudicial misconduct. With this notice she served and filed an affidavit tending to show misconduct of jurors.

On October 6 at 9 o'clock the matter was called and defendant's counsel stated, "I would like to have additional time in which to argue this motion for a new trial." The record continues:

"The Court: You may take as much time as you wish.

"Mrs. Kellogg: Well, 15 days.

"The Court: No, today. This is the time for the hearing on the motion.

"Mrs. Kellogg: * * * I am entitled to at least 10 days in which to argue this motion for new trial, and it was fixed by the court that the argument for the new trial should be heard on the 16th of October.

"The Court: Well, I suggested that date to you. You said you were engaged that day. [The judge's statement, "You will have to be here," seems more than a mere suggestion.]

"Mrs. Kellogg: I know, but that was the last thing I heard, and since that time I have served and filed a written affidavit, upon which I intend to stand.

"The Court: But that does not set forth new evidence, which is the only ground for a continuance * * * [Section 1191 of the Penal Code provides that "The court may extend the time not more than ten days for the purpose of hearing or determining any motion for a new trial," but does not specify any "ground for a continuance."] Your affidavit sets forth certain hearsay, but doesn't state any facts to show misconduct on the part of the jury.

"Mrs. Kellogg: That is why I want to have time for argument of my motion for a new trial. *I am not prepared to argue it at this time.* (Italics added.)

"The Court: You may proceed. You can have all the time you wish. If necessary, we will go into next week.

"Mrs. Kellogg: I am not going to argue at this time, on account of the additional affidavits I have presented * * * and I would like to submit more affidavits.

"The Court: There isn't anything in the Code that gives any additional time. It doesn't even provide for argument. Of course, the court has to be satisfied. If you raise any points that trouble me, I would want more time to look them up myself. * * * What section do you refer to that you are entitled to additional time? * * * The Code seems to be silent on the matter. It simply says a motion for new trial will be made and the judge will forthwith enter his ruling on the same. [Section 1182 of the Penal Code provides, "The application for a new trial must be made before judgment, and the order granting or denying the same must be immediately entered by the clerk in the minutes."] Of course, in any case where any point is raised of which I am uncertain, the purpose of a new trial being to permit a judge to correct any errors himself, before it goes on for appeal, sometimes we put it over for argument. *If I did not put it over for argument I don't see how it could be any error, because if I made a mistake, it would be because I did not correct something, and of course the Supreme Court would correct it.* [Italics added.] * * * Didn't the clerk inform you by telephone—I told him to—to have you prepared—if you entered a motion to be prepared to argue it today?

"Mrs. Kellogg: He asked me if I would argue it today, and I said I could not, I was on trial.

"The Court: That message was returned to me, and I said to tell you to be prepared to argue it today.

"Mrs. Kellogg: I said I could not and would not, because the court had made a ruling that it would be on the 16th of October.

"The Court: Well, proceed. If you raise any point that troubles me, I will put it over on my own motion. Otherwise, I will hear you now on your motion for new trial. * * * I suggested why I did not think it could be error, because *the purpose of a motion for new trial is to permit the trial judge to correct any error he feels was committed, before it is presented to the Supreme Court, but it couldn't obviously work to any prejudice to the defendant, because if there were in fact any reasons why a new trial should be granted, the Supreme Court is quite capable of granting it.*" (Italics added.)

Defendant's counsel argued and again asked for "at least ten days in which to argue this motion upon this additional affidavit that I have now filed." The record continues:

"The Court: I am not limiting you. It is now about 9:40. You can have all day to argue, if you wish.

"Mrs. Kellogg: I have no further argument.

"The Court: Very well. Do you submit the matter? * * *

"Mrs. Kellogg: I have to."

The judge then, forthwith, denied the motion.

The above quoted excerpts disclose, not only that counsel for the defendant was misled as to the date upon which she would be required to argue the motion, but also that the trial judge entertained an egregious misconception of his duties and of the relative powers and functions of the trial court and reviewing court in respect to such a motion. He twice stated that "the purpose of a motion for new trial is to permit the trial judge to correct any error he feels was committed" and that his refusal to put the matter over "couldn't obviously work to any prejudice to the defendant, because if there were in fact any reason why a new trial should be granted, the Supreme Court is quite capable of granting it."

[6] One ground of defendant's motion was asserted prejudicial misconduct of the district attorney. A trial judge is in a better position than is an appellate court to determine the probable effect of misconduct of counsel and his conclusion on that question will not be disturbed by an appellate court unless in the circumstances it is plainly wrong. Walling v. Kimball, 17 Cal.2d 364, 369, 110 P.2d 58, and cases there cited.

[7] Another ground of defendant's motion for new trial—misconduct of the jury—presents a question of fact. If evidence of the asserted misconduct is conflicting the decision of the trial judge is conclusive on appeal. People v. Ung Sing, 171 Cal. 83, 88, 151 P. 1145; People v. Lee Yick, 189 Cal. 599, 610, 209 P. 538; People v. Hanks, 35 Cal.App.2d 290, 301, 95 P.2d 478.

[8] Another ground of defendant's motion—that the verdict is contrary to the evidence—presents an issue to the trial court upon which an appellate court cannot pass: We cannot appraise the weight

of the evidence. Appraising the weight of the evidence is exclusively the province of the trial court. We may review evidence only for its legal sufficiency. So also, the *effect* of error, under the evidence, is primarily for the trial court and its determination on that question is usually conclusive.

[9-11] The "defendant is entitled to two decisions on the evidence, one by the jury and another by the trial judge in passing upon a motion for a new trial. [Citation.] In giving consideration to the important matter of the sufficiency of the evidence to support the jury's verdict, the trial court, in ruling on a motion for a new trial, is not bound by conflicts in the evidence [citation], and the duty is imposed upon it then to consider such additional and not unimportant features as the credibility of witnesses, their manner and appearance in testifying, and the proper weight to be accorded to the evidence. While the solemn verdict of a jury should not lightly be vacated the responsibility nevertheless rests with the [trial] court again to review the cause and only after such review to decide the application for a new trial. [Citation.]" People v. Cesena, 18 Cal.App.2d 727, 729, 64 P.2d 732, 733.

[12] The trial judge has broad discretion in passing on a motion for new trial on the ground that the verdict is contrary to the evidence and his action, whether in denying or particularly in granting the motion, will not be disturbed on appeal unless it clearly appears that he abused such broad discretion. People v. Canfield, 173 Cal. 309, 312, 159 P. 1046; People v. Simpson, 134 Cal.App. 646, 649, 25 P.2d 1008.

[13-15] But the record here tends strongly to suggest that the present case is not one where the judge denied the motion in the exercise of a broad discretion. It appears rather that he did not give the second decision on the weight of the evidence to which defendant was entitled. An appellate court cannot order a new trial on the ground of insufficiency of the evidence if there is any substantial evidence by which the verdict can be supported. People v. McClennegen, 195 Cal. 445, 449, 450, 234 P. 91; People v. Schafer, 198 Cal. 717, 721, 247 P. 576. But a trial court can grant a motion for new trial where the evidence is legally sufficient and even where the only evidence is that of the prosecution. People v. Knutte, 111 Cal. 453, 456, 44 P. 166; People v. Cesena, supra, 18 Cal.App.2d 727, 729, 64 P.2d 732; People v. Mattmueller, 25 Cal.App.2d 418, 421, 77 P.2d 504.

As previously indicated the evidence in this case amply supports the verdict but that fact cannot justify us in sustaining a judgment pronounced after a denial of any essential element of a fair trial or of due process of law.

Even if we assume that the trial judge did exercise judicial discretion in passing upon the weight and sufficiency of the evidence, the circumstances attending the presentation and argument of the motion for a new trial are not consonant with a fair trial or due process as including a fair and reasonable opportunity to be heard.

[16-19] A motion for a new trial is a legislatively established procedure which it is the right of any convicted defendant to invoke. While due process of law does not require that the Legislature provide such a procedure (8 Cal.Jur. § 442, p. 414; 23 C.J.S., Criminal Law, § 1418, p. 1116), when it has been provided a defendant may not arbitrarily be deprived of the right to pursue it. In the presentation, hearing, and disposal of the motion the parties and the court are engaged in a trial. In Finn v. Spagnoli, 67 Cal. 330, 332, 7 P. 746, 748, it was held that "the hearing and disposition of a motion for new trial is a trial." See, also, Goldtree v. Spreckels, 135 Cal. 666, 669, 67 P. 1091. That counsel for a defendant has a right to reasonable opportunity to prepare for a trial is as fundamental as is the right to counsel. "It would be a cheap subterfuge of and shameless mockery upon justice for the state to put a man on trial in its courts charged with an offense which involved his life, liberty, or character, and then place him in such a position that he could not prepare to make his defense. * * * In fact, there can be no such thing as a legal trial, unless both parties are allowed a reasonable opportunity to prepare to vindicate their rights. * * *" Quoted from State v. Davis, 9 Okl.Cr. 94, 97, 130 P. 962, 963, 44 L.R.A.,N.S., 1083, in Re Rider, 50 Cal.App. 797, 799, 195 P. 965, and in People v. Simpson, 31 Cal.App.2d 267, 271, 88 P.2d 175. Here, the asserted willingness of the trial judge to permit defendant's counsel to argue "all day" and "into next week" was directly coupled with his refusal to continue the matter for even one day beyond

October 6 despite the facts that on October 3 he had insisted that the argument must be had on the 16th and that counsel positively averred that in reliance upon such insistence she was not prepared to argue the motion on October 6. In the light of all the circumstances the right of the defendant to a reasonable opportunity to present his motion for a new trial and to have it judically entertained and passed upon appears to have been so grievously impaired as to be tantamount to a refusal to hear it. Section 1202 of the Penal Code provides that "If the court shall refuse to hear a defendant's motion for a new trial * * * then the defendant shall be entitled to a new trial."

[20] Although it has been held that in some circumstances a trial judge in the exercise of his discretion may refuse defendant's request to orally argue a motion for new trial (People v. Norton, 45 Cal. App.2d 789, 791, 115 P.2d 44), such action should be sustained only where it is apparent that the party has not thereby been deprived of a substantial right. In the cited case it appears that the trial judge gave judicial consideration to the motion. He granted it as to two of three counts. It further appears to have been undisputed that the only argument counsel there was foreclosed from presenting concerned "alleged technical errors in the instructions given by the trial court." "Misdirection of the jury" is a type of error included in the saving language of section 4½ of article VI of the state Constitution, which directs that "No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." Refusal to permit counsel for the defendant a reasonable opportunity to both prepare and present a motion for a new trial is, under the circumstances shown here, more than a mere error in procedure. It amounts to a deprival of a substantial statutory right and is not covered by the quoted constitutional provision.

[21, 22] The second of the two most serious errors above mentioned lies in an instruction given to the jurors during their voir dire examination. They were told by the trial judge, "By the way I think I ought to, since we have some new jurors—if you forget anything, honestly forget it, and then you are sworn in as a juror in the case, it is too late to do anything about it. I have had jurors suddenly remember something and get up and try to tell me about it. It is embarrassing for all parties. At that point it is your own secret. After you have been candid and honest in your voir dire examination and you are accepted as a juror and sworn, then anything which you know after that, if you innocently discover you made a mistake in your answers, or remember you did not say something, it is your secret. Don't say anything more about it."

Under this instruction any disqualification discovered or remembered by a juror, whether a general or a particular cause of challenge, would have to remain forever undisclosed, once the jury were sworn. The instruction potentially exacts of the jurors conduct in direct violation of the provision of section 1120 of the Penal Code that "If a juror has any personal knowledge respecting a fact in controversy in a cause, he must declare the same in open court during the trial. If, during the retirement of the jury, a juror declare a fact which could be evidence in the cause, as of his own knowledge, the jury must return into court. In either of these cases, the juror making the statement must be sworn as a witness and examined in the presence of the parties."

The defendant has not shown that any juror, subsequent to being sworn, discovered that he was subject to disqualification or that he possessed personal knowledge concerning a fact in controversy, but we are of the view that such a showing is unnecessary. It should not be required because the very substance and nature of the error would normally operate to preclude the possibility of such a showing. Every juror who found that he possessed such disqualification or personal knowledge would be bound by the instruction not to reveal it. The defendant thus would be foreclosed from gaining the essential information from what in many cases might be its only repository. Section 4½ of article VI does not contemplate a situation where defendant "without fault has been denied an opportunity to determine whether or not he has been prejudicially injured." Opinion of this court denying hearing in People v. Stevenson, 103 Cal. App. 82, 93, 284 P. 487, 492. We are satisfied that the instruction must be regarded as error prejudicial per se, so fraught with dangerous potentialities as not to be reconcilable with our concept of the necessary attributes of a fair trial and due process, including the rights to be confronted by the witnesses and to have the protection afforded by the provisions of the statute quoted. Pen.Code, § 1120.

For the reasons above stated the judgment and order appealed from are reversed and the cause is remanded for a new trial.

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26 Cal.2d 854

PEOPLE v. SMITH.

Cr. 4623.

Supreme Court of California.

Aug. 31, 1945.

1. Receiving stolen goods ⇨4

In prosecution for receiving stolen goods, where there was evidence that defendant had received the stolen property, evidence that he had paid anything for it was unnecessary, since the offense is committed when the person either buys or receives stolen property. Pen.Code, § 496.

2. Receiving stolen goods ⇨8(3, 4)

Evidence sustained conviction of receiving three stolen radios with knowledge that they were stolen. Pen.Code, § 496.

3. Witnesses ⇨282½

In prosecution for receiving stolen radios, where the thief had testified on cross-examination that the officers had promised him nothing and that he had not been led to believe that he would receive any leniency because of his testimony, sustaining objections to further questions as to whether witness expected something out of his testimony did not unduly restrict right of cross-examination. Pen.Code, § 496.

4. Receiving stolen goods ⇨1

The gist of the offense of "receiving stolen goods" is the purchase or receipt of the stolen goods with guilty knowledge, but the particular ownership of the goods is not an element of the crime, and neither the legal nor moral character of the act is affected by fact the stolen property may have belonged to several persons rather than to a single person. Pen.Code, § 496.

See Words and Phrases, Permanent Edition, for all other definitions of "Receiving Stolen Goods".

5. Receiving stolen goods ⇨2, 3

Successive thefts from different owners enter into the crime of receiving such stolen property in a single transaction only for the purpose of showing that the property had in fact been stolen, and that the person charged had guilty knowledge. Pen. Code, § 496.

6. Criminal law ⇨984

One receiving three stolen radios from another in a single transaction was guilty of but a single offense, notwithstanding knowledge that radios were separately stolen from several owners and imposition of separate sentences to run consecutively was error. Pen.Code, § 496.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Fred Robert Smith was convicted of receiving stolen radios, and he appeals.

Judgment of conviction based on one count affirmed, and judgment of conviction based on two other counts reversed.

Prior opinion, 155 P.2d 378.

Morris Lavine, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Carl S. Kegley, Deputy Atty. Gen., for respondent.

SPENCE, Justice.

Defendant was charged in five counts with receiving stolen property, consisting of a gun and five radios. The cause was tried by the court sitting without a jury. The uncontradicted evidence showed that the three radios referred to respectively in counts 2, 4 and 5 had been stolen at various times by one Stepzinski from the automobiles of the respective owners named in said counts, and that these three radios, together with a fourth radio, had been received by defendant from Stepzinski in one transaction at defendant's radio shop on November 10, 1943. The trial court found defendant guilty on counts 2, 4 and 5, and not guilty on counts 1 and 3. Three separate judgments were entered. In the first judgment, relating to count 2, defendant was sentenced to six months in the county jail. In the second judgment, relating to count 4, defendant was sentenced to six months in the county jail, which sentence was ordered to run consecutively with the sentence relating to count 2. In the third judgment, relating to count 5, defendant was sentenced to six months in the county jail, which sentence was ordered to run consecutively with the sentence relating to count 2 and concurrently with the sentence relating to count 4. Defendant appeals from the judgments of conviction.

[1] Defendant contends that the evidence was insufficient to sustain his conviction. He stresses the fact that there was no evidence of "buying *and* receiving" stolen property, as alleged in the information, as it was not shown that he had paid anything to Stepzinski. It was not necessary, however, to show that any payment had been made as section 496 of the Penal Code reads in the alternative and the offense therein defined is committed when a person either "buys *or* receives any personal property, knowing the same to have been stolen." (Italics ours.) We therefore pass to defendant's main argument under this heading which is that there was no evidence to show that defendant received the property from Stepzinski "with guilty knowledge."

[2] There was direct evidence showing such guilty knowledge in the testimony of Stepzinski who testified for the prosecution. The evidence showed that defendant was in the business of repairing and selling car radios, although it was conceded that he had no license permitting him to engage in such sales. He had known Stepzinski for about two years. Stepzinski testified that about a week before November 10, 1943, he called at defendant's shop and proposed that he bring defendant some radios; that upon inquiring of defendant "if he needed any radios," defendant answered, "Yes"; that he told defendant that he could get some—that he "would take them out of cars"—and defendant answered, "Bring them around".

After Stepzinski had stolen the radios involved in counts 2, 4 and 5 of the information, together with others, he took the radios in his automobile to defendant's shop. These radios still had the cut wires attached to them. He held a brief conversation with defendant outside the shop and then carried two radios into the shop and placed them on the counter. He then returned to his car and brought in two more which he placed on the floor. Defendant picked up two of the radios and moved them behind the service counter. Police officers then entered the shop and arrested the two men.

In addition to the direct evidence of Stepzinski, there was other evidence bearing upon the knowledge, motives and intentions of defendant. Just prior to the arrest, the officers asked Stepzinski if he had brought in some radios and he replied, "No." Defendant said nothing, letting Stepzinski's answer stand unqualified. The officers took six radios from the shop, among which were the three which were definitely identified at the trial by expert testimony covering the matching of the cut wires. After the arrest, the officers asked defendant if he had other radios and he answered that he had only the three which were left in the shop. He admitted at that time that he had previously told Stepzinski that if he would bring in some radios, he (defendant) would buy a few. Later the officers located a room and garage rented by defendant at a place other than his residence. They found there thirty-two car radios of various makes and also a pistol, a holster and a clip. When questioned about these, defendant told the officers that he had bought all of them from an ex-convict named Dave Wagner. He stated that he had bought not more than fifty radios from Wagner and, when the officer asked how long he had been buying "hot radios" from Wagner, he stated that he had been getting them from Wagner for about a year. When asked whether he knew that the radios had been stolen, he admittedly replied, "No, I couldn't say that I knew definitely they were stolen radios." And when further asked whether he "suspicioned" they were stolen, he admittedly replied, "Not necessarily, because the radios were always clean and no wires cut." On the trial, he testified, however, that if a radio was brought into his shop with the wires cut, "I would say it was stolen or taken out of a car by someone that was careless or reckless." He further admitted on the trial that he might have told the officers that the radios he got from Wagner were "a little off color" and that he knew Wagner "had done time." But in his testimony, he stated that he had not bought any radios from Dave Wagner; that he had mentioned that name in talking to the officers "purely for the purpose of answering at the time" as he was then "willing to tell lies * * * about the radios" in his possession.

It is unnecessary to detail further the admissions, evasive answers and contradictory statements given by defendant. The evidence which has been summarized, strongly corroborated the direct evidence of Stepzinski concerning defendant's guilty knowledge, and the evidence as a whole amply supported the finding that defendant had been guilty of the crime of receiving stolen property as defined in section 496 of the Penal Code. People v. Jacobs, 73 Cal.App. 334, 238 P. 770; People v. Cox, 117 Cal.App. 254, 3 P.2d 581; People v. Juehling, 10 Cal.App.2d 527, 52 P.2d 520. This conclusion is entirely consistent with the decision in People v. Lima, 25 Cal.2d 573, 154 P.2d 698, 703, as the reversal in the cited case was based upon the "total absence of evidence corroborative of the accomplices."

[3] Defendant further contends that the trial court erred in sustaining an objection to the following question asked of Stepzinski on cross-examination, "In other words you expect something out of this, don't you?" While this question was one of many directed at the witness to determine his "state of mind," the subject had been exhaustively covered in the prior questioning before the objection to the continued probing was finally sustained. He had already testified that he had been promised nothing and that he had not been led to believe that he would be accorded any leniency because of his testimony relating to his dealings with defendant. An examination of the record shows that defendant's right of cross-examination was not unduly curtailed (4 Cal.Jur. 10-Yr.Supp. § 600, pp. 1001 et seq.; People v. Stanhope, 37 Cal. App.2d 631, 635, 99 P.2d 1075); and that the order sustaining the above-mentioned objection could not have constituted prejudicial error.

Defendant's final contention is that the evidence established at most but a single offense, and that the trial court committed prejudicial error in finding defendant guilty on three separate counts and imposing separate sentences on said counts. In other words, defendant contends that the simultaneous reception of several articles of stolen goods constitutes but a single offense regardless of the fact that the articles so received may have been previously stolen from several different owners. Both reason and authority indicate the soundness of this contention.

[4, 5] The crime of receiving stolen goods consists of either buying or receiving personal property with knowledge that it has been stolen. (Pen.Code, § 496.) The gist of the offense is the purchase or receipt of the stolen goods with guilty knowledge but the particular ownership of the goods is not an element of the crime. Neither the legal nor moral character of the act is affected in any way by the fact that the stolen property may have belonged to several persons rather than to a single person. The crimes of larceny and of receiving stolen goods are separate and distinct, People v. Hawkins, 34 Cal. 181; 22 Cal.Jur. § 2, p. 556, and the pleading and proof of successive thefts from different owners enters into the pleading and proof of the crime of receiving such stolen property in a single transaction only for the purpose of showing that the property had in fact been stolen and that the person charged had guilty knowledge.

These views find support in the conclusions reached in People v. Willard, 92 Cal. 482, at page 488, 28 P. 585, at page 587, where the court said: "The same proof, and the only proof, of a receipt of the Hazard goods on or about March 11th, equally proved a receipt of the Williams goods at the same time; and, if both were received at the same time, it was one offense, and the acquittal on the first charge was a bar." Further support is found by analogy in the authorities dealing with the crime of larceny, which authorities hold that the theft of several articles at one and the same time constitutes but one offense although such articles belong to several different owners. (See Wharton's Criminal Law (vol. 2) § 1171, p. 1489; State v. Sampson, 157 Iowa 257, 138 N.W. 473, 42 L.R.A.,N.S., 967, and exhaustive note.)

[6] In the instant case, the evidence showed that defendant received the stolen goods, specified in counts 2, 4 and 5, in a single transaction at the time and place mentioned, and, in our opinion, such evidence proved but a single offense under section 496 of the Penal Code. While a single judgment based on any one of the three counts above-mentioned can be sustained, the several judgments cannot be permitted to stand.

For the reasons stated, the judgment based upon count 2 is affirmed and the judgments based upon counts 4 and 5 are reversed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.

71 Cal.App.2d 65

FIDELITY & CASUALTY CO. OF NEW YORK v. MAHONEY et al.

MAHONEY v. MAHONEY.

Civ. 14838.

District Court of Appeal, Second District, Division 3, California.

Sept. 28, 1945.

As Modified On Rehearing Oct. 26, 1945.

1. Husband and wife ⚷249

The widow of insured, paying premium on airplane-travel accident policy, naming his son as beneficiary, from his separate funds, was not entitled to any part of proceeds of policy after insured's death in airplane accident. Civ.Code, § 157.

2. Husband and wife ⚷262(1)

Property acquired by husband after marriage, other than by gift, devise, or descent, is presumed to be community property. Civ.Code, § 164.

3. Husband and wife ⚷262(1)

The presumption that property acquired by husband after marriage is community property is of less weight where marriage relation has existed for short time than in case of long-continued marriage relation. Civ.Code, § 164.

4. Husband and wife ⚷262(1)

In determining whether property acquired by husband is community property or his separate property, there is no presumption as to whether he acquired it before or after marriage. Civ.Code, § 164.

5. Husband and wife ⚷273(12)

In insurance company's interpleader action to determine whether insured's widow or his minor son by former marriage was entitled to proceeds of airplane-travel accident policy naming son as beneficiary, burden was on widow to prove that insured paid premium on policy from community funds without her consent. Civ.Code, § 172.

6. Husband and wife ⚷273(12)

In interpleader action to determine whether insured's widow or his son was entitled to proceeds of airplane-travel accident policy naming son as beneficiary, widow's evidence was insufficient to show that insured paid premium on policy from community funds without her consent. Civ. Code, § 172.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action in interpleader by the Fidelity & Casualty Company of New York against J. B. Mahoney, Jr., a minor, his guardian, Claire Hoffman, and Patricia Mahoney to determine whether such minor or defendant Patricia Mahoney was entitled to an amount deposited in court by plaintiff as proceeds of an airplane-travel accident insurance policy issued by plaintiff to J. B. Mahoney, Sr., before his death in an airplane accident. From a judgment for defendant minor by his guardian, defendant Patricia Mahoney appeals.

Affirmed.

Milan E. Ryan and Robert Ryan, both of Santa Monica, for appellant.

Frank J. Indovina, of Santa Monica, and Philip Schwabacher, of Lancaster, for respondent.

PARKER WOOD, Justice.

On June 28, 1943, in Louisville, Kentucky, J. B. Mahoney, Sr., a resident of Los Angeles, purchased an airplane-travel accident insurance policy from the plaintiff insurance company and mailed it to the beneficiary named therein, J. B. Mahoney, Jr., of Los Angeles, his sixteen-year-old son by a former marriage. Soon after the policy was purchased, the insured boarded an airplane for the purpose of going to Los Angeles, and within an hour thereafter the airplane fell in Kentucky and as a result thereof he was killed.

Patricia Mahoney and the insured had been married about two months preceding the airplane accident, and at all times during their marriage they were domiciled in California. She made a demand on the insurance company for one-half the proceeds of the policy on the ground that th policy was purchased with community property.

The insurance company filed this action in interpleader, and upon stipulation an interlocutory decree was entered wherein it was ordered that upon deposit in court by the insurance company of $4989.50 (being the amount of the policy less $10.50 for costs) it would be released from liability under the policy, and it was further ordered that J. B. Mahoney, Jr., and Patricia Mahoney litigate between themselves to determine who was entitled to receive the amount so deposited. The insurance company made the deposit.

Defendant Patricia Mahoney alleged, among other things, that she was the widow of J. B. Mahoney, deceased; that the premium on said policy was paid by J. B. Mahoney from community property funds owned by him and her; and that as his widow she was entitled to one-half of said $5000.

Defendant J. B. Mahoney, Jr., alleged, among other things, that he was the beneficiary named in the policy; that the $5000 was not community property; that Patricia Mahoney had no right, title or interest in said $5000; and that the policy was purchased with the separate property of the deceased J. B. Mahoney.

The court found that the $5000 was not community property; that Patricia Mahoney had no right, title or interest therein; and that the policy was purchased with the separate property of deceased J. B. Mahoney. The court concluded that J. B. Mahoney, Jr., was entitled to a judgment ordering that the funds deposited with the court be paid to his guardian. The judgment was that J. B. Mahoney, Jr., by his guardian, recover judgment as against defendant Patricia Mahoney, and that he, by his guardian, was entitled to the sum of $2494.75 deposited in court by plaintiff. Defendant Patricia Mahoney appeals from the judgment, and contends that the findings of fact are not supported by the evidence.

In the statement on appeal it is recited: "There is no evidence as to the nature or extent of the decedent's estate, whether separate or community, except that it is shown the decedent earned a gross monthly salary in an undetermined amount during the period of his second marriage and that he had a bank account in his own name. There was no evidence on behalf of either of the defendants as to whether or not the premium paid for said policy of insurance came from the separate estate or the community estate of the decedent." The record does not show what amount was paid for the policy, but since it was stated in the written opinion of the trial judge and in the briefs that the amount was $1, it will be assumed herein that $1 was the amount of the premium.

Appellant's theory is that the insuranc premium was paid by the insured from community funds, that such payment was a gift by the husband of community funds, and that such gift, being without her written consent, was a nullity under the provisions of Section 172 of the Civil Code as to her one-half interest in the premium money, and therefore she is entitled to one-half the proceeds of the policy.

[1-6] Section 172 of the Civil Code provides: "The husband has the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate estate; provided, however, that he cannot make a gift of such community personal property * * * without the written consent of the wife." If the insurance premium was paid from the husband's separate funds the wife was not entitled to any part of the proceeds of the policy, it being provided in Section 157 of the Civil Code that "Neither husband nor wife has any interest in the property of the other. * * *" In Mundt v. Connecticut Gen. Life Ins. Co., 1939, 35 Cal.App.2d 416, 95 P.2d 966, wherein the husband had paid the premiums on his life insurance policy from community funds without the wife's consent, the question was whether the wife, who was not the named beneficiary, was entitled to one-half the proceeds of the policy. In that case the court said, 35 Cal.App.2d at page 421, 95 P.2d at page 969: "* * * the only test applied to this problem has been whether the premiums (on a policy issued on the life of a husband after coverture) are paid entirely from community funds. If so, the policy becomes a community asset and the nonconsenting wife may recover an undivided one-half thereof * * *." See also Bazzell v. Endriss, 1940, 41 Cal.App.2d 463, 107 P.2d 49. The court was required to find whether the

money used in paying the premium was paid from community funds. As above shown, there was no oral or documentary evidence as to whether the money used in paying the premium was community property or separate property. As to appellant's contention that the findings were not supported by the evidence, she argues that, since there was no evidence to the contrary, the presumption, under Section 164 of the Civil Code that property acquired after marriage (other than by gift, devise, or descent) is community property, is determinative that the money used to pay the insurance premium was community property. There is a presumption that property acquired after marriage, other than by gift, devise, or descent, is community property. In re Estate of Duncan, 9 Cal.2d 207, 217, 70 P.2d 174. Where the marriage relation has existed a short period of time the presumption that property acquired after marriage is community property is of less weight than in the case of a long-continued marriage relation. In re Estate of Duncan, supra, 9 Cal.2d at page 217, 70 P.2d 174; Falk v. Falk, 48 Cal.App.2d 762, 767, 120 P.2d 714; 41 C.J.S., Husband and Wife, § 189, p. 1031. There is no presumption, however, as to when property was acquired. Scott v. Austin, 57 Cal.App. 553, 556, 207 P. 710; 3 Cal.Jur.Supp. 554. The marriage relation had existed about two months. The husband had a bank account in his own name. It was not shown at the trial whether his bank account was large or small or whether the bank account had been in existence a long or short time, and it was not shown whether his monthly salary was large or small. It would seem that proof of such matters was available. Such proof would have been of material assistance to the trial court in determining whether the $1 used in paying the premium was acquired before or after the marriage, especially in view of the short time of marriage and in view of the small amount of the premium. The appellant had alleged in her answer that the premium was paid from community funds, but she did not allege that it was paid without her consent. Even if the premium had been paid from community funds, the gift of the $1 would not be invalid unless it was made without her consent. Although she was in the best position to know and to prove whether she had so consented, she offered no evidence as to whether she had consented to such payment. She was the one who was asserting an interest in the proceeds of a policy wherein she was not a named beneficiary. The $5000 was not property which had been in actual possession of the husband or wife. In the transaction whereby the husband expended $1 and acquired the accident insurance policy he did not dispose of property in possession of the value of $5000 or of any value in excess of $1. If the $1 was community property, and if the payment of it was an invalid gift because she had not consented thereto, her only interest therein during his lifetime would have been a one-half interest in the cash surrender value of the policy, namely, some amount less than fifty cents. There was no evidence that it had any surrender value. It was only upon the death of the insured that the expenditure of the $1 became the basis of a fixed right to recover $5000. The appellant was not entitled to a portion of the $5000 unless, as above stated, the premium was paid from community funds, and unless she had not consented to such payment. It was necessary therefore to determine the source of the $1 used in paying the premium. The burden was upon appellant to prove that the $1 premium was paid from community funds. Also the burden was upon her to prove that she did not consent to the payment of the premium. She failed to carry the burden in both respects.

As above indicated, only one-half of the amount deposited in court was in dispute. Before judgment was rendered, counsel stipulated and the court ordered that the other half of the amount deposited in court be paid to defendant, J. B. Mahoney, Jr.

The judgment is affirmed.

DESMOND, P. J., and SHINN, J., concur.

70 Cal.App.2d 851

PETROLEUM MIDWAY CO. v. ZAHN et al.
ZAHN v. PETROLEUM MIDWAY CO. et al.
Civ. 14803.

District Court of Appeal, Second District, Division 3, California.

Sept. 25, 1945.

1. Stipulations ⚷14(12)

Where judgment to be entered depended on appraisal of producing oil wells with accompanying lease and equipment by appraiser appointed by the court pursuant to stipulation of the parties who agreed to order that none of the parties, their attorneys, or employees should communicate with appraiser except in presence of court and when both parties were represented, but appraiser did communicate with an employee of one of the parties out of the presence of the court, the other party was not bound thereby and judgment against him based solely on appraisement could not stand.

2. Stipulations ⚷14(12)

Where stipulation was ambiguous as to whether parties intended to waive right to cross-examination, appraiser appointed by court and appraiser's valuation made in violation of the stipulation of the parties could not become the foundation of a judgment and thereby deprive losing party of an opportunity to cross-examine appraiser.

3. Appeal and error ⚷845(1)

Where judgment was entered solely on appraisal of independent expert appointed by court and expert had communicated with employee of one of the parties, contrary to express provision of the stipulation, appellate court could not go into whether employee's statements were true or to what extent they had influenced the appraiser who arrived at a value less than 40 per cent. of that fixed by appellee's four expert witnesses.

◆

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Action by Petroleum Midway Company against Fred E. Zahn and others to recover balance due on purchase price of two oil-producing wells with accompanying lease and equipment, wherein the named defendant filed a cross-complaint. From a judgment that plaintiff recover nothing from the defendant Petroleum Production Company, the plaintiff appeals.

Judgment reversed.

Owen E. Kupfer, Baldwin Robertson, and Merrill Brown, all of Los Angeles, for appellant.

Burke Mathes, of Los Angeles, for respondents.

FOX, Justice pro tem.

Plaintiff appeals from a judgment that it "recover nothing from the defendant Petroleum Production Company."

According to plaintiff's amended complaint, the defendants had agreed to buy from the plaintiff two producing oil wells, with accompanying lease and equipment, for $40,000—one-half to be paid in cash and the other half by the transfer of stock. Only $11,000 had been paid. During the course of their defense the defendants put on four expert witnesses to prove the value of the oil property in question, apparently on the theory that such value was material to a defense of failure of consideration. Generally speaking, the value placed on the property by these four witnesses was something over $13,000. A stipulation was then entered into that the court might appoint "a disinterested person as the court's appraiser for the purpose of appraising and giving the fair market value of leasehold, the two wells and the equipment in the bill of sale described as of July 18, 1941." The stipulation provided, in part: "That judgment shall be entered in favor of the plaintiff and against the defendant Petroleum Production Corporation only for any difference that may exist, if any, between the fair market value as determined by the Court upon said appraisal and the sum of $11,000.00 heretofore received by the plaintiff, without interest to date of judgment;

"That in the event that the fair market value of said property shall be determined to be the sum of $11,000.00 or less as of July 18, 1941, then judgment shall be entered in favor of the defendant Petroleum Production Corporation, that plaintiff takes nothing." It was also stipulated, "That all attachments heretofore levied against the property of the Petroleum Production Corporation continues to remain in full force and effect until either: (1) Any judgment that may be rendered in favor of the plaintiff is paid and satisfied or (2) Judgment is rendered in favor of the defendant and against the plaintiff as hereinabove set forth * * * ." Provision was then made for the dismissal of defendant Zahn's cross-complaint.

The final paragraph of the stipulation reads as follows: "It is further stipulated that an order may be made forthwith by the Court directing that neither any parties to this action now [know] any of its attorneys, agents, employees or representatives contact either directly or indirectly said appraiser; that no communications shall be had by any of the parties to this action, their attorneys, agents, or representatives with said appraiser except in the presence of the Court and both parties being represented." (The entire stipulation is quoted in the opinion on the former appeal of this case, 62 Cal.App.2d 645, at pages 647, 648, 145 P.2d 371, at page 373.) After the parties had expressed their assent to the terms of the stipulation, the court said: "It will be so ordered and judgment will be entered in accordance with the stipulation * * * I want to thank you gentlemen for working this matter out. I assume it is worked out. At least, there will be a judgment entered."

Pursuant to said stipulation the court appointed F. A. Graser to make the said appraisal. He fixed the fair market value of the leasehold, the two wells and the equipment, as of July 18, 1941, at $4,923. Judgment was accordingly entered that plaintiff take nothing since the said value of the property was determined to be less than $11,000. An appeal was taken and the judgment reversed because the court entered said judgment without the filing of findings of fact, the same not having been waived. Petroleum Midway Co. v. Zahn, 1944, 62 Cal.App.2d 645, 145 P.2d 371.

Thereafter, the court made findings of fact and found that the fair market value of the said property as of July 18, 1941, was $4,923, which was the exact amount the court's appraiser, Mr. Graser, had arrived at in his report. The court thereupon rendered a second judgment that plaintiff "recover nothing from the defendant Petroleum Production Company." It is from this latter judgment that plaintiff prosecutes this appeal.

Plaintiff contends that the appraisal report of Mr. Graser could not properly be considered by the trial court as it was prepared in violation of the stipulation and that in the absence of that report there is no evidence to support the finding of the fair market value of the property. Plaintiff also contends that it was improperly deprived of an opportunity to cross-examine Mr. Graser and hence did not have a fair trial.

[1, 2] A note to the Graser report reads: "Mr. Cole now employed with Petroleum Production Co. (defendant) and formerly employed by Petroleum Midway Co. (plaintiff) reported to Mr. Graser that the plug is now at 3400'. The first plug to 3570' shut off bottom water and the plug from 3570', to 3404' excluded a bad running sand." As pointed out in the opinion on the previous appeal (62 Cal.App.2d at page 653, 145 P.2d at page 375): "Conversing with Mr. Cole was a plain violation of the spirit of that provision of the stipulation which agreed that the court was to make an order forbidding the employees to 'contact either directly or indirectly said appraiser,' * * *." It was also a plain violation of the further provision of the stipulation "that no communications shall be had by any of the parties to this action, their attorneys, agents, or representatives with said appraiser except in the presence of the Court and both parties being represented." It is perfectly natural that the parties should desire some protection against the employees of either side furnishing information to the appraiser which he might take into consideration in arriving at his conclusions. Such "information" might be inadvertently erroneous or deliberately so. Hence the provision that the appraiser should not be contacted "either directly or indirectly" and that no communication should be had with him "except in the presence of the Court and both parties being represented." If there was to be any information furnished the appraiser by anyone representing either of the parties, the other obviously was entitled to know what it was and thus have an opportunity to check it and verify it. Otherwise, the foundation of fairness inherent in an appraisal made by an appraiser appointed by the Court is upset. Under such a stipulation as we have here the parties ought not be bound by an appraisal made in violation of the provisions thereof. To hold that

they were bound would, in effect, be to modify the stipulation on a point that had been specifically covered by them. This the court has no right to do. The parties, by their stipulation, had limited the issues of fact to be tried to only one, viz., the fair market value of the property in question. Petroleum Midway Co. v. Zahn, supra, 62 Cal.App.2d at page 649, 145 P.2d 371. That issue was obviously determined by the court solely on the basis of the Graser appraisal. There is no other evidence that would support the finding on that question. Since the issue of value was determinative of the law suit it was doubly important that the court's appraiser adhere to the stipulation of the parties in making his evaluation. The importance of this is emphasized by the fact that the plaintiff had no opportunity to cross-examine the appraiser. As pointed out in the opinion on the previous appeal (62 Cal.App.2d at page 649, 145 P.2d at page 373), "The stipulation is ambiguous in some particulars", and one of those particulars is as to whether or not the parties intended to waive the right to cross-examine the court's expert. There is no express waiver of this right, but such waiver may perhaps be implied when the stipulation in its entirety is considered. However, it is a moral certainty that the parties would not have waived such right if they had anticipated that the provisions of the stipulation would not be carried out in all material respects. To allow an appraiser's evaluation, which is made in violation of a stipulation of the parties, to become the foundation of a judgment and to deprive the losing party of an opportunity to cross-examine such appraiser where such right is not clearly waived is to deny such party a fair trial. The opinion on the former appeal clearly supports this conclusion.

[3] Defendant, however, contends that if the statements made by Cole to the appraiser were actually believed by the latter, the effect would have been to increase the value of the wells and thus should have helped rather than harmed the plaintiff. Whether or not Cole's statements were true and unbiased (which plaintiff disputes), and what effect they had on the appraiser, and to what extent they were reflected in his final evaluation, are questions of fact which we obviously cannot determine. These are matters which the plaintiff should unquestionably have the right to inquire into, particularly since the court's appraiser arrived at a value less than 40% of that fixed by the defendant's own four expert witnesses.

The judgment is reversed.

SHINN, Acting P. J., and PARKER WOOD, J., concur.

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71 Cal.App.2d 121

LANG et al. v. BARRY.

Civ. 12711.

District Court of Appeal, First District, Division 1, California.

Oct. 2, 1945.

1. Automobiles 🔑244(6)

In pedestrian's action against motorist for injuries sustained when motorist ran into pedestrian while pedestrian was crossing street, evidence authorized finding that motorist was negligent.

2. Automobiles 🔑217(3)

The statute pertaining to pedestrian's duty, when crossing street at a point other than a crosswalk, to yield right of way to motor vehicle, does not prohibit a pedestrian from crossing outside of a crosswalk at any time when a motor vehicle is upon street, but merely calls on pedestrian to exercise a higher degree of care while crossing between intersections. Vehicle Code, § 562, St.1935, p. 188.

3. Automobiles 🔑217(6)

The question of whether pedestrian, as a matter of law, was guilty of contributory negligence in crossing street outside of a crosswalk in front of an approaching automobile is resolved by determining whether care exercised by pedestrian was commensurate with danger reasonably to be anticipated. Vehicle Code, § 562, St.1935, p. 188.

4. Automobiles 🔑245(72)

Pedestrian, wearing jeans and a light shirt, pulling a large object, crossing wide, well-lighted city street at twilight, when but one automobile was approaching, at a point where motorist's view of pedestrian was unobstructed and where there was plenty of room for motorist to have passed pedestrian in safety, was not chargeable with contributory negligence as a matter of law. Vehicle Code, § 562, St.1935, p. 188.

5. Automobiles ⚷217(1)

Pedestrian crossing street has duty to exercise due care at all times. Vehicle Code, § 562, St.1935, p. 188.

6. Negligence ⚷136(26)

Uncontroverted conclusion that injured person took no precautions for his safety makes contributory negligence of injured person a question for court.

7. Negligence ⚷136(9)

Contributory negligence of injured person is question of fact for jury, where inferences from evidence concerning vigilance exercised by injured person are debatable.

8. Negligence ⚷68

Assumption that one is not exposed to danger which comes to him only from violation of law or duty by another person is not negligence.

9. Automobiles ⚷245(72)

Whether a mistake in judgment by a pedestrian, when crossing a street, as to speed and danger of an approaching automobile, constitutes contributory negligence, is for jury.

10. Damages ⚷216(6)

Medical testimony that there would be a permanent difference in size of injured and uninjured legs, that there had been some atrophy of injured leg and calf, that two years after accident there was some limitation of motion, and that there was a permanent overlapping of the fibula, authorized instruction which permitted jury to consider permanent injuries and loss of wages which plaintiff was reasonably certain to suffer in the future because of his impairment, if any. Civ.Code, § 3283.

11. Damages ⚷26

The "detriment" for which damages can be awarded under code section authorizing damages for detriment certain to result in the future is not limited to impairment of earning capacity or pain. Civ. Code, § 3283.

See Words and Phrases, Permanent Edition, for all other definitions of "Detriment"

12. Trial ⚷311

The permanent weakness of plaintiff's left leg having been shown, impairment of plaintiff's earning power could properly be considered by jury, being within knowledge and observation of jury as persons of ordinary intelligence and experience.

◆

Appeal from Superior Court, City and County of San Francisco; Robert McWilliams, Judge.

Action by Rudolph D. Lang, Jr., a minor, by Rudolph D. Lang, his guardian ad litem, and by Rudolph D. Lang individually, against Lois Barry to recover for injuries sustained by minor plaintiff and consequential damages to adult plaintiff when minor plaintiff was struck by defendant's automobile. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Robert L. Lamb, of San Francisco (A. Dal Thomson, of San Francisco, of counsel), for appellant.

Walter McGovern, Elliott R. Divine and Julian D. Brewer, all of San Francisco, for respondents.

PETERS, Presiding Justice.

At about 6:20 p.m. on the evening of October 14, 1941, Rudolph Lang, Jr., a sixteen-year-old minor employed part time as an attendant at the Signal Oil Station at the southeast corner of Fowler Avenue and Portola Drive in San Francisco, was called upon to repair the tire of an automobile which was then parked on the north side of Portola Drive a short distance west of the Signal station. Lang procured a protable jack and proceeded west along Portola Drive until he reached a point directly opposite the disabled automobile. He then proceeded north straight across Portola Drive at a point where there was no marked or unmarked crosswalk. When he was three or four feet north of the center line of Portola Drive he was struck by defendant's automobile which was traveling west on that street, and received the serious injuries for which this action was brought. The jury awarded Rudolph, Jr., $4,500 for his injuries, and awarded his father $1,576.95 special damages.

On this appeal defendant makes but two contentions, first, that plaintiff was guilty of contributory negligence as a matter of law, and second, that the jury was erroneously instructed that it could award damages for permanent injury. Neither contention is sound.

Portola Drive runs in an easterly and westerly direction. It is 130 feet wide from curb to curb. At the time of the accident defendant was driving her Dodge Sedan west on Portola Drive. There was no other traffic moving in either direction. It was dusk, but the evening was clear and dry, there was no fog, the area was well-lighted by street lights, and the view was unobstructed. As plaintiff stepped into the eastbound traffic lane, he looked to the west and saw no approaching automobiles. He looked to the east and saw defendant's car coming over a slight rise at a distance later measured as 300 feet away. He estimated that its speed was moderate. On his deposition plaintiff had likewise placed the car when observed by him as coming over the rise, but then estimated the distance in feet at about two hundred. At the trial he testified that his deposition estimate was based on "what I remembered at the time of the accident." Defendant contends that in determining whether plaintiff was guilty of contributory negligence as a matter of law the two hundred foot estimate alone must be considered although the actual distance was in fact three hundred feet. As defendant interprets the evidence plaintiff testified that when he saw the car he estimated that it was but two hundred feet away. That is not the only or most reasonable interpretation of the evidence. It is also susceptible of the interpretation that when plaintiff first observed the car he made no estimate in feet as to its distance, but based his belief that it was safe to cross on the position of defendant's car on the road in relation to his own position.

After observing defendant's car, and without looking again, plaintiff continued walking across the street pulling the jack, and was struck by defendant's car at a point three or four feet north of the center line, when he had traveled about thirty-five feet from the point where he had first observed the automobile.

[1-8] Defendant does not question the sufficiency of the evidence to establish her negligence, but urges that the minor plaintiff was contributively negligent as a matter of law in crossing the center line of the highway into the path of the car he had seen approaching, and in failing to yield the right of way as required by § 562 of the Vehicle Code, St.1935, p. 188. The contentions are without merit. Section 562 does not prohibit a pedestrian's crossing outside of a crosswalk at any time when a motor vehicle is on the highway. "While the duty to yield the right of way, imposed upon the pedestrian by section 562, may call for a higher degree of care while crossing between intersections, the real question of fact in such a case is whether the required care has been exercised, and not merely whether or not the right of way has been actually yielded." Shipway v. Monise, 59 Cal.App.2d 565, 571, 139 P.2d 60, 63. "It cannot be said that as a matter of law a pedestrian who crosses a well lighted business street in the middle of a block is guilty of violating the statute or of negligence proximately contributing to his injury when he proceeds on his way after having observed an automobile approaching from a distance of 200 feet, with nothing to obstruct his view or that of the driver." Fuentes v. Ling, 21 Cal.2d 59, 62, 130 P.2d 121, 122. In the Fuentes case the observation was made at the center line, whereas in this case the observation was made at the edge of the eastbound traffic lane. But the question is still whether, as a matter of law, the plaintiff failed to exercise the requisite degree of care. The answer depends upon whether the care exercised was commensurate with the danger reasonably to be anticipated. Portola Drive is a city street, where only moderate driving speeds are to be expected. The street is broad, and the view unobstructed. There was plenty of room for the automobile to have passed in front of Lang. There was no other traffic on the road. It was well-lighted. Plaintiff was dressed in jeans and a light shirt, and pulling a large object. He was within view of the driver during the entire time he was upon the street. He observed the approaching automobile and its speed and distance from him. He observed that there was no other traffic upon the road. It was his duty to exercise due care at all times while crossing the street. Moss v. H. R. Boynton Co., 44 Cal.App. 474, 186 P. 631; Sheldon v. James, 175 Cal. 474, 166 P. 8, 2 A.L.R. 1493. But it is only "when a person takes no precautions at all for his own safety and is injured, and this conclusion is uncontroverted, contributory negligence is a question to be decided by the court. [Citing cases.] If evidence is introduced relative to the degree of requisite vigilance, and the inferences therefrom are honestly debatable,

it becomes a question of fact for the jury to determine. [Citing cases.] In the instant case, whether respondent looked in the direction from which appellant was approaching, whether the point from which observation was made was prudently selected, whether respondent should have seen appellant's car within a distance of sixty feet, whether respondent should have looked north and south, or north alone, and whether due vigilance was observed continuously, were disputable questions of fact upon which reasonable minds might legitimately debate and honestly reach different conclusions. The question was properly submitted to the jury, and its finding under all the circumstances of the case is conclusive upon appeal." Lavin v. Fereira, 10 Cal.App.2d 710, 712, 52 P.2d 518, 519; see, also, Zehnder v. Spaulding, 53 Cal.App.2d 268, 127 P.2d 620; Anthony v. Hobbie, 25 Cal.2d 814, 155 P.2d 826. It is not negligence to assume that one is not exposed to danger which comes to him only from the violation of law or duty by another person. Dickinson v. Pacific Greyhound Lines, 55 Cal.App.2d 824, 827, 131 P.2d 401.

[9] Appellant cites numerous cases in which pedestrians have been held contributively negligent as a matter of law. They depend upon the circumstances of the particular cases and are not applicable here, where the plaintiff actually observed the car, its speed and relation to him, the width of the street and absence of traffic, and concluded that it was safe to cross. "Whether a mistake in judgment by a pedestrian when crossing a street, as to the speed and danger of an approaching vehicle constitutes contributory negligence, is a question for the jury." Kirk v. Los Angeles Ry. Corp., 26 Cal.2d 839, 161 P.2d 673, citing Lowell v. Harris, 24 Cal.App.2d 70, 74 P.2d 551; Welch v. Sink, 24 Cal.App.2d 231, 74 P.2d 832; Ladas v. Johnson's B. & W. Taxicab Co., 43 Cal.App.2d 223, 110 P.2d 449; Sanker v. Humborg, 48 Cal.App.2d 203, 119 P.2d 431; Nightingale v. Birnbaum, 11 Cal.App.2d 34, 52 P.2d 955; Gallardo v. Luke, 33 Cal.App.2d 230, 91 P.2d 211.

[10-12] Appellant also contends that the court erred in instructing the jury that it could consider permanence of the injuries, if any, in fixing damages. There is no contention that the form of the instruction is incorrect, but appellant argues that there is no evidence that the injury is permanent, and that hence the instruction authorized the jury to award damages for future injury not certain to occur. There was no error in the giving of the instruction. It authorized the jury to consider permanent injuries, if any, and loss of wages which plaintiff is reasonably certain to suffer in the future because of his impairment, if any. Section 3283, Civil Code, authorizes damages for detriment certain to result in the future. The "detriment" for which damages can be awarded is not limited to impairment of earning capacity or pain. While the medical testimony is not as clear as might be desired on this issue, plaintiff's physician, Dr. Dillon, testified that there will be a permanent difference in the size of the injured and uninjured leg, that the difference in circumference means that the muscles of the injured leg are smaller and correspondingly weaker; that there had been some atrophy of the left leg and calf; that two years after the accident there was some limitation of motion; that there was a permanent overlapping of the fibula. It also appeared that plaintiff had been disqualified because of his injury for regular military service, and had been accepted only for limited service as a specialist. This evidence supports the submission to the jury of the question of permanence of the injury as an element of damages. The permanent weakness of the left leg having been shown, impairment of the minor plaintiff's earning power could properly be considered by the jury, being within the knowledge and observation of the jury as persons of ordinary intelligence and experience. Girard v. Irvine, 97 Cal.App. 377, 385, 275 P. 840; Ostertag v. Bethlehem, etc., Corporation, 65 Cal.App.2d 795, 151 P.2d 647; Bauman v. City and County of San Francisco, 42 Cal.App.2d 144, 108 P.2d 989; Kimic v. San Jose & Los Gatos, etc., Ry. Co., 156 Cal. 273, 104 P. 312.

The judgment appealed from is affirmed.

KNIGHT and WARD, JJ., concur.

71 Cal.App.2d 55

BAYS v. CLUGSTON.

Civ. 14655.

District Court of Appeal, Second District, Division 3, California.

Sept. 28, 1945.

1. Automobiles ⚷244(33, 38)

Evidence, including testimony of defendant motorist that he was traveling in city with lights on low beam at rate of between 20 and 25 miles per hour, and that visibility at time he struck pedestrian attempting to cross street between intersections was so poor that he could see only 20 or 30 feet ahead, supported finding that motorist was guilty of negligence proximately causing the accident.

2. Automobiles ⚷217(3)

A pedestrian is not prohibited by statute from crossing street at a place outside a crosswalk. Vehicle Code, § 562, St.1935, p. 188.

3. Automobiles ⚷227(2)

Even if pedestrian in attempting to cross street between intersections outside of a crosswalk failed to yield right of way to approaching automobile, motorist was not relieved from duty of exercising due care for safety of pedestrian. Vehicle Code, § 562, St.1935, p. 188.

4. Automobiles ⚷245(72)

Evidence failed to establish as matter of law that pedestrian attempting to cross street about 110 feet from intersection and outside of crosswalk was guilty of contributory negligence, so as to preclude recovery for injuries sustained when struck by automobile. Vehicle Code § 562, St.1935, p. 188.

5. Automobiles ⚷217(3)

While the duty to yield right of way imposed upon a pedestrian by statute relating to crossing a roadway between intersections outside of crosswalk may call for a higher degree of care while crossing between intersections, the real question in such case is whether the required care has been exercised, and not merely whether the right of way has been actually yielded. Vehicle Code, § 562, St.1935, p. 188.

6. Appeal and error ⚷1010(1)

Questions of negligence and contributory negligence are for trial court to determine in a case tried without a jury, and its findings thereon when supported by evidence will not be disturbed on appeal.

◆

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Charlie F. Bays against John M. Clugston for injuries as result of being struck by an automobile driven by defendant. From a judgment for plaintiff, the defendant appealed.

Affirmed.

Hunter & Liljestrom, of Los Angeles, for appellant.

Lindelof & Perelli-Minetti, of Los Angeles, for respondent.

PARKER WOOD, Justice.

This is an action for damages for personal injuries sustained by plaintiff, a pedestrian, as a result of being struck by an automobile driven by defendant. In a trial without a jury, plaintiff obtained judgment. Defendant appeals from the judgment and contends that plaintiff was guilty of contributory negligence as a matter of law.

The accident occurred about 110 feet south of the intersection of Los Robles Avenue and Del Mar Avenue in Pasadena. These avenues will be referred to as Los Robles and Del Mar. Los Robles in that vicinity extends north and south and is 48 feet wide. Del Mar extends east and west, intersects Los Robles at a right angle, and is 32 feet wide. At the intersection there are marked pedestrian crosswalks extending across Los Robles at the north and south sides of Del Mar. There is a sidewalk on each side of Los Robles, and between each sidewalk and the curb there is a parkway. Along each parkway there are large pepper trees, the branches of which overhang the street on each side approximately 18 feet. There were street lights on each of the four corners of the intersection, and there was a street light on the east side of Los Robles about 100 feet south of the intersection and another street light on the west side of Los Robles about 85 feet south of the intersection. The street lights were lighted at the time of the accident. There were no traffic signals at the intersection and there were boulevard stop signs only for east-west traffic on Del Mar. There were no white pavement lines on Los Robles at the place of the accident.

Plaintiff lived at the southwest corner of the intersection above mentioned, and kept his automobile in a garage at the rear of a residence on the east side of Los Robles. The driveway from the street to the garage is 160 feet south of the south curb of Del Mar. On October 23, 1941, about 6:15 p.m., after dark and when the atmospheric conditions were foggy, and there was a drizzling rain, plaintiff drove his automobile to the garage, and then walked westerly along the driveway to the sidewalk on the east side of Los Robles, and thence diagonally in a northwesterly direction to the east curb of Los Robles to a point about 130 feet south of the south curb of Del Mar.

Plaintiff testified that he stopped at said point on the east curb of Los Robles, looked toward the south along Los Robles, saw an automobile approaching about 175 to 200 feet away, and he waited until that automobile passed him and then stepped into the street; that he walked diagonally in a northwesterly direction across Los Robles intending to go to his residence on the southwest corner of the intersection; that he did not look toward the south again until he had gone to a point on Los Robles designated on a map in evidence as point "C." Point C was approximately 10 feet west of the center of Los Robles. He testified further that when he was at point C he saw two or more cars coming from the north on Los Robles and he waited at point C until those cars had passed to the west of him; that there was another car coming from the north which passed to the east of him; that after those cars had passed him, while he was at point C, he heard "the rubber burning" behind him and he looked over his shoulder and "got a glance of one heading in my [his] direction," and he then ran 2 or 3 steps and was struck by the bumper of defendant's automobile which was coming from the south; that defendant's car traveled about 6 feet in a northwesterly direction after it struck him; and that when the automobile came to a stop plaintiff was hanging on the left side of the front bumper. Plaintiff testified that he was 73 years of age; that at the time of the accident he was wearing a white hat, dark coat, and overalls with white and blue stripes; and that his hearing and eyesight were good.

Defendant testified that he was driving north on Los Robles, about 3 feet east of the center of the street traveling between 20 and 25 miles an hour; that the headlights of his automobile were on the "low-beam"; that the visibility was extremely bad; that the windshield wipers were working; that he could see 20 or 30 feet ahead of his automobile; that as he was proceeding on Los Robles he saw a silhouette, 20 to 25 feet ahead of him, against the light of approaching cars; that when he saw that object he turned to the right as far as he could, about 2 feet, applied the brakes, and stopped the car; that there was no impact between his car and the object; that he opened the door of his car and looked back to see if the object, which he assumed was a human being, was proceeding on its way to the curb, and he saw a dark object in back of him in line with the left side of his automobile; that he went back to that object, a distance of approximately 12 feet from his automobile, and found the plaintiff "on one knee" and he had some currency in his hand.

A witness called on behalf of defendant testified that at the time of the accident he was driving his automobile north on Los Robles and he noticed a dark object in the street when he was between 50 and 60 feet from the object; that as he drew closer he noticed it was a man; that the man, the plaintiff, was lying approximately in the center of the street; that an automobile was standing on Los Robles "just directly ahead" of the plaintiff, approximately 8 feet north of him and 4 feet to the east; that the tail light of the automobile was lighted; and that the plaintiff had some currency in his hand.

A police officer, called on behalf of defendant, testified that he was present at plaintiff's home when plaintiff said to another officer that, "The car was not coming very fast. I thought I could get by him when I was in front, it hit me near the center of the street." He testified further that defendant said: "All of a sudden the man loomed up in front of my car, which was about 150 feet south of Del Mar. He was about 50 feet in front of my car and standing still. I yelled and swung my car and put on the brakes. I did not feel any impact. As I went by, I saw shadows in the street. I then stopped my car."

The court found that plaintiff stopped at the curb before going upon the street, looked northerly and southerly along Los Robles, and saw the headlights of one automobile some 200 feet to the south of the point where he was standing; that he thereupon began to walk slowly across Los Robles in a westerly direction "angling to the north"; that plaintiff yielded the right of way to the automobile which passed to the west of him, and then continued walking across Los Robles in a careful manner until he "had about reached the center of Los Robles"; that defendant operated his automobile so negligently at a speed greater than was then reasonable so as to strike plaintiff who was then "about at the center line of Los Robles Avenue"; and that the negligence of the defendant was the sole proximate cause of the accident.

[1-6] The evidence was sufficient to support the finding that defendant was guilty of negligence proximately causing the accident. It should not be concluded as a matter of law that plaintiff was guilty of contributory negligence. Plaintiff was required under the provisions of Section 562 of the Vehicle Code to yield the right of way to vehicles upon the street. When plaintiff was about to start across the street he yielded the right of way to an automobile which was then about 200 feet away, which automobile, in the view of the evidence most favorable to plaintiff, was the only automobile then approaching which would constitute an immediate hazard. Plaintiff was not prohibited by the provisions of said Section 562 from crossing the street at a place outside a crosswalk. Genola v. Barnett, 14 Cal.2d 217, 220, 93 P.2d 109. Even if plaintiff failed to yield the right of way, defendant was not relieved from the duty to exercise due care for the safety of plaintiff. Section 562, Vehicle Code, St.1935, p. 188. The plaintiff was about the center of the street when the accident occurred. There was no marking on the street to indicate the center. According to the testimony of one of the officers, the defendant said he saw the plaintiff standing still about 50 feet in front of defendant's automobile. The defendant testified, as above stated, that under conditions when visibility was extremely bad and he could see only 20 or 30 feet ahead, he was traveling about 25 miles an hour near the center of the street. He said there was no impact; however, for some reason he stopped his automobile quickly and went back to the "dark object" he had just passed. The impact was of sufficient force to break plaintiff's legs. In Shipway v. Monise, 59 Cal.App.2d 565, at page 571, 139 P.2d 60, at page 63, it was said: "While the duty to yield the right of way, imposed on a pedestrian by section 562, may call for a higher degree of care while crossing between intersections, the real question of fact in such a case is whether the required care has been exercised, and not merely whether or not the right of way has been actually yielded." In Fuentes v. Ling, 21 Cal.2d 59, at page 62, 130 P.2d 121, at page 122, wherein a pedestrian was crossing a street outside a crosswalk, the court said: "The questions of negligence and contributory negligence were for the trial court to determine [citing cases], and its findings when supported by the evidence will not be disturbed on appeal."

The judgment is affirmed.

DESMOND, P. J., and FOX, Justice pro tem., concur.

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71 Cal.App.2d 104

HAMILTON v. SALOPEK.

Civ. 7153; Sac. 5707.

District Court of Appeal, Third District, California.

Oct. 1, 1945.

1. Contracts 🔑147(3)

A contract must be construed as a whole with the intention of the parties to be ascertained from the entire instrument and not from detached portions thereof.

2. Contracts 🔑147(1)

Each contract must be construed according to its meaning and no rigid rules of construction can be applied that will do violence to the intention of the parties.

3. Master and servant 🔑1, 81

Where contract recited that plaintiff had an established medical practice from which he would be absent because of military service, that defendant agreed to associate with, and maintain the practice for, plaintiff until plaintiff's return, and that defendant should receive for compensation a certain percentage of the "net office income" contract as a whole indicated that it was a mere employment contract, and defendant was required to account to plaintiff for accounts receivable on at least the same basis as provided in the contract for division of net office income.

Appeal from Superior Court, Yuba County; Warren Steel, Judge.

Action by R. Lucian Hamilton against Joseph J. Salopek for an accounting. From an adverse judgment, defendant appeals.

Affirmed.

Rich & Weis and Carlin & Fuidge, all of Marysville, for appellant.

Manwell & Manwell, of Marysville, for respondent.

PEEK, Justice.

This is an appeal by defendant from an adverse judgment in an action for an accounting.

The sole issue involved is the right as between the parties, both of whom are licensed medical practitioners, to certain accounts receivable which had accrued during the course of their business association and remained uncollected at the termination thereof. Said association was predicated upon a written contract by virtue of which defendant was placed in charge of the office and professional equipment belonging to plaintiff while the latter was away on military duty. Under the terms of said contract the defendant was to receive a specified salary or drawing account and a designated percentage of the "net office income." During the life of the agreement the defendant regularly accounted for and paid over to plaintiff the share due the latter based upon the cash receipts. Upon the termination of the arrangement the defendant refused to account to plaintiff for any portion of the outstanding accounts receivable, and plaintiff thereupon brought this action to recover his alleged proportionate share of said accounts. The judgment of the trial court was in his favor, ordering a division of said accounts on the same basis as that provided for "net office income" in said agreement.

It is appellant's contention that as the contract uses the phrase "net office income" in referring to the income which was to be divided between the parties, such phrase must be construed to mean the actual money received and not accounts receivable. He further contends that as payments were made each month in accordance with the terms of the contract that therefore when the agreement was terminated plaintiff "had already been paid everything that had been collected" during the course of the contract and he was entitled to nothing further.

[1, 2] It is a fundamental rule of interpretation that a contract must be construed as a whole with the intention of the parties to be ascertained from the entire instrument and not from detached portions thereof. As stated in the case of Hunt v. United Bank, etc., 210 Cal. 108, 115, 291 P. 184, 187," * * * each contract, of necessity, must be construed according to its meaning, and no rigid rules of construction can be applied that will do violence to the intention of the parties. The problem is not what the separate parts of the contract may mean, but rather what the contract means as a whole. The separate parts have little weight when compared with the contract in its entirety."

Turning then to the contract itself we find recitals at the beginning thereof which state in part that: "Whereas, the party of the first part [*Dr. Hamilton*] *has an established medical practice* * * * and whereas, the said Dr. R. Lucian Hamilton has been called for military duty * * * *and will be absent from his said practice* for a certain length of time * * * and whereas the party of the second part [*Dr. Salopek*] does by these presents *agree to* associate with, and *maintain the medical practice of, the party of the first part,* * * * *until* the *party of the first part shall* be released from the Government Service and * * * *resume his said practice.*" (Italics added.)

It is then provided that Salopek shall receive "as compensation" a specified amount for three months. Thereafter, provided the agreement "is in existence", he should receive, after designated office expenses were paid, a certain percentage of the "net office income" according to the formula therein set forth. The contract further provided that if Dr. Hamilton did not return to "his practice" Dr. Salopek was given the option to either continue as an associate or "purchase the practice" from him. If, however, he returned within a short period of time further agreements might be necessary. It also provided if the parties could not agree upon an association advantageous to both, Dr. Hamilton agreed that Dr. Salopek could practice in the same community. Finally the last paragraph of said contract specifically provided, "*The purpose of this agreement is to provide* for such period of time as the party of the first part is in the military service of the United States and absent from the community and *for the preservation of his practice.*" (Italics added.)

[3] From this summary of the entire agreement it appears that said contract was nothing more than a contract of employment wherein a profit sharing arrangement had been worked out between the parties. Nothing can be found therein even intimating that Dr. Hamilton was in any way selling or disposing of, or otherwise turning over his practice to Dr. Salopek. The practice remained that of Dr. Hamilton for the preservation of which the contract was executed. This being true, the defendant was entitled only to that "compensation" which the contract specifically gave to him. Under the circumstances herein plaintiff might well have been entitled to an accounting for all accounts receivable from the defendant. However, plaintiff by his complaint merely requested that defendant be required to account for plaintiff's share in the accounts receivable on the same basis as provided in the agreement for the division of "net office income."

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

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71 Cal.App.2d 5

PEOPLE v. McKINNEY et al.

Cr. 569.

District Court of Appeal, Fourth District, California.

Sept. 27, 1945.

Hearing Denied Oct. 25, 1945.

1. Conspiracy 🔑48
Criminal law 🔑742(2)

In prosecution for conspiracy to receive and for receiving stolen property, whether witness against defendants was a coconspirator or an accomplice to the overt acts related in the information and the crimes charged against defendants was question for jury. Pen.Code, § 1111.

2. Criminal law 🔑1159(5)

Jury's implied finding that there was sufficient corroboration of accomplice's testimony could not be disturbed on appeal. Pen.Code, § 1111.

3. Criminal law 🔑742(2)

As respects charge of receiving stolen property, whether the thief or coconspirator to receive stolen property was an accomplice of the one receiving stolen goods was for jury. Pen.Code, § 1111.

4. Criminal law 🔑511(1)

In prosecution for receiving stolen property, substantial independent corroborating evidence supported alleged accomplice's testimony and sustained conviction. Pen.Code, § 1111.

5. Criminal law 🔑878(1)

The verdict should make adequate reference to the information and the counts specified therein under which the issues were presented by plea of not guilty. Pen. Code, § 1151.

6. Criminal law 🔑893

Where one offense is charged and a general verdict is rendered, a verdict of guilty imports a conviction of the offense charged in the information and upon every material allegation therein contained. Pen. Code, § 1151.

7. Criminal law 🔑878(2)

Separate verdicts finding defendant guilty of receiving stolen property and of conspiracy to receive stolen property were general verdicts. Pen.Code, § 1151.

8. Criminal law 🔑875(1)

The form of the verdict is immaterial if the intention to convict of the crime charged is unmistakably expressed. Pen. Code, §§ 960, 1151, 1258, 1404.

9. Criminal law 🔑893

The form of verdict should be construed in connection with the information and the plea of the defendant. Pen.Code, § 1151.

10. Criminal law 🔑878(2)

Where the defendants were charged in count one with conspiracy to receive stolen property and in count two with receiving stolen property and jury were fully instructed as to such charges, separate verdicts against one defendant of guilty of conspiracy to receive stolen property and of receiving stolen property and against other defendant of guilty of receiving stolen property, without referring to the different counts or following statutory form, were not fatally defective in view of clear intention of jury to convict defendant of offenses charged in the information and absence of prejudice to defendants. Pen. Code, §§ 182, 496, 960, 1151, 1258, 1404.

◆

Appeal from Superior Court, Fresno County; Arthur C. Shepard, Judge.

C. S. McKinney was convicted of a conspiracy to receive and of receiving stolen property, and Michael Marcus was convicted of receiving stolen property, and they appeal.

Affirmed.

Edward L. Davin and E. L. Johnson, both of San Diego, for appellants.

Robert W. Kenny, Atty. Gen., and Howard S. Goldin, Deputy Atty. Gen., for respondent.

GRIFFIN, Acting Presiding Justice.

Appellants C. S. McKinney and Michael Marcus and defendant Dale Dodd, were jointly charged in Count I with the crime of criminal conspiracy to receive stolen property. It is alleged that they did, between certain specified dates, voluntarily conspire with each other and with one C. R. Holloway, Marvin Kelley, John Dunn, and divers other persons now unknown, for their own gain and to prevent the owner from again possessing said property, to buy and receive property which had been or would be stolen, knowing the same to be stolen. The overt acts charged are (1) that Dodd informed McKinney that he could obtain a quantity of cigarettes for the sum of $1 per carton, at which time defendants knew said cigarettes had been or would be stolen; (2) that subsequently and in pursuance of such conspiracy and to effect its object, defendants agreed to receive from Holloway a quantity of cigarettes to be delivered at a future date for $1 per carton, knowing that said cigarettes had been or would be stolen; (3) that thereafter defendants agreed to give Holloway $50 for the delivery of the stolen cigarettes; (4) that defendants met with Holloway, Kelley, and Dunn for the purpose of arranging for the sale of said stolen cigarettes to defendants; (5) that again defendants met with Holloway, Kelley and Dunn for the same purpose; (6) that defendants later met with Dunn and agreed that the cigarettes would be delivered to defendants' place of business, namely, the Club Biltmore, on the early morning of January 16, 1945, knowing at the time that said cigarettes had been or would be stolen; (7) that on January 16th defendants, in pursuance of such conspiracy, received from Kelley and Dunn, eleven bales of cigarettes, knowing the same to have been stolen, which were in fact stolen from the Post Exchange, Camp Pinedale, in Fresno County; (8) that defendants then paid Dunn $500 therefor; (9) that thereafter defendants concealed and withheld such stolen property from the owner.

The second count of the information charges each appellant, McKinney and Marcus, with the crime of "receiving stolen property" in that they did, for their own gain and to prevent the owner thereof from again possessing said property, on January 16, 1945, receive 11 bales of cigarettes belonging to the Post Exchange, then and there knowing the same to have been stolen. After a plea of not guilty was entered a trial was had by jury which returned separate verdicts of guilty as to appellant McKinney on the charges of conspiracy to receive stolen property and of receiving stolen property. A separate verdict of not guilty was returned on the conspiracy count but guilty on the receiving stolen property count as to appellant Marcus.

During the course of the trial, on motion of his counsel, the case was dismissed as to defendant Dale Dodd.

Appellant McKinney was the manager of, and appellant Marcus and defendant Dale Dodd were employees in a night club known as Club Biltmore, in Fresno. Kelley and Dunn were privates in the Army and were stationed at Camp Pinedale near that same city. Holloway was stationed at the Fair Grounds.

On the night of January 5, 1945, Dunn and Kelley met Holloway near the club. They told Holloway that they had about 1000 cartons of cigarettes that they would like to sell if he knew where he could sell them at $1 per carton. Holloway replied that he would try to find a purchaser. On January 7th Holloway met defendant Dale Dodd and informed him about the cigarettes. During a later conversation, Dale Dodd told Holloway that he thought his brother Joe Dodd would like to take about 500 of the cartons. About January 10th Holloway had a conversation with appellant McKinney at the club and told him about Dunn and Kelley and offered to get 500 cartons at $1 per carton for him. McKinney said: "Bring them around." On

January 10th Kelley was introduced to McKinney for the first time by Holloway. They conversed about the deal and Kelley told McKinney that Dunn was at some gunnery class, would be back on Sunday night, and that soon thereafter the cigarettes would be delivered. Again, on January 12th, Holloway and McKinney conversed at the club. Holloway told McKinney that this deal was strictly non-profit, as far as he was concerned, and McKinney told him that he would give him $50 if it went through.

Joe Dodd, brother of Dale Dodd, owned a lunch stand in Fresno. Holloway testified that he first approached Joe Dodd about January 12th, at the Club Biltmore; that he told him he knew where cigarettes were available and asked him if he wanted to buy some; that he answered in the affirmative and that he told Joe Dodd he would arrange a meeting between him and the persons who had them. Subsequently, Holloway told John Dunn of the conversation with Joe Dodd and that Joe could be located at his cafe. Dunn later visited Joe Dodd at his place of business. On January 14th Dunn, Kelley, Holloway and McKinney met, in a booth, at the Club Biltmore. Dunn told McKinney that the cigarettes would be delivered sometime during the early morning of January 16th; that there would be 500 cartons at $1 apiece. McKinney agreed and informed them that they need not worry about the cigarettes being found at the club as he wouldn't keep them there.

On January 15th the Camp Pinedale Army Post Exchange had on hand about 30,000 packages of cigarettes. The bales or boxes in which the cartons were contained were plainly labeled: "Post Exchange, Camp Pinedale, California," in type about 1½ inches in height. There were no identifying marks on the packages of cigarettes or cartons to distinguish them from those purchased on the open market. During the early morning hours of January 16th, Dunn and Kelley stole an army truck from the camp and drove to the Post Exchange, broke open the rear door, stole and removed 26 full bales and some broken bales of cigarettes, which bales contained about 50 cartons each. The truck, driven by Dunn, crashed the west gate of the camp. Kelley was just outside in a stolen Chevrolet. They drove to a vacant lot in Fresno. Ten bales of cigarettes were transferred from the truck to the Chevrolet. Dunn and Kelley drove the Chevrolet directly to the Club Biltmore and arrived at about 2:45 a. m. Five minutes thereafter appellants McKinney and Marcus drove up. They all retired to an apartment back of the club. There Dunn informed McKinney that the cigarettes were in the Chevrolet. McKinney stated that the transfer would be made away from the club. About 3:20 a. m. Dunn asked if he could use the phone in the apartment to get in touch with Joe Dodd. Dunn placed the call but McKinney took the phone and told Dodd that the boys were out there with the cigarettes and for him to come and get them or make some arrangements to have them delivered. Joe Dodd testified that he did not know he was talking to McKinney but believed it to be the soldier who had previously made arrangements with him about the sale of the cigarettes. Kelley and McKinney stayed at the apartment. Marcus and Dunn left and remained away about 20 minutes. Kelley heard their car drive away. After Marcus and Dunn returned Kelley noticed the cigarettes had been removed from the Chevrolet. Later, Kelley drove the Chevrolet back to the army truck and loaded 12 more cases of cigarettes into the Chevrolet. When he returned, Dunn, McKinney, Marcus and Joe Dodd were present.

Joe Dodd testified that he received a phone call at his home in the early morning of January 16th telling him to pick up the cigarettes at the Club Biltmore; that he had made no arrangements for the delivery of the cigarettes at that club; that prior thereto he did not know that Marcus or McKinney would be there or that any cigarettes were being delivered to them; that he had never discussed the purchase of cigarettes with Marcus or McKinney; that he then learned for the first time that cigarettes were being delivered to them; that he did not know, when he bought the cigarettes, that they were stolen and no one told him that they were; that Dunn told him they were not stolen and had he known they were so stolen he would not have taken them; that he did not look at them to observe the "Camp Pinedale" on the sides of the bales; that Kelley brought one bale of cigarettes into the apartment and Marcus checked to see if the bale was full; that Kelley then drove the Chevrolet and Joe Dodd drove his own car about 200 feet from the club where 11 bales of cigarettes were transferred by Kelley to Joe Dodd's car; that Kelley then returned to the apartment; that a 12th bale of cigarettes had been turned over to McKinney prior to the delivery to Dodd. On their return to the club, when all the parties mentioned were present, McKinney asked Dunn if Marcus had given him the $500. Dunn said he had been given that amount. Joe Dodd saw Marcus pay that sum to Dunn when Kelley was present. A short time after the cigarettes were delivered to Dodd and McKinney, Dunn and Kelley left. Later, Dunn gave $200 to Holloway, $400 to Kelley, and retained the balance which appeared to be about $400.

An officer at Camp Pinedale testified as to the burglary and the number of bales of cigarettes missing; that they were marked "Camp Pinedale Exchange"; that the bale of cigarettes in evidence (recovered from Joe Dodd, marked as indicated) "contained cigarettes of the size and nature that we have had out at the Post Exchange." No carton or package of that description was found on the Club Biltmore premises or in the possession of the appellants when search was made at a later date.

During the course of the trial Joe Dodd testified that he had the promise of the District Attorney that if he would testify in this case he would not be prosecuted; that he received only 11 bales from the army boys and disposed of most of them and that he delivered the remaining bale to the District Attorney.

Holloway and Kelley testified for the prosecution. Appellant Michael Marcus failed to testify at the trial. Appellant McKinney was a witness in his own behalf and testified that he met Holloway at the Club Biltmore; that he was a friend of Dale Dodd; that about January 1st he (McKinney) bought 18 small packages of cigarettes from Holloway; that Holloway had apparently purchased these at the exchange; that Holloway asked him if he would like some more later on; that he stated he would; that Holloway introduced Kelley to him about January 12th and stated that Kelley might also bring him some cigarettes; that Kelley agreed to this; that on January 15th Kelley, Holloway and Dunn talked to him in a booth at the club and they asked him if he "was interested in buying the cigarettes"; that he told them he was; that nothing was said about the price or amount; that after the close of the club on the night of the 15th he and Marcus checked the sales and cash; that they completed this task about 2 a. m. and drove to a near-by place to get something to eat; that they retired to the rear of the club into the apartment in which he lived and saw the Chevrolet with Dunn and Kelley sitting in it; that Dunn asked him if he had seen Joe Dodd and also asked if he would be interested in some cigarettes; that he asked how many he had and that he said 25 or 30 cases; that he told him he would not be interested in that amount; that Dunn called Joe Dodd and told him that he was at the Club Biltmore and that he had his cigarettes for him and wanted to know where he would like them delivered; that he talked to Joe Dodd and Dodd asked him to receive and pay for them for him; that he told him he wanted nothing to do with those cigarettes and if he wanted them he could come out and get them; that Joe said he would be right out; that Marcus, Dunn, Kelley and Joe Dodd were later present in his apartment; that Dunn told Joe Dodd that Kelley would go with him to make the transfer of the cigarettes into his car; that they left for about 15 minutes; that Kelley brought a bale of cigarettes into his apartment and said: "This is for your trouble" and that he told him he didn't want any part of it; that Kelley then took it away; that there was no other conversation about the cigarettes and that no money passed in his presence; that he received no cigarettes and paid no money to anyone. He denied having any other conversation with any of the parties mentioned. On cross-examination he admitted having been previously convicted of a felony on two counts of burglary.

Holloway testified that he at no time knew the cigarettes were to be stolen or that they had been stolen. Kelley testified that he and Dunn had burglarized at least five places in Fresno between December 5th and January 16th.

[1, 2] It is argued on this appeal that Joe Dodd was an accomplice or co-conspirator, as a matter of law, and that therefore there was no substantial corroboration of the testimony of the accomplices to show appellants' connection with the crime or crimes of which they were convicted. The testimony of Holloway and Kelley, if believed by the jury, clearly shows the commission of the offenses charged. The testimony of appellant McKinney corroborates their testimony to a great extent. Added to this is the testimony of Joe Dodd. It cannot be said, from the evidence, as a matter of law, that Joe Dodd was a co-con-

spirator, or an accomplice to the overt acts related in the information and the crimes charged against these particular appellants. The most that could be said is that the question was one of fact for the jury to determine under proper instructions. People v. Ross, 46 Cal.App.2d 385, 394, 116 P.2d 81; People v. Compton, 123 Cal. 403, 56 P. 44; People v. Williams, 30 Cal.App. 2d 234, 85 P.2d 974. The jury was repeatedly instructed in the language of sec. 1111 of the Penal Code as to who may be an accomplice and that the testimony of an accomplice must be corroborated; that it was "necessary that the prosecution prove, by evidence outside of and in addition to, that of the co-conspirators, that the agreement or conspiracy did in fact exist and that the defendants were connected therewith as conspirators. It is not necessary that all of the facts and circumstances of the conspiracy be shown by such independent evidence, but only that the agreement existed and that these defendants were a part of such conspiracy as participants." No complaint is made as to the court's instructions given on the subject. They were full and complete. The jury believed that there was sufficient corroboration of the accomplice's testimony. This implied finding cannot be disturbed on appeal.

[3, 4] As to the charge of "receiving stolen property" set forth in the second count of the information, it cannot be held that the thief, or co-conspirator to receive stolen property, must be, as a matter of law, regarded as an accomplice of the one receiving the stolen goods. In re Morton, 179 Cal. 510, 177 P. 453; People v. Clapp, 24 Cal.2d 835, 151 P.2d 237; People v. Stoddard, 48 Cal.App.2d 86, 119 P.2d 160; People v. Burness, 53 Cal.App.2d 214, 127 P.2d 623. Notwithstanding this contention, there is substantial independent corroborating evidence supporting the claimed accomplice's testimony to uphold the convictions on this count.

It is next argued, in the opening brief of appellants, that the acquittal of Marcus of the conspiracy charge was indirectly an acquittal of that defendant of the crime of receiving stolen property. In their reply brief they concede that the holding in People v. MacMullen, 218 Cal. 655, 24 P.2d 793, destroys this argument.

The next error complained of, which is of a more serious nature, results from an unhappy wording of the separate verdicts returned against the appellants. These separate verdicts, as to each defendant, read as follows: "We, the jury in the above-entitled action, find the defendant * * * guilty of receiving stolen property." "We, the jury * * * find the defendant C. S. McKinney guilty of conspiracy to receive stolen property." It will be noted that neither verdict recites: "as charged in the first count of the information," or "the second count." Appellants contend that this omission is fatal and reversible error resulted. A similar form of verdict as to "receiving stolen property" was returned in the case of People v. Tilley, 1901, 135 Cal. 61, 67 P. 42, cited by appellants, in which case the judgment of conviction was reversed and the defendant ordered discharged for reasons therein set forth. In addition thereto appellants cite People v. Small, 1 Cal.App. 320, 322, 82 P. 87; People v. Bowman, 24 Cal.App. 781, 787, 142 P. 495; People v. Cornell, 29 Cal. App. 430, 443, 155 P. 1026; People v. De Vaughn, 136 Cal.App. 746, 749, 29 P.2d 914; People v. Murray, 42 Cal.App.2d 209, 215, 108 P.2d 748.

[5-9] It is argued that, as to the second count, the verdicts lack the essential elements of the offense charged, to wit, that the property was received for their own gain, and knowledge that they knew the property was stolen; that as to the first count relating to the conspiracy charge, the verdict lacked the essential elements of knowledge, personal gain to defendants, as well as intent to prevent the owner from possessing said property. We must concede that the prosecution did not follow the form of verdict prescribed in sec. 1151 of the Penal Code. Proper pleading would require that the verdict make adequate reference to the information and counts specified therein under which the issues were presented by the plea of not guilty. The rule generally applied in cases where one offense is charged, and where a general verdict is rendered, is that the verdict of guilty imports a conviction of the offense charged in the information and upon every material allegation therein contained. People v. March, 6 Cal. 543; Sec. 1151, Penal Code. The verdicts in the instant case were general verdicts. People v. McCarty, 48 Cal. 557; Sec. 1151, Penal Code. There are innumerable authorities which declare that the form of the verdict is immaterial if the intention to convict of the crime charged is unmistakably expressed.

People v. Mercado, 59 Cal.App. 69, 74, 209 P. 1035; People v. West, 73 Cal. 345, 14 P. 848; People v. Adams, 92 Cal.App. 6, 267 P. 906. Penal Code, section 1404, provides that "Neither a departure from the form or mode prescribed by this code in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right." See, also, Penal Code, secs. 960 and 1258. The form of verdict should be construed in connection with the information and the plea of the defendant. People v. Mercado, supra.

The charging portion of the information in this case reads: "Count I. The District Attorney * * * accuses (defendants) * * * of a felony, to wit: Criminal Conspiracy to Receive Stolen Property In that the * * * defendants * * * conspired * * * etc." Then follows the enumeration of the alleged overt acts. "Count II. Complainant further accuses said defendants * * * of the crime of a felony, to wit: Receiving Stolen Property, committed as follows:" Then follows the specified charge in the general language of section 496 of the Penal Code. In conjunction therewith it should be noted that by stipulation the jury took with it to the jury room a copy of the information setting forth in full the charges above related. The trial court thoroughly instructed the jury on the necessary elements essential to prove before a conviction could be had on each count. When presenting the verdicts to the jury the trial judge then instructed the jury in the following language:

"Now, those instructions are rather long and for that purpose I desire to review a little of it in order to clarify in your minds the difference between the two offenses which are charged in the information and with respect to which it is your duty to pass on the facts.

"The defendants in this case are charged with two different crimes. First, the crime of conspiracy to receive stolen property. Second, the crime of receiving stolen property. The evidence necessary to convict is different in the two crimes * * * the soldiers who committed the burglary and theft of the cigarettes are not accomplices on the crime of receiving stolen property. Therefore, if you believe their testimony, and if it establishes the necessary elements of the crime, and convinces you thereof beyond a reasonable doubt, then their testimony would be sufficient standing alone, to justify your verdict of guilty against the defendants on the charge of *Count II* of the complaint, that is receiving stolen property." (Italics ours.)

When the jurors returned into court with the verdicts, they were individually polled as to each verdict. No objection was then taken by appellants as to the form thereof, as suggested in People v. Gayle, 202 Cal. 159, 163, 259 P. 750 (Sec. 1161, Pen.Code; People v. Cornell, 29 Cal.App. 430, 155 P. 1026), and no objection was made thereto on the motion for new trial. The question here presented was raised for the first time on this appeal.

In Johnson v. Visher, 96 Cal. 310, at page 314, 31 P. 106, at page 107, it is said:

"As a general rule, a party will not be heard to object to a verdict for the first time on appeal from the judgment, if it is susceptible of a construction which may have a lawful and relevant effect", relevant to the pleadings.

This was approved in People v. Morley, 8 Cal.App. 372, 376, 97 P. 84.

In Barbour v. State, 8 Ga.App. 27, 68 S.E. 458, it is said:

"A verdict is to be given reasonable intendment, and, when ambiguous, may be construed in the light of the issues actually submitted to the jury under the charge of the court; and if, when so construed, it expresses with reasonable certainty a finding supported by the evidence, it is to be upheld as legal." See, also, People v. West, 73 Cal. 345, at page 346, 14 P. 848, at page 849, wherein the court said,

"Section 1151 of the Penal Code provides that a verdict of guilty upon the general issue imports a conviction of the crime charged in the information. Under the instructions given in the court, the jury could not have been misled, and the verdict is sufficient in form and substance."

Under the facts related, it seems clear to us that the jurors were fully instructed as to the nature of the charges against the defendants and that the intention of the jury to convict the defendants of the offenses charged in the information is unmistakably expressed and sufficient in form and substance to apprise them of its conclusions as to the issues presented. It is true that most of the cases cited by appellants and those cited by respondent in support of the form of verdict distinguishes the form of verdicts in the cited cases from the one in the Tilley case by reason of the fact that the verdicts rendered in the cited cases refer specifically to the charge in the information or specified counts set forth therein. We are aware of the general rule stated in 8 Cal.Jur. p. 404, sec. 434, that "Where the statute in a word specifies and defines the crime, it is sufficient for the verdict so to specify it. Thus, it is sufficient for the verdict to find the defendant guilty of 'forgery' or of 'manslaughter'. But when the statute does not define the crime except as the specially forbidden acts define it, a verdict is insufficient which neither refers to the information nor contains a recital of the inhibited acts." People v. Tilley, supra; People v. Somsky, 46 Cal. App. 377, 189 P. 456.

In this connection it should be noted that section 182 of the Penal Code specifically defines the offense of criminal conspiracy. Section 496 of the Penal Code defines what acts constitute the offense and defines the offense under the sub-head: "Buying or receiving stolen property".

By inference, the language of People v. Chavez, 11 Cal.App.2d 388, 53 P.2d 1020, 1021 (hearing denied by Supreme Court), leads one to believe that People v. Tilley, supra, is affected by Article VI section 4½ of the Constitution. In that case the court upheld a verdict of conviction of "burglary in the first degree" and made reference to the Tilley case in the following language, 11 Cal.App.2d at page 390, 53 P.2d at page 1021:

"Appellant lays stress upon People v. Tilley, 135 Cal. 61, 67 P. 42 and other cases which preceded section 4 1/2 of article 6 of the Constitution. These cases which followed the rule of strict interpretation, and which were reversed on a meager showing of error, were decided upon an appeal from the judgment. None supports the argument of appellant that the verdict here in question was void upon its face."

People v. Tilley, supra, has been questioned on another ground. In People v. Ham Tong, 155 Cal. 579, 580, 102 P. 263, 264, it is said: "If it be the doctrine of the case of * * * People v. Tilley * * * that the defendant has been once in jeopardy in every case wherein a verdict of guilty of a crime not strictly embraced within the pleadings has been returned, and the jury has been discharged without consent, then those cases should be overruled." See, also, People v. Sachau, 78 Cal.App. 702, 704, 248 P. 960.

In People v. Cecil, 72 Cal.App. 565, 237 P. 568, the jury returned a verdict on a charge of "violation of the provisions of section 288 of the Penal Code" and omitted the words "as charged in the information". In affirming the judgment the court said, 72 Cal.App. at page 569, 237 P. at page 569:

"We are not prepared to follow the state to the extent that the verdict as rendered is free from legal objections. It has been pointed out in numerous cases that in the trial of cases of this nature the verdict should find the defendant guilty or not guilty of the offense 'charged in the information or indictment.' Though we entertain these views, it does not follow that the judgment should be reversed. At the time of the oral argument, we requested the appellant to point out to us what prejudice resulted to him from the form of the verdict, but he was unable to do so. We have examined the entire record with care and are satisfied from our examination that the appellant was fairly tried and fairly convicted of the offense charged in the information, and we are unable to perceive how any prejudice has resulted to him because the jury in rendering its verdict failed to include in its verdict the words 'as charged in the information.'

"Without approving the form of the verdict, but because no prejudice is shown to have resulted therefrom, the judgment and order denying a new trial are affirmed." See, also, People v. Eley, 121 Cal.App. 53, 8 P.2d 885.

[10] We are opposed to the contention that the verdicts as rendered in the instant case are void on their face and that defendants have been once in jeopardy. We prefer to follow the more liberal construction and give effect to the plain intention of the jury as expressed by their verdict rather than the technical construction applied in People v. Tilley, supra. We are firmly convinced that the defendants were not prejudiced by the claimed error or omissions in the form of verdicts. Considering the evidence, the pleadings, instructions, verdicts and the merits of the case, no miscarriage of justice resulted.

Judgment and order affirmed.

MARKS, J., concurs.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

70 Cal.App.2d 840

LA MALFA et al. v. PIOMBO BROS. et al.

Civ. 12872.

District Court of Appeal, First District, Division 2, California.

Sept. 25, 1945.

Rehearing Denied Oct. 25, 1945.

Hearing Denied Nov. 19, 1945.

1. Appeal and error 🔑927(7), 989

In determining appeal from a judgment entered on a directed verdict, appellate court must consider only the evidence most favorable to plaintiff, together with every inference which can reasonably be drawn and every presumption which can fairly be deemed to arise therefrom in support of plaintiff.

2. Principal and agent 🔑19, 119(1), 147(2)

Persons dealing with an assumed agent, whether assumed agency is general or special, are bound at their peril, if they would hold the principal, to ascertain not only the fact of agency, but the nature and extent of the authority, and, if either is controverted, the burden of proof is upon such persons to establish it.

3. Principal and agent 🔑147(2)

Contractor's foreman, in negotiating for use of a truck which he knew belonged to another, was bound to ascertain the scope and extent of authority of person with whom he negotiated to contract for use of the truck.

4. Principal and agent 🔑102(1)

A truck driver employed by agent whom owners authorized to rent the bare truck without driver to a contractor and to service the truck, or by third person to whom agent turned the truck over for servicing without owners' knowledge, was not an employee of owners.

5. Negligence 🔑32(1)

A possessor of property is bound to exercise ordinary care for safety of invitee and invitee's property upon premises in his possession and under his control.

6. Negligence 🔑32(1)

The servant of an independent contractor engaged in performing services on the land for its possessor occupies the status of invitee toward whom possessor owes duty of ordinary care.

7. Negligence 🔑55

Contractors were bound to exercise ordinary care for safety of truck which was on contractors' private roadway engaged in performance of services for contractors wrongfully as to owners, because operating under purported contract with owners' agent attempted to be made in excess of agent's authority, and which truck was in the control of a driver who was contractors' business invitee, but who had no authority from owners to operate truck.

8. Master and servant 🔑315

A principal is not liable for the negligence of an independent contractor.

9. Negligence 🔑136(15)

In action against general contractors for damage sustained by truck while performing services for contractors when it collided with truck of subcontractor on private roadway built by general contractors for use in performance of contract, whether general contractors retained control of such roadway and negligently permitted subcontractors to use it in a manner likely to produce collision such as occurred was for jury.

10. Negligence 🔑61(2)

If the realizable likelihood that a third person may act in a particular manner is one of the hazards which makes actor negligent, such an act, whether innocent, negligent, intentionally tortious, or criminal, does not prevent actor from being liable for harm caused thereby.

11. Master and servant 🔑318(1)

One who intrusts work to independent contractor, but retains control of any part of the work, is subject to liability for bodily harm to others, for whose safety employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

12. Master and servant 🔑318(1)

Where principal contractor intrusts part of work to subcontractors but superintends the entire job, principal contractor is subject to liability if he fails to prevent subcontractors from doing the work in a way unreasonably dangerous to others, if he knows or by reasonable care could know that subcontractors' work is being so done and has the opportunity to prevent it by exercising power of control retained in himself.

13. Negligence ⚷136(30)

Whether driver of truck was negligent so as to preclude recovery against general contractors for damage to truck on ground that general contractors negligently permitted use of private road under their control by subcontractors in a manner likely to produce collision such as occurred, was for jury.

14. Negligence ⚷136(9)

A person can be held guilty of negligence as matter of law only if that is the only conclusion that can be rationally drawn from the evidence and there is no room for reasonable minds to differ.

15. Automobiles ⚷192(1)

Where owners intrusted truck to agent with limited authority to rent it without driver to contractor and agent, rented truck with driver employed by agent, driver, later employed by third person to whom agent turned the truck over without owners' knowledge, was not owners' employee and was not driving truck with consent of owners within statute imposing liability on owner for negligence of person operating automobile with owners' consent. Vehicle Code, § 402, St.1943, p. 2808.

◆

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by J. La Malfa and others against Piombo Bros., a copartnership, etc., and others for damages sustained by plaintiffs' truck while being operated under rental agreement with named defendant. From a judgment for defendants entered upon a directed verdict, plaintiffs appeal.

Judgment reversed.

James F. Boccardo and Edwin H. Williams, both of San Jose, for appellants.

Henry F. Wrigley and John J. Taheny, both of San Francisco, for respondents.

DOOLING, Justice pro tem.

Plaintiffs appeal from a judgment for defendants entered upon a directed verdict. Defendant, Piombo Bros., is a copartnership engaged in the contracting business and at the time of the occurrence out of which this action arises had a contract to enlarge the San Francisco airport in San Mateo County. This work required the hauling of material to make a fill and, in addition to using several of their own trucks to haul this material, Piombo Bros. engaged the services of trucks owned by other persons. It is undisputed that in the case of the trucks owned by others than Piombo Bros., with the exception of the truck belonging to plaintiffs which is the subject of this action, the trucks were hired by Piombo Bros. with drivers furnished by the truck owners. It may be taken as established that the drivers of all such trucks were employees of the respective owners of the trucks and not of Piombo Bros. and that the owners of such trucks were subcontractors of Piombo Bros.

Among these subcontractors was a man named Morgan who was furnishing two trucks with drivers to Piombo Bros. Morgan, knowing that plaintiffs were the owners of an International truck, suggested to one Adams, a foreman for Piombo Bros., that if he was interested it might be possible to secure plaintiffs' International truck for use on the job. Adams stated that if Morgan could secure the truck he would be glad to have it. Morgan went to Morgan Hill and saw the plaintiff La Malfa. According to La Malfa's testimony Morgan stated to him that he could rent the truck to Piombo Bros. for use on the airport job and that Piombo Bros. would furnish the drivers and pay their wages. In this connection La Malfa testified positively as to his conversation with Morgan:

> "We said we didn't want to hire any drivers, we didn't want to have any drivers on the payroll; we would just rent the bare truck."

Morgan was called as a witness for defendants but his attention was not called to this testimony of La Malfa and it stands without conflict in the record.

Adams testified, however, that when Morgan brought the plaintiffs' truck to the job his agreement with Morgan was to hire the truck with a driver employed by the owners. It is clear from the testimony that the drivers of the plaintiffs' International truck were actually engaged by Morgan while he remained on the job and by one Grove after Morgan left. The wages of all drivers, including the drivers of plaintiffs' truck, were actually paid by Piombo Bros. and their wages charged back to the owners of the trucks. Piombo Bros. carried the workmen's compensation insurance on all truck drivers, their names and accounts were entered on Piombo Bros.'

books and they were reported to the insurance carrier as Piombo Bros.' employees.

By agreement with plaintiff, La Malfa, Morgan was to service the International truck while it was in use by Piombo Bros. and was to receive therefor ten per cent of the income from the truck. Shortly before the collision which gave rise to this action occurred Morgan sold his own trucks to Grove and left. He turned plaintiffs' truck over to Grove and asked him to keep it serviced and working on the job. Plaintiffs testified that they had never heard of Grove and did not know that he was servicing their truck until after the truck was damaged. Grove engaged one Scovil to drive plaintiffs' truck and while Scovil was hauling material on a private roadway built by defendant Piombo Bros. for use in performing their contract the truck came into collision with a truck owned by Diamantine Bros. and plaintiffs brought this action against Piombo Bros. for the damage to their truck sustained in this collision.

Before detailing the evidence of the circumstances surrounding the collision clarity will be served by first considering the legal relation of the plaintiffs and defendant partnership arising from the arrangement for the use of the truck made through the intermediacy of Morgan.

[1] We may first notice that we are bound by the rule recently restated by the Supreme Court in Wood v. Samaritan Institution, 26 Cal.2d 849, 161 P.2d 556:

"According to established principles it is our duty, in determining an appeal from a judgment entered on a directed verdict, to consider only the evidence most favorable to plaintiff, together with every inference which can reasonably be drawn and every presumption which can fairly be deemed to arise therefrom in support of plaintiff."

It is clear that Morgan's authority as agent for plaintiffs was exceeded when he undertook to hire drivers for their truck and to contract with defendants' foreman to furnish the truck to Piombo Bros. with a driver. We may note, in passing, that under plaintiffs' testimony, if believed, Grove had no authority whatever from plaintiffs and was not their agent for any purpose.

[2] The court said in Ernst v. Searle, 218 Cal. 233, 240, 22 P.2d 715, 717:

"A third person, such as appellant, is not compelled to deal with an agent; but if he does so, he must take the risk. He takes the risk not only of ascertaining whether the person with whom he is dealing is the agent, but also of ascertaining the scope of his powers. The rule is cogently stated in 1 Mechem on Agency (2d Ed.) § 743, p. 527, as follows: 'An assumption of authority to act as agent for another of itself challenges inquiry. Like a railroad crossing, it should be in itself a sign of danger and suggest the duty to "stop, look and listen." It is therefore declared to be a fundamental rule, never to be lost sight of and not easily to be overestimated, that persons dealing with an assumed agent, whether the assumed agency be a general or special one, are bound at their peril, if they would hold the principal, to ascertain not only the fact of the agency but the nature and extent of the authority, and in case either is controverted, the burden of proof is upon them to establish it.'"

[3] Adams, as agent for defendant partnership, in negotiating with Morgan for the use of plaintiffs' truck knew that the truck belonged to plaintiffs and not to Morgan. The duty was cast upon Adams to ascertain the scope and extent of Morgan's authority from plaintiffs to contract for the use of the truck. That inquiry if made would have disclosed that the limit of that authority was to rent the "bare truck" to Piombo Bros. and that Morgan had no authority to hire drivers for the truck or to contract with Piombo Bros. to furnish them the services of the truck with driver.

[4] Even if hired by Morgan, Scovil, who was driving the truck at the time of the collision, would not have been the employee of plaintiffs. That Scovil was in fact hired by Grove who, under plaintiffs' testimony, had no authority of any sort from them, only serves to make clearer the fact that Scovil was not the plaintiffs' employee.

The case is the not uncommon one of a purported contract with an agent in excess of the agent's authority by which the plaintiffs, as Morgan's principals, were not bound. This resulted in the anomalous situation of plaintiffs' truck being in use in defendants' work, wrongfully as to plaintiffs, but with defendants' full and complete acquiescence and consent.

The diligence of counsel has not produced a case dealing with the duty of care for the safety of the truck cast upon defendants under such circumstances. We are compelled, therefore, to arrive at the solution of this question by reasoning from analogies.

[5-7] A possessor of property is bound to exercise ordinary care for the safety of an invitee upon the property in his possession and under his control. 19 Cal.Jur. 618. This duty extends to the property of the invitee as well as to his person. Royal Ins. Co. v. Mazzei, 50 Cal.App.2d 549, 123 P.2d 586. The servant of an independent contractor engaged in performing services on the land for its possessor occupies the status of an invitee. Hinds v. Wheadon, 19 Cal.2d 458, 460, 121 P.2d 724; Leenders v. California Hawaiian, etc., Corporation, 59 Cal.App.2d 752, 756, 139 P.2d 987. In the anomalous situation of the plaintiffs' truck engaged in the performance of services for defendants, wrongfully as to plaintiffs because operating under a purported contract with their agent attempted to be made in excess of his authority, it would seem that the defendants would owe the same duty of ordinary care for the safety of the truck that they would owe to an invitee for the safety of his person and property. The truck, an inanimate object it is true, was on defendants' private roadway at defendants' invitation and on defendants' business. It was there in the control of a driver who was a business invitee of defendants. That this driver had no authority from plaintiffs to operate the truck was a fact which defendants were under a duty to ascertain at the time that they entered into the contract with Morgan under the rule above quoted from Ernst v. Searle, supra. We entertain no doubt that under the circumstances the defendants were under a legal duty to exercise ordinary care for the safety of the plaintiffs' truck.

The evidence showed that in preparation for the performance of their contract defendants had built certain private roadways for use by the trucks which would later be engaged in hauling material to the fill. One of these roadways paralleled the Bayshore Highway and by reason of topographical difficulties was too narrow to accommodate two-way traffic by trucks throughout its length. It was for this reason designed to be used as a one-way road. It made a turn into another private roadway which connected at approximately right angles with the Bayshore Highway and was designed for two-way traffic. The plan of operation contemplated by defendants for the use of these roadways called for loaded trucks to proceed along the two-way private roadway to the turn into the one-way private roadway, follow the turn into the one-way road and proceed thereon to the fill; and for the empty trucks to return on the Bayshore Highway to the point where it was intersected by the two-way private roadway, turn onto the two-way road and proceed thereon to the shovels where the filling material was loaded onto the trucks. The evidence shows, however, that disregarding the requests of defendants' agents on the job to all contracting truckmen to follow this procedure many of them, including Diamantine Bros., directed their drivers to keep their trucks off the Bayshore Highway at all times and to travel both ways on the one-way private road. It also appears that when a loaded truck traveling on the two-way private road approached the turn into the one-way road at the same time that an unloaded truck was pulling into the two-way road from the highway, it was the practice of many of the drivers of loaded trucks to pull to the left to permit the unloaded trucks the more readily to pass them; while the drivers of other trucks kept their trucks on the right hand side at all times. There was also evidence from which the jury could have found that the safer practice at this turn was for a loaded truck to pull to the left when an empty truck was approaching it from the Bayshore Highway. The driver of plaintiffs' truck testified that at a time when he was employed by defendants to drive one of their trucks he had been instructed by defendants' foreman to pull his truck to the left under such circumstances. This the foreman denied, but there is ample evidence that defendants through their agents in charge of the work, knew that some drivers were pulling to the left and others keeping to the right at this turn, and that they also were fully advised that some empty trucks were being driven over the one-way road contrary to the method of operation for which the one-way road was designed and in violation of the direction to all truck operators that they drive empty trucks on the Bayshore Highway and not on the one-way road.

That these diverse and conflicting modes of operation created confusion and greatly increased the hazard of collision between trucks proceeding in opposite directions might be readily inferred by the jury. Indeed the witness Diamantine, called by the defendants, testified:

> "I knew that a condition existed there to this extent—not all the drivers of all the different contractors that was on the job were going on the left hand side of the road, and some were maintaining their right—some were going to the left, and a person being there never knew what the truck was going to do. In other words, some of our drivers were maintaining the right hand side for four or five or six trips, then possibly he would meet an oncoming truck, and he would have to swerve over to the left, due to the fact that this other truck was also on the left. There was a congestion there that was not any too pleasant."

The collision with plaintiffs' truck which gives rise to this action occurred at night. Scovil, the driver of plaintiffs' truck testified that he was driving the truck loaded along the two-way road approaching the curve into the one-way road, that he saw the lights of a truck approaching and believed that it was on the Bayshore Highway; that he pulled to the left on the turn, following his custom, to permit the approaching truck to pass him; that the other truck was in fact traveling on the one-way road and the two collided on the turn. The other truck belonged to Diamantine Bros. and was operated by a driver who had come onto the job for the first time that night.

[8-10] Respondents to sustain the directed verdict rely upon the cases which hold that a person is not liable for the negligence of an independent contractor with whom he has entered into a contract. Boswell v. Laird, 8 Cal. 469, 68 Am.Dec. 345; Teller v. Bay & River Dredging Co., 151 Cal. 209, 90 P. 942, 12 L.R.A.,N.S., 267, 12 Ann.Cas. 779; Atlanta & F. R. Co. v. Kimberly, 87 Ga. 161, 13 S.E. 277, 27 Am. St.Rep. 231. The general principle may be readily conceded. This concession however does not dispose of the case, if the jury could properly find under the evidence that defendants were in possession and control of the private roads and negligently permitted operations to be continued thereon as a result of which a person of ordinary prudence could foresee that a collision such as actually occurred was likely to ensue. The general principle involved is thus stated in Restatement of Torts, section 449:

> "If the realizable likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious or criminal does not prevent the actor from being liable for harm caused thereby."

This rule has been applied by our own courts to a variety of factual situations. Mosley v. Arden Farms Co., 26 Cal.2d 130, 157 P.2d 372; Katz v. Helbing, 215 Cal. 449, 10 P.2d 1001; Pastene v. Adams, 49 Cal. 87; Terrell v. Key System, 69 Cal. App.2d 926, 159 P.2d 704; Stockwell v. Board of Trustees, 64 Cal.App.2d 197, 148 P.2d 405; Siebel v. Shapiro, 58 Cal.App. 2d 509, 137 P.2d 56.

[11] More specifically as applied to the relation of contractor and contractee we quote from Restatement of Torts, section 414 and Comments a and b thereto:

> "One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for bodily harm to others, for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.
>
> "a. * * * The employer may * * * retain a control less than that which is necessary to subject him to liability as master. He may retain only the power to direct the order in which the work shall be done or to forbid its being done in a manner likely to be dangerous to himself or others. Such a supervisory control may not subject him to liability under the principles of Agency, but he may be liable under the rule stated in this Section unless he exercises his supervisory control with reasonable care so as to prevent the work which he has ordered to be done from causing injury to others.
>
> [12] "b. The rule stated in this Section is usually, though not exclusively, applicable when a principal contractor entrusts a part of the work to subcontractors but himself or through a foreman superintends the entire job. In such a situation, the principal contractor is subject to liability if he fails to prevent the subcontractors from doing even the details of the work in a way unreasonably dangerous to others, if he knows or by the exercise of reasonable care should know that the subcontractors'

work is being so done and has the opportunity to prevent it by exercising the power of control which he has retained in himself."

The jury could well have found from the evidence in this case that defendants, as general contractors, had built these private roadways for use in the performance of the contract; that they remained in general possession and control of them under the principal contract for that purpose; that their foremen were at all times present in general supervision of the work; that these foremen knew that the subcontractors were customarily operating their trucks over these private roadways in a manner likely to produce collisions between trucks; and that defendants failed to exercise their general control over the private roadways to direct the traffic in such fashion as to prevent such dangerous practices.

Defendants argue that there is no showing in the record that they were in fact in possession and control of the private roadways. They built the roadways for the performance of their general contract; they with their own trucks driven by their own employees used them for that purpose; they likewise permitted the subcontracting truck owners to use them for the same purpose. The jury could have reasonably inferred that under their general contract they had the right to their possession, use and control. They also argue that, while they "requested" all truck owners to use the Bayshore Highway, and not the one-way road, for their trucks when returning empty, some truck owners, including Diamantine Bros., refused to comply with their request. The record would support the inference that they permitted this state of anarchy not because they had not retained the general control of the private roadways but because they preferred to take the risk involved to keep the trucks on the job. The defendants' general superintendent testified that the job was a rush job and that "in these days we are subject to lots of whims of individuals."

We attach no importance in support of the directed verdict to the fact that after the collision plaintiffs accepted a check from defendants in full payment for the use of their truck, attached to which was a statement setting out the drivers' wages paid by defendants and deducting them from the gross rental of the truck with drivers to arrive at the net payment. Plaintiffs testified that they were not concerned with defendants' method of bookkeeping so long as they received the amount to which they were entitled, and the jury could have found that they were not put on notice by the form of the statement that defendants were claiming that they had hired the truck with drivers employed by the plaintiffs.

[13, 14] The claim that plaintiffs are barred from recovery by the negligence of the driver of their truck is completely met by the fact that the jury could have found that Scovil was not negligent. It is only where there is no room for reasonable minds to differ and the conclusion that he was guilty of negligence is the only one that can be rationally drawn from the evidence that a person can be held guilty of negligence as a matter of law. Kirk v. Los Angeles Ry. Corporation, 26 Cal.2d 833, 161 P.2d 673; Anthony v. Hobbie, 25 Cal.2d 814, 818, 155 P.2d 826.

[15] It is met, as well, by the fact already noted that under the uncontradicted evidence Scovil was not plaintiffs' employee. It is claimed that under section 402, Vehicle Code, St.1943, p. 2808, Scovil was at least driving plaintiffs' truck with the express or implied consent of plaintiffs. Hicks v. Reis, 21 Cal.2d 654, 134 P.2d 788. We cannot agree. Morgan was entrusted with the truck by plaintiffs with limited authority. Even Morgan was without authority to hire drivers for the truck. Morgan in turn entrusted the truck to Grove who was a complete stranger to plaintiffs. Grove himself testified concerning his employment of Scovil:

"Q. You said something about you would have the privilege of putting another driver on there? A. Well, no sir, I took it on my own authority, maybe. It is better to have the truck operating than sitting still. Anyone with common sense would know that; but nobody gave me any direct authority. I took it on my own, because that was my job, to keep it operating."

We are satisfied that the court erred in directing the verdict for defendants. The judgment is reversed.

NOURSE, P. J., and GOODELL, J., concur.

70 Cal.App.2d 806

LAMAR v. JOHN & WADE, Inc.

Civ. 14763.

District Court of Appeal, Second District, Division 3, California.

Sept. 19, 1945.

1. Automobiles ⚷181(1, 2)

Evidence that plaintiff was engaging in unloading of rock lath from defendant's truck for mutual benefit of defendant and plaintiff's employer established that plaintiff was an invitee to whom defendant owed a duty to exercise ordinary care to provide plaintiff with a reasonably safe place in which to work.

2. Evidence ⚷8

The angle at which tiers of rock lath piled on truck would slide and fall is not a matter of common knowledge.

3. Automobiles ⚷244(20, 56)

Evidence supported finding that injury sustained by plaintiff when a stack of rock lath fell upon him while he was helping unload defendant's truck was caused by negligence of defendant's truck driver in placing truck upon a greater angle of inclination while plaintiff was absent from truck after plaintiff had unloaded two tiers with safety, and that plaintiff, as a common laborer, did not assume risk of injury.

◆

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Action by Clarence Lamar against John & Wade, Inc., for injuries sustained by plaintiff when a stack of rock lath fell upon him while he was helping to unload defendant's truck. From a judgment for plaintiff, the defendant appeals.

Affirmed. Attempted appeal from order denying motion for new trial dismissed.

Forrest A. Betts, of Los Angeles, for appellant.

Lasher B. Gallagher, of Los Angeles, and Murray H. Roberts, of Wilmington, for respondent.

SHINN, Justice.

Plaintiff had verdict and judgment against John & Wade, Inc., for personal injuries sustained when a stack of rock lath fell upon him while he was helping unload defendant's truck. Defendant appeals, urging insufficiency of the evidence to show negligence upon its part, and claiming that the evidence established its defenses of assumption of risk and contributory negligence.

Atkinson & Pollock Company was constructing buildings at Norco, California, and employed John & Wade to haul rock lath from Corona to the building site. One Olsen was defendant's truck driver. Plaintiff was a laborer employed by Atkinson & Pollock Company. The rock lath was in sheets 18″ x 48.″ Several sheets were bound together with gummed paper, making each bundle two or three inches thick, weighing 50 or 60 pounds. They were stacked in nine tiers of 21 to 23 bundles each, to a height of some four feet, crosswise, in the truck bed, the load consisting of 210 bundles. There was a clearance of a couple of feet at each end of the tiers and the bed was filled from the cab to within a foot or two of the rear end, which had no tail board. During transit the load was roped down. One of the buildings was against a side hill. A dirt road, ten feet wide, ran up the hill alongside the building to the level of the third or fourth floor. It had a grade of 18 or 20 percent and in places, up to 30 percent. After Olsen had delivered several loads to other points he was sent up this road by the foreman of Atkinson & Pollock Company to unload at about the level of the second floor. The truck was stopped at that point and the unloading began. Olsen lifted bundles from the front end and handed them down to Atkinson & Pollock's employees, who stacked them on the ground. Plaintiff, upon orders from his foreman, climbed upon the rear of the truck floor and handed bundles down to the right of the truck, toward the building. When he had unloaded two tiers at the rear he left to go to a rest room. While he was away Olsen moved the truck forward four or five feet and in doing so increased the angle of inclination above what it had been. The grade there was 20 percent or thereabouts. When plaintiff returned to the truck he climbed onto the floor from the rear. As he was removing the first bundle from the top of a tier the bundles slipped down "like a deck of cards," and nearly all of the tier came down. Plaintiff jumped from the truck but the bundles fell upon him, broke his legs and caused other injuries. One of the witnesses to the accident was a truck driver who was working for Atkinson & Pollock, taking the bundles as they were handed down by plaintiff. He testified that as the truck was moved forward it "quivered." Plaintiff testified that as he removed a bundle he placed his hands under it and lifted it and that he did not pull the bundles toward him. Accepting this testimony as true, as the jury evidently did, it would follow that the tier fell because it was out of balance, due to the inclination of the truck floor and perhaps also to some displacement caused by the jerky motion of the truck as it was moved ahead. The danger that was inherent in this condition is proved by the fact that the slabs slipped from the tier and fell. The place where plaintiff was working was not a reasonably safe one at the time; it had been provided by defendant as a place for workmen and plaintiff had done nothing which rendered it unsafe.

The jury was instructed that if plaintiff was found to be an invitee (as that term was defined in the instruction), defendant owed him a duty to exercise ordinary care to provide him with a reasonably safe place in which to work. It is contended that defendant did not have that duty, that it did not create the conditions, that its driver placed his truck as directed by the foreman of Atkinson & Pollock and was not responsible for the resulting condition of danger. A sufficient answer is that it was a reasonable conclusion that the moving and replacing of the truck, in the manner described, which was solely the act of defendant's employee, caused the pile of lath to become out of balance and brought about the dangerous condition.

[1] That plaintiff was an invitee of defendant cannot be seriously questioned. The unloading was for the mutual benefit of defendant and Atkinson & Pollock. If plaintiff's services were not expressly requested they were accepted by defendant, and the manner in which they were being performed was known to defendant. The jury was correctly instructed as to the conditions under which plaintiff might be found to have been defendant's invitee, substantially as stated in Aguilar v. Riverdale C. C. Ass'n, 1930, 104 Cal.App. 263, 285 P. 889. The implied finding that he was an invitee upon defendant's truck is sustained by the evidence.

[2, 3] Appellant's further argument, in support of which many cases are cited, is that even if plaintiff was an invitee he assumed the risk of injury, due to the conditions under which he was working. These conditions, it is said, were just as obvious to plaintiff as they were to defendant and he therefore assumed the risk of working under them and is equally responsible for the consequences. If this were the only logical conclusion from the facts in evidence, the point would be well taken and the defense would have been established. But the jury was not obliged to believe that plaintiff knew, or in the exercise of ordinary care would have known, that the tier was likely to fall upon him. He was a common laborer and inexperienced in the work he was doing. He had unloaded two tiers with safety. While he was absent from the truck it had been moved and placed upon a greater angle of inclination. He observed that it was being moved as he started away and of course saw how it stood when he returned. In this process the truck had "quivered," which would have had a tendency to unsettle the load and put the unsupported rear tier out of balance, but there was no evidence that plaintiff knew this. As against plaintiff's inexperience, Olsen was experienced in the work and was in charge of it. The surfaces of the lath were not sufficiently rough to prevent its slipping when the tier was tipped at such an angle. Appellant argues that if Olsen should have known this, plaintiff also should have known it. Olsen evidently did not know it. But negligence may consist of not knowing and of doing what should not be done, without knowledge as to what the consequences may be. Plaintiff evidently did not know that the lath might fall. He had a right to place some reliance in Olsen's judgment. He had not created the condition and did not have as great a responsibility as Olsen had. Those who supervise and direct how work shall be done have a responsibility toward the men who do purely manual labor and they cannot shift that responsibility. The jury concluded that Olsen was negligent because he should have known better than to place the truck at a dangerous angle. That was an altogether proper conclusion. Plaintiff was required to use only the common care and skill of a manual laborer in deciding whether he was in danger. The jury could have found that he also was negligent but we think the finding that he was not negligent was the more reasonable. The angle at which tiers of rock lath will slide and fall is certainly not a matter of common knowledge, and plaintiff, who only accepted conditions as he found them, was not re-

quired to have an uncommon knowledge as to their safety.

What we have said distinguishes the present case from the many cited by appellant. They are either cases in which accidents arose under conditions which became unsafe solely in the prosecution of the work and because of the manner in which it was done, or in which the dangerous condition was one which was known or would have become known in the exercise of ordinary care. The case before us does not belong in either class. The immediately dangerous condition was created by defendant and the danger was not one which an unskilled laborer would necessarily have recognized in the exercise of ordinary care.

Appellant criticizes the allowance of an amendment of the complaint during the trial. It is unnecessary to discuss the point. The complaint was sufficient without the amendment.

The judgment is affirmed. The attempted appeal from the order denying motion for new trial is dismissed.

DESMOND, P. J., and PARKER WOOD, J., concur.

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71 Cal.App.2d 107

GARCIA v. CALIFORNIA EMPLOYMENT STABILIZATION COMMISSION et al.

Civ. 7173.

District Court of Appeal, Third District, California.

Oct. 1, 1945.

1. Master and servant ⚷78

Application for unemployment benefits was required to be remanded to the state Employment Stabilization Commission for further evidence, where there was an insufficiency of evidence to support Commission's findings, and the findings, upon the evidence so introduced, were conflicting. Gen.Laws 1937, Act 8780d, § 13(a); § 57 (c), as added by St.1939, p. 2150.

2. Master and servant ⚷78

The words "suitable employment", as used in section of act disqualifying an individual from unemployment benefits if without good cause he has refused to accept suitable employment when offered him, should be given same meaning as it bears in section defining meaning of the term. Gen.Laws 1937, Act 8780d, § 13(a); § 56, as amended by St.1939, p. 8.

See Words and Phrases, Permanent Edition, for all other definitions of "Suitable Employment".

3. Master and servant ⚷78

A seasonal worker who cannot find employment in his usual occupation during off-season should endeavor to seek other work for which he is reasonably fitted in order to be eligible for unemployment benefits. Gen.Laws 1937, Act 8780d, § 13(a); § 56, as amended by St. 1939, p. 8; § 57, as added by St.1939, p. 2150.

4. Master and servant ⚷78

The determination of state Employment Stabilization Commission that rejection of referral work by seasonal worker during off-season because of lack of available transportation from community in which worker lived did not disqualify worker from receiving unemployment benefits carries with it implied determination that refusal was for good cause and that condition of unavailability to labor market during off-season was also for good cause. Gen.Laws 1937, Act 8780d, § 56, as amended by St.1939, p. 8.

5. Master and servant ⚷78

Although determination of state Employment Stabilization Commission that referral work rejected by seasonal worker during off-season because of lack of available transportation from community in which worker lived was unsuitable would be consistent with finding that worker had restricted herself from accepting such work at that distance under existing conditions, such determination was inconsistent with further finding that worker had thus restricted herself without good cause. Gen. Laws 1937, Act 8780d, § 56, as amended by St.1939, p. 8.

6. Master and servant ⚷78

The Unemployment Insurance Act is remedial and must be liberally construed. Gen.Laws 1937, Act 8780d, as amended.

7. Master and servant ⚷78

If the unavailability for work be involuntary and without fault, claimant may not be deprived of unemployment benefits.

Gen.Laws 1937, Act 8780d, § 13(a); § 56, as amended by St.1939, p. 8; § 57(c), as added by St.1939, p. 2150.

8. Master and servant 🔑78

"Availability for work", within Unemployment Insurance Act, requires no more than availability for suitable work which claimant has no good cause for refusing. Gen.Laws 1937, Act 8780d, § 13(a); § 56, as amended by St.1939, p. 8; § 57(c), as added by St.1939, p. 2150.

See Words and Phrases, Permanent Edition, for all other definitions of "Availability for Work".

Original application by June Garcia against the California Employment Stabilization Commission and others for a writ of mandate to compel respondent Commission to grant petitioner benefits which she claimed she was entitled to under the Unemployment Insurance Act, Gen.Laws 1937, Act 8780d, as amended.

Cause remanded to the California Employment Stabilization Commission for further proceedings in accordance with opinion.

Charles J. Janigian, of San Francisco, for petitioner.

Robert W. Kenny, Atty.Gen., and Clarence A. Linn and Doris H. Maier, Deputy Attys. Gen., for respondent.

PEEK, Justice.

This is an original application for a writ of mandate to compel the California Stabilization Commission to grant petitioner the benefits which she claims she is entitled to under the Unemployment Insurance Act, Deering's General Laws, Act 8780d, as amended.

For the past eleven years petitioner has resided in Riverbank, which is located approximately ten miles from the city of Modesto. During the latter part of that time she was seasonally employed from April to November at the Riverbank cannery, which is situated half way between the two communities. Transportation to and from her work was on a share-the-ride basis with neighbors. On May 17, 1943, in accordance with said act and regulations of the commission, she registered for work and filed her claim for unemployment insurance benefits. On November 20th, after the termination of the canning season, she filed a claim for additional benefits and as a result thereof was granted the maximum benefits. Her registration certificate shows that she registered for cannery or bottle labeling work only. A referral to employment was offered her on or about January 10, 1944, as a cannery worker on the day shift in a cannery located in Modesto, at the union scale of pay and under union conditions. She refused to accept the referral, her reason being that she had no means of transportation to the proffered work. Because of such refusal the department disqualified her from receiving benefits for the six weeks' period beginning January 9, 1944 and ending February 19, 1944, on the ground that she had failed to apply for suitable employment without good cause. She thereupon appealed to a referee who affirmed the original determination. In accordance with the provisions of said act she duly appealed from said decision of the referee to the respondent commission. A hearing was had at which claimant appeared with counsel, and thereafter the board, by a two to one decision, likewise decided against her.

In her petition for writ of mandate she asks that said decision be set aside "excepting only insofar as said decision holds that petitioner had not refused an offer of suitable employment." Therefore the sole issue presented to this court is whether the board properly determined that petitioner was not available for work within the meaning of section 57(c), as added by St.1939, p. 2150.

At the outset this court granted petitioner's request that we take original jurisdiction of her application for the reason that the petition presented a question of first impression involving interpretation of the act; that many hundreds of people in this state were in the same position as petitioner, living in small communities where the labor market was limited and each year were employed in seasonal work in other communities to which transportation was available only during seasonal work; that no work existed in their own communities, and because of the lack of transportation facilities they had no means of obtaining employment in the larger labor markets; that such persons were of limited means unable to undertake independent litigation and the amounts in any event were relatively small; that therefore, a proper interpretation of such a remedial statute should be speedily, authoritatively and inexpensively determined by an appellate court.

[1] Because of such circumstances we have with reluctance reached the conclusion that, by reason of the insufficiency of the evidence in the record filed herein to support the findings of the board, it is necessary that this application be remanded for further evidence, and, secondly, this must be done because of the apparent conflict in the findings of the board upon the evidence so introduced.

Under what is denominated "Reason for Decision" the board first found that "because of the entire lack of transportation facilities * * * the work was not an offer of suitable employment as defined in section 13(a) of the Act. Therefore, claimant is not subject to the disqualification provided in Section 56(b) of the Act and Rule 56.1 adopted pursuant thereto." The board then found that "claimant's lack of any useable transportation to any work during the off season in the canning industry rendered claimant not available for work within the meaning of Section 57(c) of the Act." In amplification of these findings, the board, in its decision, states that it is of the opinion that the claimant's "lack of transportation to any possible work creates a personal circumstance which so restricts opportunities for employment of such a claimant as to render the claimant not available for work." Lastly the board found that "there was no work which the claimant could perform within walking distance of her home and she had no transportation to the nearest labor market in which she could become employed. Therefore, we conclude that claimant herein, during the period she lacked a means of transportation from her residence to any possible employment, was removed from the labor market and did not meet the availability requirement of section 57(c) of the Act." The decision of the board was that "Claimant is held not to have refused an offer of suitable employment. Claimant is further held not to be available for work. * * * Claimant is denied benefits."

Section 13(a) provides in part: "Definition. 'Suitable employment' means work in the individual's usual occupation or for which he is reasonably fitted * * *." Under section 56, as amended by St.1939, p. 8, it is provided: "An individual is not eligible for benefits * * * (b) If without good cause he has refused to accept suitable employment when offered him * * *", while the "prerequisite to eligibility" is defined in section 57 in part as follows: "An unemployed individual shall be eligible to receive benefits * * * *only* if the commission finds" that proper claim for benefits has been made; that proper registration for work has been made, and that (c) "he is able to work and available for work * * *."

[2, 3] Under ordinary rules of statutory construction, the words "suitable employment" as used in said section 56 should be given the same meaning as it bears in section 13(a), which is the section defining the meaning of the term. Therefore, as applied to the instant case, if the work in the cannery at Modesto, which was offered to petitioner and which she refused to accept, was unsuitable as the board held because of the distance from her home, then it was not available to her and likewise she was not available for such work. It also would follow that the petitioner would not be available for work in other Modesto canneries as long as the distance and the lack of transportation prohibited the acceptance thereof by her. But this does not dispose of the entire question of availability. From the quoted portion of section 57 we find that an unemployed individual is eligible to receive benefits *only* if "able to work and available for work" while "suitable employment" as previously mentioned is defined in section 13(a) as work in the "individual's usual occupation or *for which he is reasonably fitted.*" (Italics ours.) These provisions suggest that a seasonal worker who cannot find employment in his usual occupation during the off season should endeavor to seek other work for which he is reasonably fitted.

However, the record, in regard to the points herein mentioned, does not disclose that claimant was unqualified for and would not have accepted work of a different character from that for which she registered. Her registration certificate shows that she was applying for cannery work in which she had had experience in most all of the seasonal crops. Although she testified she did not think she had had experience in any other work, yet when asked why she did not work in the spinach crop the previous year, she replied, "Last year I didn't because I was working at another place in Riverbank." Whether she understood she could apply or did apply for other kinds of unskilled work in her immediate locality does not appear.

Likewise it does not appear that there was not available in Riverbank such work as she had done the previous year or that there was not some suitable work for which she was reasonably fitted or could have accepted. Although there is a finding by the appeals board that "it appears there was no work which the claimant could perform within walking distance of her home", no evidence appears in the record upon which such a finding could have been based.

In addition the record discloses that the proffered work at the Modesto cannery was for the day shift beginning at 8 o'clock a. m.; that a bus left Riverbank for Modesto at approximately 8:30 o'clock each morning, returning from Modesto at approximately 4 o'clock each afternoon. Claimant testified that she did not investigate to determine whether the job would have been available within the limitations of the bus schedule or was any evidence introduced by the Examiner in this regard.

In reaching our determination that this matter must be remanded, we are strongly influenced by the case of Hagadone v. Kirkpatrick, Idaho, 154 P.2d 181, 182. There a claimant, a man sixty years of age, had been employed as a band saw filer by a lumber company for approximately twenty-seven years. When his employer discontinued seasonal operations the claimant was earning more than $2 per hour. He properly applied for employment and was offered two relatively unskilled jobs, neither of which he investigated, and both of which he rejected for physical reasons. His claim for unemployment benefits was denied, and on appeal the appeals board affirmed that determination. The Supreme Court, however, reversed the order of the board, holding that the findings were inconsistent and based on insufficient evidence and inadequate investigation, and therefore remanded the cause with appropriate instructions, saying:

"Under the facts and circumstances of the case at bar, the board should have more exhaustively inquired into the situation for the purpose of determining whether or not suitable employment of a like or suitable kind as claimant had theretofore performed, with like or similar wages and hours, was obtainable, and of such a nature that claimant could have performed due to his age and alleged physical condition and without exposure to cold. In other words, the board was not justified, in view of the limited investigation touching claimant's availability for work, in denying his claim and dismissing his application based solely on the ground that the referral jobs offered had not been accepted.

"The Unemployment Compensation Law must be liberally construed to the end that its purposes be accomplished. Availability for work requires no more than availability for suitable work which the claimant has no good cause for refusing."

[4, 5] Although by reason of the disposition made of the present controversy it becomes unnecessary to decide any of the other issues involved, nevertheless we feel that mention should be made of a further question which has been posed by the findings of the board. As has been previously noted, section 56(b) of the act provides that an individual is not eligible for benefits "if *without good cause* he has refused to accept suitable employment." (Italics ours.) The determination of the board that the rejection of the referral work does not disqualify claimant, carries with it the implied determination that the refusal was for good cause, and likewise that the condition of unavailability to the Modesto labor market during the off season, was also for good cause. From this it logically follows that complainant was entitled to the benefits accruing under the act. Therefore, while the board's determination that the rejected work was unsuitable, would be consistent with the finding that claimant had restricted herself from accepting such work at that distance under the existing conditions, that conclusion is inconsistent with the further finding that claimant had thus restricted herself without good cause.

[6-8] It is well established that the act under consideration is remedial and therefore must be liberally construed to effectuate the stated objects of the statute. California Emp. Comm. v. Butte Co., etc., Ass'n, 25 Cal.2d 624, 154 P.2d 892; Matson Terminals, Inc., v. California Emp. Comm., 24 Cal.2d 695, 151 P.2d 202; California Emp. Comm. v. Los Angeles, etc., News Corp., 24 Cal.2d 421, 150 P.2d 186; Whitcomb Hotel, Inc., v. California Emp. Comm., 24 Cal.2d 753, 758, 151 P.2d 233, 155 A.L.R. 405. Thus, in conformity with the liberal interpretation which must be accorded to it, it would appear from the quoted portions thereof that if the unavailability for work be involuntary and without fault, a claimant may not be deprived of benefits, and that therefore the holding

of the board herein, in the absence of further evidence as previously indicated, would be erroneous. Directly in point with this question is the language in the Hagadone case, supra: "Availability for work requires no more than availability for suitable work which the claimant has no good cause for refusing."

For the foregoing reasons the cause is remanded for further proceedings in accordance with the views herein expressed.

ADAMS, P. J., and THOMPSON, J., concur.

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70 Cal.App.2d 803

HEGLIN et al. v. F. C. B. A. MARKET, Inc., et al.

Civ. 14886.

District Court of Appeal, Second District, Division 2, California.

Sept. 19, 1945.

1. Appeal and error 🔑930(1)

On defendant's appeal from a judgment for plaintiff entered upon a verdict of a jury, evidence is viewed in light most favorable to plaintiff.

2. Automobiles 🔑208

Where plaintiff's automobile first entered intersection and defendant's truck drove through a boulevard stop into intersection and collided with plaintiff's automobile, right of way statute did not apply and plaintiff was not guilty of contributory negligence as a matter of law for failure to observe the statute. Vehicle Code, § 550(b), St.1937, p. 619.

3. Automobiles 🔑245(79)

Where plaintiff, at time of collision at intersection, was operating his automobile upon right-hand side of highway but near center thereof, at night, with lights dimmed in accordance with wartime regulations, whether plaintiff complied with statutory requirement that motorists drive on right half of highway as close as practicable to right-hand curb or edge of roadway was for jury. Vehicle Code, § 525(a), St.1941, p. 2722.

4. Appeal and error 🔑1001(1)

Finding of jury supported by testimony will not be disturbed by appellate court.

5. Automobiles 🔑244(32)

Where it was conceded that truck involved in fatal accident was owned by corporate defendant and that at time of accident defendant driver was an employee of corporate defendant, an inference arose sufficient to support jury's finding that defendant driver was operating truck with permission of corporate defendant and authorized a verdict against corporate defendant.

6. Appeal and error 🔑1078(1)

Where appellant failed to furnish argument or authority bearing upon a proposition, point was abandoned.

◆

Appeal from Superior Court of Los Angeles County; Alfred L. Bartlett, Judge.

Action by Charles E. Heglin and others against F.C.B.A. Market, Inc., and others, for the wrongful death of named plaintiff's wife in an automobile accident. Judgment for plaintiffs, and named defendant appeals.

Affirmed.

Oliver O. Clark and David D. Sallee, both of Los Angeles, for respondents.

Edgar T. Fee and L. A. Gordon, both of Los Angeles, for appellants.

McCOMB, Justice.

From a judgment in favor of plaintiffs after trial before a jury in an action to recover damages for the wrongful death of plaintiff Charles E. Heglin's wife, defendant F.C.B.A. Market, Inc., appeals.

[1] The evidence* being viewed in the light most favorable to the plaintiffs (respondents), the essential facts are:

About seven p.m., October 7, 1942, a Ford truck owned by defendant F.C.B.A. Market, Inc., and driven by defendant Reynosa, an employee of the aforesaid market, in the intersection of Normandie Avenue and 208th Street, Los Angeles county, collided with an automobile driven by plaintiff Charles E. Heglin. As the result of the accident Mrs. Heglin, who was riding in the car with her husband, received injuries from which she died. At the time of the accident both cars were being driven with lights dimmed in compliance with war-time "dim-out" regulations.

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* It should be noted that plaintiffs (respondents) have failed to file any brief and the cause has been submitted pursuant to the provisions of Rule 17b, Rules on Appeal.

Defendant F.C.B.A. Market, Inc., relies for reversal of the judgment on three propositions which will be stated answered hereunder seriatim:

First: *Plaintiff Charles E. Heglin was guilty of contributory negligence as a matter of law in not complying with the requirements of (a) section 550(b) of the Vehicle Code, St.1937, p. 619, and (b) section 525(a) of the Vehicle Code, St.1941, p. 2722.*

This proposition is untenable.

[2] a) Section 550(b) of the Vehicle Code requires that when two vehicles enter an intersection from different highways at the same time, the driver of the vehicle on the left shall yield the right of way to the driver of the vehicle on the right.

This section is not applicable to the facts in the present case because the two vehicles did not enter the intersection at the same time. Mr. Heglin testified that while he was crossing the intersection of Normandie and 208th streets, driving in a northerly direction, Mr. Reynosa, driving the truck owned by defendant F.C.B.A. Market, Inc., drove through a boulevard stop into the intersection and hit the automobile Mr. Heglin was driving.

[3] b) It is conceded that plaintiff Heglin was operating his car upon the right hand side of the highway but near the center thereof. Section 525(a) of the Vehicle Code requires one driving on a public highway to drive on the right half and as close as practicable to the right hand curb or edge of the roadway. It was a question of fact for the jury to determine whether or not from the evidence in view of the "dim-out" restrictions plaintiff was driving upon the right hand half of the highway as close as practicable to the right hand curb of the roadway.

[4] The jury having impliedly found that in view of the circumstances plaintiff was driving as near to the right hand curb of the highway as was practicable its finding will not be disturbed by this court. Tuderios v. Hertz Drivurself Stations, 70 Cal.App. 192, 160 P.2d 554, and cases cited therein.

Second: *There is not any substantial evidence to support the jury's finding that Mr. Reynosa, the driver of the truck owned by defendant F.C.B.A. Market, Inc., was driving the vehicle with the permission of the owner.*

[5] This proposition is likewise untenable. The law is established in California that, if there is proof that an automobile (1) belongs to an employer, and (2) at the time of an accident is being operated by an employee of the owner, an inference arises sufficient to support a finding that the employee was operating the automobile by the authority of his employer. Shields v. Oxnard Harbor Dist., 46 Cal.App.2d 477, 487, 116 P.2d 121; Bushnell v. Yoshika Tashiro, 115 Cal.App. 563, 565, 2 P.2d 550.

It is conceded that (1) the truck driven by defendant Reynosa was owned by his co-defendant F.C.B.A. Market, Inc., and (2) at the time of the accident defendant Reynosa was an employee of said co-defendant. Therefore under the rule above stated an inference arose sufficient to support the jury's finding that defendant Reynosa was driving the truck with the permission of its owner.

Souza v. Corti, 22 Cal.2d 454, 139 P.2d 645, 147 A.L.R. 861, is not applicable to the facts in the instant case for the reason that insofar as the judgment was reversed as to the defendant Joseph Gigle, there was no proof either express or implied, that he had given permission to defendant Corti to drive his car at the time of the accident which resulted in personal injuries to plaintiff.

Third: *The "dim-out" regulations affected the question of the alleged contributory negligence of plaintiff Heglin.*

[6] Defendant F.C.B.A. Market, Inc., has not furnished us with argument or authority bearing upon this proposition; therefore the point is deemed to have been abandoned and will not be considered by us. People v. Raines, 66 Cal.App.2d 960, 963, 153 P.2d 424; Woodcock v. Petrol Corporation, 48 Cal.App.2d 652, 657, 120 P.2d 889.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., concurs.

71 Cal.App.2d 146

PEOPLE v. HARSHAW.

Cr. 2361.

District Court of Appeal, First District, Division 2, California.

Oct. 4, 1945.

1. Criminal law ⚷1144(13)

Appellate Court, in support of conviction, assumed that trial court believed evidence most favorable to judgment rendered and drew any reasonable inferences from that evidence which would support court's finding of defendant's guilt.

2. Rape ⚷53(2)

Evidence sustained conviction of assault with intent to commit rape.

3. Criminal law ⚷517(4)

In prosecution for assault with intent to commit rape, the corpus delicti need only be proved prima facie or by slight evidence to lay foundation for introduction of a confession.

4. Rape ⚷16(3, 7)

The crime of assault with intent to commit rape is complete if, at any moment during assault, defendant intends to have carnal knowledge of victim and to use for that purpose whatever force may be required, and the fact that defendant desists before accomplishing his purpose is immaterial.

5. Criminal law ⚷982

Defendant's use or attempt to use a deadly weapon in connection with the perpetration of crime, as bearing on court's power to grant probation, is a question of fact. Pen.Code, § 1203.

6. Criminal law ⚷982

Evidence in prosecution for assault with intent to commit rape justified denial of probation on ground that defendant used or attempted to use a deadly weapon in connection with the crime. Pen.Code, § 1203.

◆

Appeal from Superior Court, Santa Clara County; Wm. F. James, Judge.

William Harshaw was convicted of assault with intent to commit rape, and he appeals.

Affirmed.

Edward M. Fellows, of San Jose (Robert E. Hayes, of San Jose, of counsel), for appellant.

Robert W. Kenny, Atty. Gen., and David K. Lener and Miriam E. Wolff, Deputy Attys. Gen., for respondent.

DOOLING, Justice pro tem.

Defendant appeals from a judgment of conviction of assault with intent to commit rape. The case was tried without a jury and the sole attack on the judgment is that it is not supported by the evidence.

[1] In support of the judgment we must assume that the trial court believed the evidence most favorable to the judgment rendered and drew any reasonable inferences from that evidence which would support the court's finding of defendant's guilt. People v. Perkins, 8 Cal.2d 502, 510-511, 66 P.2d 631; People v. Green, 13 Cal.2d 37, 42, 87 P.2d 821.

Defendant (a petty officer in the navy) first saw the complaining witness (an unmarried woman twenty years of age) on a street corner in San Jose at about 11 p.m. on January 5, 1945. She was waiting for a bus to take her to her home and was standing in front of a jewelry store window. The defendant approached her and asked her about a ring on display, whether it was an engagement ring or a marriage ring, and she replied that it was an engagement ring. According to the complaining witness nothing further was said at that time. She boarded her bus and defendant followed her. She sat near the front of the bus and defendant stood in the rear. She testified that she did not see him on the bus at any time. When she left the bus near her home defendant also alighted but she did not observe that fact. She walked toward her home in the middle of the street. After she had proceeded some distance she observed the defendant on the sidewalk. She continued to walk in the middle of the street and he walked in the same direction on the sidewalk. The defendant asked her where 1313 was and she approached him and answered that she did not know. She continued to walk in the middle of the street until she neared her home when she crossed over to the sidewalk. She then noticed that the defendant was running toward her. She screamed and the defendant put one arm around her body and the other hand over her mouth. She continued to scream and the defendant told her that if she didn't stop screaming he would cut her throat. Her screams attracted a neighbor who came out onto his front porch and the defendant fled. The defendant was seen by other witnesses shortly afterward running across a street toward them. He asked them if a car standing there was a taxicab and when they answered in the negative he proceeded on his way. He was picked up by a police "prowl car" which had been advised by radio to be on the look-out for him and which he mistook for a taxicab.

The next morning a witness found a knife, admittedly the defendant's, at about the place of the assault with the large blade open. After the assault Lieutenant Baile of the navy and Police Captain Blackmore questioned the defendant. He admitted to them that he was looking that evening for a woman with whom to engage in sexual intercourse, that he followed the complaining witness with that idea in mind and when he grabbed her he intended to get what he wanted that way. Captain Blackmore testified that he asked the defendant if when he seized the complaining witness he intended to rape her and the defendant answered: "Yes." Lieutenant Baile's recollection of the question was that Captain Blackmore did not use the word "rape," but a vulgarism meaning sexual intercourse.

[2, 3] We are satisfied of the sufficiency of the evidence to support the conviction. If Captain Blackmore's testimony was believed, as we must assume in support of the judgment, the intent with which the assault was committed was clearly established. The corpus delicti need only be proved prima facie or by slight evidence to lay the foundation for the introduction of evidence of a confession. People v. Bollinger, 196 Cal. 191, 200, 237 P. 25; People v. Kaye, 43 Cal. App.2d 802, 809, 111 P.2d 679; 8 Cal.Jur. 235. It may be conceded, although we expressly refrain from so holding, that without the confession the other evidence would not be sufficient in law to establish the intent to commit rape beyond a reasonable doubt. The confession, considered with the other evidence, was sufficient for that purpose and that is all that the law requires. People v. Selby, 198 Cal. 426, 439, 245 P. 426.

[4] The cases cited by appellant are all cases where the intent had to be spelled out of the defendant's conduct and the courts held that the evidence proved no more than an intent to gratify the defendant's sexual craving by persuasion rather than by force. They are not applicable to this case where credible testimony supports the finding that the defendant admitted the specific intent to commit rape. The fact that defendant desisted when a neighbor approached is immaterial. The crime is complete if at any moment during the assault the defendant intends to have carnal knowledge of the victim and to use for that purpose whatever force may be required. People v. Stewart, 97 Cal. 238, 240, 32 P. 8; People v. Jones, 112 Cal.App. 68, 75, 296 P. 317.

[5, 6] Complaint is also made of the court's refusal to grant probation. The judge decided that he had no power to grant probation after finding that the defendant "used or attempted to use a deadly weapon in connection with the perpetration of the crime." Pen.Code, sec. 1203. The question was one of fact for the court and the court's conclusion is supported by the threat of defendant to cut the complaining witness' throat and the finding of his open knife at the scene of the crime.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.

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71 Cal.App.2d 136

WILLIAMS v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 12849.

District Court of Appeal, First District, Division 2, California.

Oct. 3, 1945.

1. Workmen's compensation 🔑1280

Before statute of limitations commences to run against a claim for compensation for an occupational disease, the disease must have so far progressed as to disable claimant from performance of his duties to such extent that he is entitled to compensation under the compensation law, the claimant must know, or by ordinary care he should have discovered, that he is suffering from occupational disease, and claimant must know, or should have discovered, that he is suffering from a compensable disability of which the occupational disease is the cause.

2. Workmen's compensation ⟹1280

Evidence showing that claimant in 1936 quit work as molder and took job as night watchman and that in 1940 claimant was informed by two physicians that he was afflicted with silicosis, failed to establish that claim for compensation for disability resulting from silicosis filed with Industrial Accident Commission on January 26, 1940, was barred by statutes of limitations, where it further appeared that reason for claimant taking job in 1936 was because of his age and not because of disability, and that physicians informed claimant that they were of opinion that no disability had at that time resulted from claimant's condition of silicosis.

◆

Proceedings for compensation under the Workmen's Compensation Act by Henry C. Williams, employee, opposed by Graham Manufacturing Company, employer. The employee petitioned for a writ of review of award of Industrial Accident Commission denying compensation. After submission of a cause to the District Court of Appeal, the original petitioner died and by stipulation his widow, Clara Williams, was substituted as petitioner.

Award annulled with directions.

Henry G. Sanford, of San Francisco, for petitioner.

Everett A. Corten and R. C. McKellips, both of San Francisco, for respondent Industrial Accident Commission.

DOOLING, Justice pro tem.

This is a proceeding to review an award of the Industrial Accident Commission denying compensation to the petitioner, Henry C. Williams. After the submission of the cause to this court the original petitioner died and by stipulation his widow, Clara Williams, has been substituted as petitioner herein.

The respondent commission found that Williams' claim for compensation was barred by the statute of limitations and the only question here presented is whether this finding is substantially supported by the evidence.

Williams was born October 4, 1868. In 1882 he started to work as a molder and thereafter continued to work as a molder until 1934. In 1905 he came to California and commenced to work as a molder for respondent Graham Manufacturing Co. Except for a period of something like three years, during which he worked as a molder for respondent H. C. McCaulay Foundery Company, he was employed by respondent Graham Manufacturing Co. as a molder with only inconsequential interruptions until February 1934. At that time he submitted to an operation for a hernia and thereafter worked on a farm near Turlock until 1936, when he returned to the employment of Graham Manufacturing Co., not as molder but as nightwatchman. He continued to work for the same employer as nightwatchman uninterruptedly until November 23, 1942.

In June 1940 during a two weeks vacation with pay, Williams consulted a physician, Dr. Grimmer, and asked for an X-ray of his chest. Grimmer took the X-ray pictures as requested and recommended, after viewing the X-rays, that Williams take them to another physician, Dr. Trimble, for his opinion and advice. At that time both physicians concluded that Williams was suffering from occupational silicosis of the lungs without disability. Williams underwent no treatment, and incurred no medical expense by reason of this condition except the cost of the examination by these two physicians, until November 23, 1942. At that time he contracted a severe cold which aggravated the preexisting condition of silicosis and his employment as nightwatchman was terminated. He filed his application for adjustment of claim with the respondent commission on January 26, 1943.

The commission made the following finding:

"He was aware in 1940 that he suffered silicosis. Since 1936 to November 23, 1942, he worked as a watchman for this employer at a considerable reduction in pay which would have entitled him to compensation on a wage loss basis had he applied for such compensation within time. The date of injury herein, within the meaning of the Workmen's Compensation Laws, is June, 1940. The application herein was not filed until January 26, 1943. No compensation has been paid, and no medical treatment has been furnished nor has any been promised by any of the defendants. The claim herein is therefore barred by the Statute of Limitations."

The law with respect to the running of the statute of limitations in cases of occupational disease has become well settled in this state. The leading case is Marsh v. Industrial Acc. Comm., 217 Cal. 338, 18 P.2d 933, 86 A.L.R. 563. The occupational disease there involved was, as in this case, pulmonary silicosis. In that case, after an exhaustive review of the cases from other jurisdictions, the court on page 351 of 217 Cal., on page 938 of 18 P.2d, announced the following rule:

"From our study of the subject we are brought to the conclusion that in the case of a latent and progressive disease, such as pneumoconiosis (pulmonary silicosis), it cannot reasonably be said that the injury dates necessarily from the last day of exposure to a dust-laden atmosphere and that the prescriptive period begins to run from that day. Rather, according to our view, should the date of the injury be deemed the time when the accumulated effects culminate in a disability traceable to the latent disease as a primary cause, and by the exercise of reasonable care and diligence it is discoverable and apparent that a compensable injury was sustained in performance of the duties of the employment."

In Price v. Industrial Acc. Comm., 9 Cal. App.2d 213, 49 P.2d 294, the court after quoting from the Marsh case added (9 Cal.App.2d at pages 215, 216, 49 P.2d at page 295):

"In the latter case the court disapproved the holding of the commission that the statute of limitations began to run as of the date the employee first was disabled from work, and indicates that in cases of this type the running of the prescription period begins when the presence of silicosis was or should have been diagnosed as the primary and efficient cause of the injury. It appears quite obvious from the evidence that petitioner, from the inception of his cough until he received the X-ray report on May 30, 1934, had no idea or reason to believe that he was suffering from a compensable injury, silicosis, arising out of and incurred in the course of his employment. * * * It is wholly unreasonable to argue, as to (do?) the respondent insurance carriers, that the employee should, through the exercise of reasonable care and diligence, have known in November of 1933 that which his medical adviser did not discover in February of 1934."

In Argonaut M. Co. v. Industrial Acc. Comm., 21 Cal.App.2d 492 at pages 496, 497, 499, 500, 70 P.2d 216, at page 219, the court again considered the same question and stated:

"In the present case there is substantial evidence in support of the findings of the commission that, while Blass Jurovich did know in 1933 that he was afflicted with silicosis from inhaling mineral dust in the mines where he had been employed, there is no evidence that he knew, or by the exercise of due diligence should have known, that the disease had disabled him to the extent that the efficiency of his work was impaired until February 16, 1936, when he abandoned the job. The burden of proving that the claim for compensation was barred by the statute of limitations was upon the respondents who opposed the claim. We are unable to say they have sustained this burden by showing that the claimant had any knowledge of the extent of his ailment, or that he should have had such knowledge as would entitle him to recover compensation.

"* * * In the case last cited (Price v. Industrial Acc. Comm., 9 Cal.App.2d 213, 49 P.2d 294) the denial of compensation by the commission was set aside on the theory that in spite of certain symptoms which the claimant previously knew that he had, it was held to be error on the part of the commission to assume that the claimant should have known the cause or nature of his ailment prior to the termination of his employment. The same rule should also apply with respect to knowledge on the part of a claimant as to the extent of his ailment.

"* * * The commission found that the compensable disability occurred February 16, 1936. In the absence of evidence to the contrary, or even where there is a conflict of evidence upon that subject, in support of the finding of the commission we must assume that the claimant had no knowledge of the nature or seriousness of his ailment prior to the time that he felt that it was necessary for him to abandon his work. Certainly the record contains no evidence that he knew, or by the exercise of due diligence that he should have known, prior to the time when he left his employment in the mine on February 16, 1936, that he was suffering from a compensable disability."

[1] The rule to be drawn from the decisions is that to start the statute of limitations running in the case of a claimant suffering from an occupational disease at

least three conditions must concur: (1) The disease must have so far progressed as to disable the claimant from the performance of his duties to such extent that he is entitled to compensation under the workmen's compensation law; (2) the claimant must know or in the exercise of ordinary care should have discovered that he is suffering from the occupational disease; and (3) he must likewise know or should in the exercise of such care have discovered that he is suffering a compensable disability of which the occupational disease is the cause.

[2] An examination of the record satisfies us that there is no substantial evidence in this case of the existence of the first or third conditions above listed.

The record amply supports the finding that in 1940 the claimant was informed by Drs. Grimmer and Trimble that he was afflicted with silicosis. In 1940 Dr. Trimble made a written report of his findings to Dr. Grimmer. We quote from that report:

"While he has a definite silicosis at the present time, it is unlikely that disability will be present in the future from his silicosis. This will, of course, be slowly progressive because of his age, but it is unlikely that he will survive the age where his silicosis reaches the point of disability. * * *

"With regard to the industrial standpoint, this is an industrial problem, but in my opinion is entitled to no compensation at the present time. The Commission has ruled that the compensation depends (in silicosis) not upon its presence alone, but upon disability arising from the silicosis, or from some other cause in which the silicosis is an important complicating factor.

"To protect his right in the matter, I would suggest, in view of the Statute of Limitations, that his present condition be reported to the Commission. If by chance disability does, in the future, arise from his silicosis, his interests will then be protected."

A later report by Dr. Trimble dated February 1, 1943, was also introduced before the commission. It states:

"This man was referred to me by Dr. Grimmer, July 23, 1940, and was examined at that time.

"A diagnosis of silicosis without disability was made. Mr. Williams and his physician were both informed of the facts."

Following Dr. Trimble's suggestion, above quoted from his 1940 report, Dr. Grimmer filed a report with the Industrial Accident Commission stating that claimant had "Silicosis of both lungs." This report contains the following statement: "Date disability began. Not as yet."

Lester R. Burdick, safety engineer of respondent Graham Manufacturing Co., testified that when claimant came back after his hernia operation "My recollection is that Mr. Williams asked for the watchman's job; that he felt he had moulded long enough and that he was too old to carry on." Nothing was said about silicosis.

A search of the record fails to disclose any evidence that in 1936 when he went to work as a watchman or in 1940 when he was informed that he had the disease the claimant's condition of silicosis had progressed to a point where it would disable him from working as a molder, or any evidence contradicting the findings of Drs. Trimble and Grimmer that in 1940 the claimant's silicosis had not progressed to the point where it had resulted in any disability. In 1936 he was 68 years old and in June 1940 he was almost 72. At a time when most men have retired from physical labor and until he was over 74 years of age the claimant continued to work steadily as a watchman. There is nothing in the record to contradict the claimant's own statement in 1936, as testified by Mr. Burdick, "that he felt that he had moulded long enough and that he was too old to carry on."

Even if there were evidence that the claimant was so disabled by silicosis in 1940 as to impair his ability to work as a molder there is no evidence to support a finding that he knew or in the exercise of ordinary care should have known that fact. He was entitled to rely on the findings of the two physicians whom he consulted and who were of the opinion that no disability had resulted from his condition of silicosis.

These conclusions make it unnecessary to consider the argument made by petitioner that even though a workman is compelled to accept less remunerative work by reason of an occupational disease that fact does not start the running of the statute of limitations unless the impairment of earnings is of such a substantial character that a man of ordinary prudence would seek compensation. That is apparently still an open question in this state. See Bianco v. Industrial Acc. Comm., 142 P.2d 73, where this question was considered by the District Court of Appeal in a decision which is not controlling because on hearing of the same case in the Supreme Court the decision went on a different ground. Bianco v. Industrial Acc. Comm., 24 Cal.2d 584, 150 P.2d 806.

The award is annulled with directions to the respondent commission to decide the application on its merits.

NOURSE, P. J., and GOODELL, J., concur.

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70 Cal.App.2d 741

PEOPLE v. SMITTCAMP.

Cr. 3867.

District Court of Appeal, Second District, Division 1, California.

Sept. 14, 1945.

1. Criminal law 🔑1023(10)

Where no judgment was pronounced on verdict of conviction, attempted appeal from "judgment" must be dismissed.

2. Criminal law 🔑783(1)

In prosecution for statutory rape and commission of lewd acts with females under 14 years old, word "adulterous" as used in instruction to jury that evidence of other acts of sexual intercourse and improper familiarity of defendant with prosecutrix was admitted to prove defendant's adulterous disposition, cannot be regarded in light of narrow or technical statutory definition of "adultery", but must be given broader, more generally accepted meaning, which includes lewdness or unchastity of thought as well as of act. Civ.Code, § 93; Pen.Code, §§ 261, 269a, 269b, 288.

See Words and Phrases, Permanent Edition, for all other definitions of "Adulterous".

3. Criminal law 🔑1172(8)

The trial court's dismissal of count of information, charging statutory rape, after jury failed to agree on verdict as to such count, did not preclude appellate court from considering, on appeal from order denying new trial after conviction on lewd counts charging acts with females under 14 years old, question whether trial court erred in instructing jury that evidence of other acts of sexual intercourse and improper familiarity by defendant with prosecutrix was admitted to prove defendant's adulterous disposition, as rendering such instruction harmless to defendant. Pen.Code, §§ 261, 288.

4. Criminal law 🔑369(1, 8)
Infants 🔑20
Rape 🔑38(3)

In prosecution for sexual offense, such as rape or commission of lewd acts with female under 14 years old, evidence of other like offenses or acts of improper familiarity and illicit intimacy or relations between defendant and prosecutrix before or after act charged in information is admissible to corroborate prosecutrix' testimony, where they tend to show continuous illicit relationship, but is never admissible to prove independent substantive offenses. Pen.Code, §§ 261, 288.

5. Infants 🔑20
Rape 🔑38(3)

In prosecution for statutory rape or commission of lewd acts with female under 14 years old, evidence of other acts of improper familiarity or illicit intimacy between defendant and prosecutrix is admissible to corroborate prosecutrix' testimony as to commission of specific offense charged only after prosecution has selected and designated particular act allegedly committed on certain date, elected to rely thereon for conviction, and introduced evidence in support of specific charge, and jury must be correctly instructed as to limited purpose for which such evidence is received. Pen. Code, §§ 261, 288.

6. Criminal law 🔑814(3), 1172(6)

In prosecution for commission of lewd acts with females under 14 years old, instruction that evidence of other acts of sexual intercourse and improper familiarity of defendant with prosecutrices was admitted only to prove defendant's adulterous disposition was prejudicial error, in absence of other testimony than that of prosecutrices themselves as to such other acts. Pen.Code, § 288.

7. Infants 🔑20

In prosecution for lewd acts with female under 14 years old, corroboration of prosecutrix' testimony as to specific acts charged is unnecessary to warrant conviction, as prosecutrix under such age cannot be accomplice. Pen.Code, § 288.

8. Criminal law ⚬⇒406(8)

In prosecution for commission of lewd acts with two females under 14 years old, defendant's testimony showing lack of proper concern for prosecutrix, who was left in his care, did not constitute admissions of defendant's commission of other lewd acts concerning which prosecutrices testified. Code Civ.Proc. § 1963, subd. 1; Pen.Code § 288.

9. Infants ⚬⇒20

In prosecution for lewd acts with two females under 14 years old, testimony of one of prosecutrices as to defendant's rape of other prosecutrix, as charged in count of information which was dismissed after jury failed to reach verdict thereon, was not corroborative of such other prosecutrix' testimony as to other lewd acts by defendant than those charged. Pen.Code, §§ 261, 288.

10. Witnesses ⚬⇒406

In prosecution for commission of lewd acts with two females under 14 years old, a witness' testimony that prosecutrices' father never ordered witness to stay away from their home and that witness never took offensive liberties with one prosecutrix was not competent in rebuttal of defendant's testimony as to such prosecutrix' statements to him that such witness had taken such liberties, that she informed her father of such fact, and that he ordered witness to remain away from prosecutrices' home. Pen.Code, § 288.

11. Infants ⚬⇒20

Prosecutrices' testimony was sufficient to support conviction for commission of lewd acts with two females under 14 years old notwithstanding inconsistencies in some of their testimony, vagueness of their memories in some respects, and their failure to complain of defendant's conduct for several months, in absence of anything to justify conclusion that such testimony was per se unbelievable and hence inherently improbable. Pen.Code, § 288.

12. Criminal law ⚬⇒1186(4)

Under constitutional provision authorizing reversal of judgment only for errors resulting in miscarriage of justice, appellate court must direct reversal of conviction when unable to say whether appellant would or would not have been convicted but for trial court's errors. Const. art. 6, § 4½.

13. Criminal law ⚬⇒1186(4)

The phrase "miscarriage of justice", in constitutional provision authorizing reversal of judgment only for errors resulting in miscarriage of justice, does not mean simply that a guilty man has escaped or that innocent man has been convicted, but is equally applicable where acquittal or conviction has resulted from some form of trial in which the people's or defendant's essential rights were disregarded or denied. Const. art. 6, § 4½.

See Words and Phrases, Permanent Edition, for all other definitions of "Miscarriage of Justice".

14. Criminal law ⚬⇒1186(4)

Justice requires that question of defendant's guilt or innocence of crime charged be determined by orderly legal procedure wherein his substantial rights are respected. Const. art. 6, § 4½.

15. Criminal law ⚬⇒1186(4)

Even convincing proof of defendant's guilt does not necessarily mean that there has been no "miscarriage of justice" within constitutional provision authorizing reversal of judgment for trial court's errors only if miscarriage of justice resulted. Const. art. 6, § 4½.

16. Constitutional law ⚬⇒268

Denial to accused of fair and impartial trial guaranteed by law amounts to denial of "due process of law."

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

17. Criminal law ⚬⇒1186(4)

In prosecution for commission of lewd acts with two females under 14 years old, where evidence was sharply conflicting, trial court's errors in instructing jury and admitting evidence required reversal of conviction. Pen.Code, § 288; Const. art. 6, § 4½.

◆

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Arthur Smittcamp was convicted of commission of lewd and lascivious acts with two females under 14 years old, and he appealed from an order denying his motion for a new trial and attempted to appeal from a "judgment", not pronounced on the verdict.

Attempted appeal dismissed, order denying new trial reversed, and cause remanded for a new trial.

Gladys Towles Root, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Carl S. Kegley, Deputy Atty. Gen., for respondent.

WHITE, Justice.

[1] Appellant was charged in an information filed by the District Attorney of Los Angeles County in counts I and III with violations of section 288 of the Penal Code, and in count II with statutory rape. The jury returned verdicts of guilty as to counts I and III, and, having failed to agree upon a verdict as to count II, the court declared a mistrial as to that count and on its own motion dismissed it "in the interest of justice." Thereafter a motion for a new trial as to the counts upon which defendant was convicted was made and denied. Thereupon, proceedings were suspended as to said counts and the defendant was granted probation for a period of five years on condition that he serve the first year of such probationary period in the county jail. From the order denying his motion for a new trial, defendant prosecutes this appeal. Defendant also attempts to appeal from "the judgment" but, inasmuch as no judgment was pronounced, the attempted appeal therefrom must be dismissed.

The prosecutrices were two sisters aged nine and thirteen years at the time of the alleged commission of the crimes charged in counts 1 and 3 of the information. Defendant was then 63 years of age and for some five years prior to his arrest had lived on Sherman Way in Los Angeles County. During the latter part of this period he was a partner of one Mrs. Hendrick in the turkey raising business. Upon her death, through the provisions of her will, he became the sole owner of such business.

When the defendant first took up his aforesaid residence, the two prosecutrices, their brother and parents lived nearby on Sherman Way. At that time the children frequented the defendant's place of business. The family of the prosecutrices later moved to another part of the valley, but continued to see defendant when they would purchase turkeys. After the death of defendant's partner, the mother of the prosecutrices acted as defendant's bookkeeper, and, in the summer of 1943, established a victory garden on defendant's property. From about December 1942 to January 1944, it was customary for the children to come to his place, being brought there by one or the other of their parents and left to work in the aforesaid victory garden, occasionally to help the defendant, but more often for him to take care of them because of their mother's absence from home. During this period, the defendant often, upon request or permission of their mother, called at school for the children and would keep them at his place until dinner time when he would bring them home.

The acts complained of, and the other improper acts about which the prosecutrices testified, are alleged to have been committed between May 2nd (the date on which the act charged in count 3 was alleged to have been committed) and September 6th, 1943 (the date on which the act charged in count 2 was allegedly committed).

The father of the prosecutrices and defendant had a disagreement as to the ownership of the money represented by a certain check; and, thereafter, defendant's arrangement to take his evening meal at the home of the prosecutrices was terminated about the 12th of January, 1944. Defendant testified that, at that time, he was "through with" the whole family. In February, 1944, some nine months after the alleged commission of the first offense complained of, while defendant was out of the city, the prosecutrices complained to their parents concerning his conduct.

[2, 3] The first ground relied upon by appellant for a reversal is that the court erred when the jury was instructed that:

> "Evidence of other acts of sexual intercourse between the defendant and the prosecutrix, and of improper familiarity on the part of the defendant towards and with the prosecutrix, both before and after the time charged in the information, is received and admitted in evidence to prove the *adulterous disposition* of the defendant, and as having a tendency to render it more probable that the act of sexual intercourse charged and relied on in the information was committed, and for no other purposes." (Emphasis added.)

Respondent insists that "unquestionably the instruction given was directed toward the second count", which charged the offense of rape, and, for that reason, even if conceded to be erroneous, was harmless error in view of the fact that upon the jury's failure to arrive at a verdict thereon said second count was dismissed by the trial court.

However, in a prosecution such as the one with which we are here concerned, the word "adulterous" cannot be regarded in the light of the narrow or technical definition of "adultery", Penal Code, sections 269a and 269b; Civil Code, section 93, but it must be given the broader and more generally accepted meaning which includes lewdness or unchastity of thought as well as of act. Therefore, the language contained in the challenged instruction that such evidence is "received * * * to prove the *adulterous disposition* of the defendant" must be taken to mean that such evidence is received to establish the fact that the defendant was given to licentious and unchaste thoughts, and therefore possessed of a tendency, desire and willingness to commit such lewd and lascivious acts as those denounced by section 288 of the Penal Code, as well as those described by section 261 of the same code. In the absence of any language directly and positively advising the jury that such evidence was not to be considered by them except as to the offense of rape charged in count 2 of the information, the conclusion is inescapable that the jurors were authorized to, could and probably would, infer from such evidence that it was more probable the defendant committed the acts charged in counts 1 and 3 as well as the act charged in count 2 of the information. It would challenge credulity and do violence to reason to assume that the instruction as given did not influence the verdicts returned as to counts 1 and 3. Therefore, respondent's argument that, because the court dismissed count 2 after the jury had considered the same and failed to reach a verdict thereon, precludes consideration of the questioned instruction on the instant appeal from the order denying a new trial as to counts 1 and 3 is not impressive.

[4, 5] By a long line of authorities it is now established as the law in this state that, in prosecutions for sexual offenses, evidence of other like offenses or acts of improper familiarity, illicit intimacy or relations between the parties, prior or subsequent to the act charged in the information relied upon by the prosecution, is admissible as *corroborative evidence* where they tend to show a continuous illicit relationship. Never is such evidence of "other acts" admissible as independent substantive offenses, upon any of which a conviction can be had. It is only after the prosecution has selected and designated some particular act allegedly committed on a date certain and upon which the prosecution has elected to rely for a conviction of the defendant and has *introduced* evidence in support of the specific charge selected and designated that evidence of "other acts" may be received as *corroboration of the testimony* introduced to prove the commission of the one specific offense charged in the information. And necessarily, a jury must be definitely and correctly instructed as to the limited purpose for which such evidence is received. In a long line of cases, instructions predicated upon the rule we have just referred to have been upheld. People v. Mathews, 139 Cal. 527, 530, 531, 73 P. 416; People v. Delgado, 37 Cal.App. 807, 809, 175 P. 24; People v. Harlan, 29 Cal.App. 600, 604, 156 P. 980; People v. Soto, 11 Cal.App. 431, 436, 105 P. 420; People v. Parrish, 25 Cal.App. 314, 322, 143 P. 546; and People v. Slaughter, 33 Cal.App. 365, 377, 165 P. 44; in each of which last three cases hearing in the Supreme Court after judgment in the District Court of Appeal was denied; People v. Koller, 142 Cal. 621, 623 to page 626, 76 P. 500, and some 28 decisions of the District Court of Appeal in which this last cited case is mentioned with approval; People v. Troutman, 187 Cal. 313, 319, 201 P.928. In these cases, however, the testimony of the prosecutrix was corroborated by circumstances or by testimony other than her own.

[6] As we have indicated herein, evidence of "other acts" to prove that the parties are adulterously, incestuously or lasciviously inclined is admitted only as corroborative evidence tending to support the one specific offense for the commission of which the defendant is on trial. Had there been testimony other than that given by the prosecutrices themselves as to the "other acts", then there would be corroboration of the prosecutrices' testimony as to such acts, and the purpose and intent of the rule of law permitting such corroborative testimony would have been accomplished, viz. that the jury would have been entitled to consider such evidence as cor-

roborative of the prosecutrices' testimony concerning the specific offenses for which the defendant was being tried. In such a situation the instruction given might not be prejudicial. But, in the absence of any testimony other than that given by the prosecutrices themselves as to "other acts," their testimony in that regard amounted only to an attempt to corroborate their own testimony. And if their testimony was not substantiated by any other evidence direct or circumstantial then, as was said in People v. Haugh, 90 Cal.App. 354, 356, 265 P. 891, 892, since the prosecutrix' testimony "was not substantiated by any other evidence, either circumstantial or otherwise. * * * in the case at bar *her statement that there were other acts of intercourse or improper familiarity on the part of defendant towards and with the prosecutrix would not have any tendency to render more credible her testimony* that the act of sexual intercourse charged and relied on in the information was committed. In other words, the only testimony connecting the defendant with the alleged crime is the testimony of the prosecutrix herself; and such evidence on the part of the prosecutrix could not be said in any way to render the guilt of the defendant more probable than if she had testified that the act had been done but the once charged in the information." (Emphasis added.)

The decision in People v. Bell, 96 Cal. App. 503, at pages 507 to 509, 274 P. 393, at page 395, cites People v. Haugh, supra, approvingly and holds that an instruction identical with the one before this court in the instant action was erroneous, saying that the testimony of the prosecutrix as to subsequent acts could not strengthen her statement concerning the act complained of *"or tend to establish more firmly the possession of an adulterous disposition by the appellant."* (Emphasis added.) However, in the Bell case such error was held not to have caused a miscarriage of justice, in view of the uncontradicted testimony that defendant had in the presence of several persons admitted that he had committed the one act alleged in the information.

In People v. Vaughan, 131 Cal.App. 265, 275, 21 P.2d 438, 442, an instruction similar to the one in the case at bar was characterized as "* * * objectionable also on grounds referred to" in People v. Haugh, and People v. Bell, supra.

While not conceding that the instruction given in the instant case is either erroneous or prejudicial, respondent devotes a considerable portion of its brief to the claim that the clear implication in the Haugh, Bell and Vaughan cases, supra, is that, had there been evidence other than the testimony of the prosecutrix as to "other acts," the instruction therein would not have been considered erroneous; and, if the testimony of the prosecutrix had been corroborated by other evidence as to the commission by the defendant of the specific crime with which he was charged, the instruction complained of might not have been prejudicial. We therefore proceed to an examination of the record to determine the verity of appellant's claim that the record is barren of any evidence, other than the testimony of the prosecutrices, to prove the commission by the defendant of any of the "other acts" relied upon by the prosecution, or the correctness of respondent's claim that there is in the record corroboration of the "stories of the two girls", both as to the crimes charged and "other acts" referred to in the instruction now under consideration.

[7] We pause here to say that what we have herein stated regarding "corroborative evidence" or "corroboration" bears no reference to the specific acts charged in counts 1 and 3, because it is established law in this state that, in a prosecution under section 288 of the Penal Code, the prosecutrix, being under the age of 14 years, could not be an accomplice, and no corroboration of her testimony as to the specific act charged against the defendant in the information is necessary. People v. Johnson, 115 Cal.App. 704, 706, 2 P.2d 216; People v. Vaughan, supra, 131 Cal. App. at page 267, 21 P.2d 438.

In so far as count 1 is concerned, there is in the record no testimony whatsoever either as to the specific act relied upon for conviction or as to the "other act," except the testimony given by the prosecutrix herself and that given by the defendant in complete denial thereof.

[8] In an effort to avoid the application of the rule herein announced upon the authority of the Haugh, Bell and Vaughan cases, supra, respondent relies upon certain portions of the defendant's own testimony as corroborative of the commission by him of the "other acts", concerning which the prosecutrices testified, which testimony, as set forth in the questioned instruction, was received to "prove the adulterous dis-

position of the defendant." The specific portions of defendant's testimony upon which reliance is placed by respondent are with reference to: (1) The receipt by defendant of an amorous letter (Defendant's Exhibit A) from one of the prosecutrices; (2) defendant's writing and delivering to said prosecutrix of several notes but of an entirely different nature and character; (3) the custom of the two prosecutrices to kiss defendant good night almost every night when he was taking his evening meal with them and their parents, and defendant's failure to discontinue or change such custom upon his receipt of the aforesaid letter (Defendant's Exhibit A); (4) conversations between one of the prosecutrices and defendant, in which she told him that another man (a friend of her father) had hugged and kissed her, played with her and done "many things" to her, and to which the defendant replied "I didn't think it was a very nice way to play, and she promised me she would cut it out," and also that defendant told her she should talk to her mother or father (not defendant) about it and that he "didn't want to get into any trouble" over it; (5) defendant's failure to tell the girl's father immediately about his own receipt of the letter (Defendant's Exhibit A), and his waiting to do so for about three weeks; and (6) defendant's failure to tell the girl's father about the conversation between them respecting her statement that another man had taken liberties with her until he had obtained the daughter's permission to do so, which was a "short time" after the occurrence of the conversation. While defendant's testimony in such respects undoubtedly might show a lack of judgment and proper concern for the welfare of this adolescent girl who was so often left in his care, it cannot be held to constitute an admission by defendant of the commission by him of any of the acts concerning which the prosecutrices testified, nor can an inference that he did commit any such act properly be drawn from such testimony. The law presumes a person is innocent of crime or wrong. Code Civ.Proc. § 1963, sub. 1.

[9] Further, as evidence of "other acts" corroborating the testimony of one of the prosecutrices, the respondent relies upon the testimony of her sister respecting the act charged in count 2 of the information in which the former appeared as the prosecutrix, concerning which the jury was unable to reach a verdict and which was later dismissed by the trial court "in the interest of justice." Obviously this could not be one of the "other acts," because it was the act specifically charged in count 2 and relied upon for a conviction upon that count. The jury was therefore authorized to consider it only in relation to the guilt or innocence of the defendant upon the charge contained in that count. Another answer to respondent's claim in this regard is that by their failure to agree upon a verdict as to said count 2, it is evident the jury did not believe that the act specified in that count was committed by the defendant.

The record in the case with which we are here concerned, therefore, presents a situation similar to those existing in the Haugh, Bell and Vaughan cases, supra, where, as in the instant case, the only evidence of "other acts" was the prosecutrices' own testimony which could in no way add to, strengthen or render more creditable their testimony that the acts charged and relied upon in the information for conviction were committed, and such evidence on the part of the prosecutrices could not be said in any way to render the guilt of the defendant or his possession of an adulterous disposition "more probable" than if they had testified only to the specific acts charged in the information.

[10] It is next contended by appellant that the court erred in its decision upon a question of law which arose during the trial. In that regard, it appears that appellant testified that one of the prosecutrices had stated to him that another man who was a friend of her father had taken offensive liberties with her person; that she had informed her father of such fact as a result of which the latter had ordered the man in question to remain away from the home of the prosecutrices in question. In rebuttal, the prosecution produced the aforesaid man as a witness and, over the objection of defendant, he was permitted to testify that neither the father of the named prosecutrix nor anyone else ever ordered him away from the home of such prosecutrix or asked him to "stay away from his place." Over defendant's further objection, this witness was permitted to testify that at no time had he "fondled, felt or caressed the private parts of ———" (the prosecutrix named), and that he had "never at any time spoken to her or anything of that kind. That is one of the things in which I have been above re-

proach." Whether or not this rebuttal witness had ever been guilty of the misconduct charged against him by one of the prosecutrices in her conversation with the defendant was not in question. In his testimony the latter did not charge the witness with being guilty of any misconduct. He testified only that the named prosecutrix had made such accusations in her conversation with him and that such information had been relayed to her father. The rebuttal testimony was, therefore, not competent or material. It did not tend to contradict the testimony of the defendant, who did not say that the rebuttal witness had committed any acts upon the person of the girl. He only testified as to what the latter said and the above mentioned rebuttal testimony did not tend to dispute that fact. People v. Mitchell, 94 Cal. 550, 554, 29 P. 1106.

[11] Finally, appellant contends that the evidence is insufficient to support the verdict. Notwithstanding the inconsistencies apparent in some of the testimony given by the prosecutrices, the vagueness of their memory in some respects, and their failure to make complaint of the defendant's alleged conduct for several months, it cannot be said that the testimony of the children in regard to the immediate circumstances surrounding the assaults allegedly made upon them was of such a character that it would appear therefrom that something had been done that it would not seem possible could be done under the circumstances described. While defendant's claims advanced here offered opportunity for a persuasive argument to the jury, we find in them nothing that would justify a reviewing court in concluding that such testimony is per se unbelievable and therefore inherently improbable. People v. Roberts, 50 Cal.App.2d 558, 564, 123 P.2d 628; People v. Harkness, 51 Cal.App.2d 133, 140, 124 P.2d 85.

[12] We must now inquire into the effect of the errors of the trial court upon the disposition of this appeal, in the light of the provisions of Section 4½, Article VI of our State Constitution. When applying the provisions of the constitutional section just cited to a cause in its entirety, we must direct a reversal when we are unable to say "whether appellant would or would not have been convicted but for the errors of the court" People v. Degnen, 70 Cal.App. 567, 234 P. 129. In People v. Davis, 210 Cal. 540, 556, 293 P. 32, 39, we find the following language:

> Section 4½ of article 6 of the Constitution was not intended to mean that the mere fact that the evidence may legally be able to stand up under the weight of the judgment is sufficient reason in all cases for refusing to set aside the judgment. The phrase 'miscarriage of justice,' used as descriptive of that condition of a cause which justifies the reversal of a judgment, has no hard and fast definition. It seems assured, however, that where errors have been committed, and where the appellate court finds that upon the record it is seriously doubtful that without such errors the defendant would have been convicted, then it may well be that errors which otherwise would not be considered to be seriously prejudicial, will require a reversal. See People v. Adams, 76 Cal.App. 178, 186, 244 P. 106, and numerous cases there cited."

In the instant case the evidence is in sharp conflict. All of the material facts testified to by the prosecution were denied and controverted and the defendant presented an imposing array of witnesses who testified to his good reputation concerning the traits involved in the offenses charged against him. There is no corroboration of the testimony of the respective prosecutrices as to the commission by the defendant of the specific acts charged in the information or of the "other acts," and the only act concerning which they in any degree corroborated each other was the act charged in count 2, upon which the jury was unable to reach a verdict and which was thereupon dismissed by the court "in the interest of justice." The doctor from Juvenile Hall, who was supposed to give corroborating testimony, on the contrary testified that there was a possibility that the condition she found as to both girls was a normal one.

As to the specific acts charged in the information, we are not unmindful of the rule of law hereinbefore referred to that corroboration of the testimony of the prosecutrix in a case such as the instant one is not required to sustain a conviction; but in considering the application of section 4½ of article VI, we make mention of the total lack of any corroboration, because the recollection and memory of the prosecutrices was admittedly vague in connection with several important circumstances of the case. There is also present the fact that neither prosecutrix made any complaint for some eight or nine months after the claimed outrages to her person occurred. In People v. Adams, 14 Cal.2d 154, 163, 93 P.2d 146, we are reminded by the Supreme Court of the language employed by that court as far back as People v. Benson, 1856, 6 Cal. 221, 223, 65 Am. Dec. 506, reading as follows:

"There is no class of prosecutions attended with so much danger, or which afford so ample an opportunity for the free play of malice and private vengeance. In such cases the accused is almost defenceless, and Courts, in view of the facility with which charges of this character may be invented and maintained, have been strict in laying down the rule which should govern the jury in their finding."

[13-16] As was said by this court in People v. Duvernay, 43 Cal.App.2d 823, 829, 111 P.2d 659, 662:

"There is creditable authority for the statement that the phrase 'miscarriage of justice,' as used in the constitutional provision, 'does not simply mean that a guilty man has escaped, or that an innocent man has been convicted. It is equally applicable to cases where the acquittal or conviction has resulted from some form of trial in which the essential rights of the people or of the defendant were disregarded or denied. The right of the accused in a given case to a fair trial, conducted substantially according to law, is at the same time the right of all inhabitants of the country to protection against procedure which might at some time deprive them of their life or liberty. "It is an essential part of justice that the question of guilt or innocence shall be determined by an orderly legal procedure, in which the substantial rights belonging to the defendant shall be respected."' People v. Wilson, 23 Cal.App. 513, 138 P. 971, 975. In the instant case we do not regard the evidence as sufficient to put into operation the provisions of section 4½ of article 6 of the Constitution, because even convincing proof of a defendant's guilt does not necessarily mean, under all circumstances, that there has been no miscarriage of justice. People v. Mahoney, 201 Cal. 618, 258 P. 607; People v. Patubo, 9 Cal.2d 537, 71 P.2d 270, 113 A.L.R. 1303. When a defendant is denied that fair and impartial trial guaranteed by law, such procedure amounts to a denial of due process of law. Powell v. [State of] Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527."

[17] Courts are obligated to insist that a defendant be fairly convicted. To relax this rule would be to provide ways and means for the conviction of the innocent. From a reading of the record in the case now before us, we are persuaded that the errors mentioned herein may well have turned the scale in favor of the prosecution; and we cannot say that, in the absence of such errors, a reasonable jury properly instructed would not have rendered a different verdict.

No judgment having been pronounced, the attempted appeal therefrom is dismissed. For the foregoing reasons, the order denying the defendant's motion for a new trial is reversed and the cause remanded for a new trial.

YORK, P.J., and DORAN, J., concur.

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71 Cal.App.2d 41

WEISBECKER v. WEISBECKER.

Civ. 14900.

District Court of Appeal, Second District, Division 1, California.

Sept. 28, 1945.

Rehearing Denied Oct. 24, 1945.

Hearing Denied Nov. 26, 1945.

1. Appeal and error ⇨82(1)

Denial of a new trial sought on ground of impossibility of obtaining a stenographic report of testimony due to death or disability of stenographic reporter is a special order made after final judgment and as such is appealable. Code Civ.Proc. §§ 953e, 963.

2. New trial ⇨93

The determination of a motion for new trial predicated on impossibility of obtaining a stenographic report of testimony due to death or other disability of stenographic reporter rests in the discretion of trial court, and in absence of showing that movant cannot prepare a proper record on appeal by means of bill of exceptions, denial of such motion is not an abuse of discretion. Code Civ.Proc. § 953e.

3. Appeal and error ⚷801(1)

The policy of the law is to favor, whenever possible, a hearing of an appeal on the merits.

4. New trial ⚷93

Trial court's discretion to grant or deny a motion for new trial predicated on impossibility of obtaining stenographic report of testimony due to death or disability of stenographic reporter is a legal discretion to be reasonably exercised. Code Civ. Proc. § 953e.

5. Appeal and error ⚷946

"Abuse of discretion" does not necessarily imply a willful abuse or intentional wrong, but discretion is abused whenever in its exercise a court exceeds the bounds of reason, all the circumstances before it being considered.

See Words and Phrases, Permanent Edition, for all other definitions of "Abuse of Discretion".

6. New trial ⚷93

Where wife's attorney acted in customary manner to perfect appeal from interlocutory judgment granting husband a divorce without providing for wife's support and upon learning of sudden death of stenographic reporter, without preparing transcript of testimony which had been duly ordered and paid for, promptly moved for new trial, and husband's attorney had waived or consented to delay in preparation of transcript, denial of motion for new trial amounted to "abuse of discretion". Code Civ.Proc. § 953e.

7. New trial ⚷96

Failure to move under court rule for a settled statement of oral proceedings for use on appeal should not be considered a penalizing circumstance in connection with motion for new trial predicated on impossibility of obtaining stenographic transcript of testimony due to death of stenographic reporter, since the remedy provided by such rule is in addition to any remedy given by law. Code Civ.Proc. § 953e; Rules of District Court of Appeal, rule 4(e).

8. New trial ⚷96

Appellant's failure to proceed for bill of exceptions, agreed statement, or settled statement at a time when stenographic reporter was alive and apparently in good health and transcript without extension of time was not yet due, did not warrant denial of her motion for a new trial predicated on impossibility of obtaining stenographic transcript due to sudden death of reporter. Code Civ.Proc. § 953a, 953e; Rules of District Court of Appeal, rule 4(e).

9. New trial ⚷157

Where respondent's attorney did not deny appellant's repeated assertions in affidavit for new trial and in opposition to motion to terminate proceedings to prepare record on appeal that delay in preparation of transcript was agreeable to respondent, presumption was authorized, in passing on appellant's motion for new trial predicated on impossibility of obtaining transcript due to death of reporter, that respondent had consented to such delay. Code Civ.Proc. § 953e.

10. Appeal and error ⚷980

Appellate court will listen more readily to appeal from order denying motion for new trial predicated on impossibility of obtaining transcript due to death of reporter than to appeal from order granting such relief, particularly in divorce cases. Code Civ.Proc. § 953e.

◆

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action for divorce by John G. Weisbecker against Arlie Marian Weisbecker, wherein defendant filed a cross-complaint for separate maintenance and an interlocutory judgment of divorce was entered. From an order denying defendant's motion for a new trial predicated upon the impossibility of obtaining a stenographic report of testimony taken on the trial due to death of stenographic reporter, and granting plaintiff's motion to terminate proceedings to prepare a record on appeal from the interlocutory judgment, defendant appeals.

Order reversed with directions.

Frank E. Carleton, Elmer P. Bromley and H. E. Lindersmith, all of Los Angeles, for appellant.

Don Lake, of Los Angeles, for respondent.

PER CURIAM.

This is an appeal from an order denying defendant's motion for a new trial under Section 953e of the Code of Civil Procedure, predicated upon the impossibility of obtaining a phonographic report of testimony taken on the trial of a divorce case, due to the death of the stenographic reporter; and granting the plaintiff's motion to terminate proceedings to prepare a record on appeal from an interlocutory judgment of divorce entered in plaintiff's favor. "The sole question presented," in the language of appellant's opening brief, "is whether or not, under all the facts and circumstances appearing, the action of the lower court was an abuse of discretion * * *."

On August 4, 1943, the plaintiff husband filed a divorce action to dissolve a marriage which had existed more than twenty one years. The wife (appellant here) denied plaintiff's general allegations of cruelty and by cross-complaint sought separate maintenance, alleging that the husband used intoxicating liquor to excess and encouraged the wife in the use thereof. Intimate relations between the husband and another woman were also charged. The husband's answer to the cross-complaint averred a mutual condonation and that thereafter the wife had "reverted to her former acts and conduct and abandoned herself to the use of intoxicating liquor". The case was tried on February 18, 23 and 24, 1944 resulting in a finding that plaintiff husband's allegations were true and that the wife's allegations were untrue. The court found that the husband earned $200 per week but made no provision for support of the wife. Certain furniture in storage, and two Packard automobiles, were divided between the parties, and the wife was awarded U. S. war bonds in the face value of $400 which were already in her possession. The husband was ordered to pay additional attorney fees to the wife's counsel, in the amount of $300.

An interlocutory judgment of divorce, in accordance with the findings, was entered April 13, 1944, and on June 12, 1944 the defendant wife filed notice of appeal therefrom. On June 20, 1944 the wife's attorneys filed a "Notice to the clerk to prepare transcripts on appeal (Section 953a C.C.P.)," and this clerk's transcript was certified and filed in the County Clerk's office on Sept. 1, 1944. The trial court made an order on June 23, 1944, requiring the husband to pay the charges for the preparation of a reporter's transcript to be used on appeal, and such payment was made by the husband's attorney on June 29, 1944. On November 3, 1944, the wife's attorney filed a motion for new trial under Code Civ.Proc. Section 953e. alleging that J. M. Phillipowski, who had reported the divorce case, had died on or about September 14, 1944, and that the reporter's death was not discovered until about October 30, 1944. The affidavit of the wife's attorney, accompanying such motion for new trial, further recited that sometime after June 23, 1944 the reporter telephoned that he had received a check from plaintiff's attorney covering the estimated cost of the reporter's transcript including a copy for the wife's attorney, and "that he would go to work on it as soon as he could; * * * Affiant states that he received one other telephone call from the said J. M. Phillipowski other than the one above referred to, in which he apologized for the fact that the transcript had not been forwarded, and stated that he had been unable to get it out but that he would do so and that no rights of affiant's client was being prejudiced by the delay as he had secured the necessary extensions of time from the Judge. Not hearing anything further in the matter, affiant states that he finally called Department 6 on October 30, and court being in session, asked that the reporter call him; thereafter he did receive a call from a reporter of a different name and was advised to talk to the Clerk of the Department, who advised him that J. M. Phillipowski had passed on in September." The affidavit further states that there were 19 exhibits offered and admitted in evidence and a great deal of testimony received at the three day trial, and that "it is utterly and entirely impossible to prepare an adequate record on appeal * * * without a transcription of the reporter's notes * * * and which transcription cannot * * * be obtained. Affiant further makes oath and says that there are grave questions involved as to the sufficiency of the evidence * * * to sustain the findings of the court upon material issues," specifying certain issues, and alleging that there was not only an absence of evidence to sustain the court's finding that the wife had no cause for divorce, but that there was "undisputed documentary evidence to the contrary," showing that plaintiff had lived with another woman, and that plaintiff had admitted that fact. An affidavit by plaintiff's attorney, in opposition to the motion for new trial, averred that defendant's counsel had not used due diligence to insure prompt filing of the reporter's transcript, and that no order had been secured extending the time for filing such transcript.

Plaintiff's attorney at the same time filed a motion to terminate the proceedings to prepare the record for appeal, likewise setting up want of diligence and no order extending time. In opposition to the latter motion there is an affidavit by the reporter's transcriber, stating that on September 12, 1944, the reporter Phillipowski had informed her that "he was going to dictate the Weisbecker case and that when she returned (from her vacation) on September 24, 1944, it would all be dictated and ready for her to transcribe," but that when she returned, the transcript had not been dictated. The transcriber's affidavit further stated that it was the reporter's practice to tell her that he had called the attorneys for both sides of a case and that they were agreeable to an extension of time, and that while she did not know what was done with respect to the Weisbecker case, "she is firmly of the belief and definitely of the opinion that all the attorneys in the Weisbecker case were contacted and that the delay in the preparation of the transcript was agreeable to all concerned." There is also an affidavit by the wife's attorney in which it is stated that there was another conversation with the reporter between the time of the two telephone calls hereinbefore mentioned, and that "said reporter called upon affiant at his office and had a conversation with affiant with reference to the transcript in this matter"; that in one of the telephone calls the reporter stated "he had secured 'the necessary extensions of time,'" and that affiant did not question the matter "because of his understanding and belief that plaintiff's attorney was agreeable to the reporter's delay," and because plaintiff's attorney had, during the trial, cooperated in entering into other stipulations.

Among other matters of evidence set forth in said affidavit as tending to show that the judgment rendered was contrary to the evidence, is the fact that although plaintiff testified that he had never indulged excessively in intoxicating liquors, he also admitted writing a certain exhibit reading as follows: "I swear to God that I will not take a drink other than the pint that I now get today. J. G. W." The affidavit further alleges that there was other evidence of plaintiff's excessive indulgence in liquor, for example, a conviction of being drunk in a public place. Also mentioned in the affidavit are certain apartment house records and testimony of the house manager indicating that the plaintiff had lived there with another woman between August 24, 1942, and September 24, 1943.

A minute order of December 12, 1944, recites that said motions "having been heretofore heard and submitted, the Court now orders the said motion for a new trial denied, and the motion to terminate proceedings on appeal granted." The record does not disclose what reasons motivated the judge in thus disposing of the motions in question. It is from this order that the present appeal is presented.

Code of Civil Procedure, Sec. 953e, under which appellant's motion for a new trial was brought, provides that: "When it shall be impossible to have the phonographic report of the trial transcribed by a stenographic reporter as provided by section 953a of this code because of the death or other disability of a reporter who participated as a stenographic reporter at the trial, the court or a judge thereof shall have the power to set aside and vacate the judgment, order or decree from which an appeal has been or is to be taken and to order a new trial of the action or proceeding." It is not contended by appellant that this section granted any absolute right to a new trial by merely that, under the circumstances, the denial of such new trial constituted an abuse of discretion.

[1, 2] That the denial of a new trial sought under Sec. 953e, is "a special order made after final judgment and as such is appealable under section 963 of the Code of Civil Procedure," was decided in Conlin v. Coyne, 15 Cal.App.2d 569, 571, 59 P.2d 884, 885. Upon a later appeal in the same case, Conlin v. Coyne, 19 Cal.App.2d 78, 64 P.2d 1123, it was held that the determination of such a motion rested in the discretion of the trial court, and that where it did not appear that defendants could not have prepared a proper record on appeal by means of a bill of exception, it could not be said that there was an abuse of discretion in denying a new trial. In the latter case it appeared that 655 folios of transcript had been transcribed before the reporter's death and were available for appellant's use, and the affidavits did not "disclose that a sufficient record could not

have been made up without a complete transcript." However, at page 82 this court observed: "Had the plight of defendants been as desperate as was pictured by the sweeping generalities of the affidavits, and had the despairing views of their then counsel been substantiated by definite and positive statements of fact, a denial of their motion for a new trial would have seemed most unjust."

[3] The case of Caminetti v. Edward Brown & Sons, 23 Cal.2d 511, 144 P.2d 570, 571, has been commented upon by both appellant and respondent. In that case it was likewise held that "the trial court has a wide discretion in passing on a motion for new trial under section 953e and that its action thereon must not be disturbed unless it is clearly shown that the trial court abused this discretion." Among other facts bearing upon the Caminetti decision is that "after the reporter became permanently disabled there was an unexplained delay of over eight months before appellant served and filed his notice of intention to move for a new trial under the provisions of section 953e." These facts are not paralleled in the instant case, for the reporter appears to have been in good health prior to his sudden death on September 14, 1944; knowledge of the reporter's death came to appellant's attention on October 30, 1944, and the motion for new trial was made on November 3, 1944. Moreover, in the Caminetti case which was a four to three decision, the observations of Carter, J., in the dissenting opinion (23 Cal.2d at page 522, 144 P.2d at page 576) are not inappropriate to the present discussion: "The policy of the law is always to favor, wherever possible, a hearing of an appeal on the merits. * * * It is just as essential that an appellant be protected in his right to have his appeal heard on the merits as that a respondent be given the benefit of the presumptions and intendments supporting his judgment. Moreover, a retrial gives both parties another chance, whereas a denial of it absolutely forecloses the appellant. There can therefore be no question that section 953e has been properly construed to repose in the trial court a wide discretion * * *. But this discretion, although a wide one, is not unlimited, arbitrary, or unrestricted. * * * In passing upon (such) a motion * * * the court cannot be motivated by his personal inclination to see his own adjudication prevail over appellant's right to have it tested by appeal on the merits."

[4, 5] It is said in Sharon v. Sharon, 75 Cal. 1, 48, 16 P. 345, 366, that: "The discretion of the court below is a legal discretion, to be reasonably exercised. 'Abuse of discretion' * * * does not necessarily imply a willful abuse, or intentional wrong. In a legal sense, discretion is abused whenever, in its exercise, a court exceeds the bounds of reason, all the circumstances before it being considered."

If trial courts become committed to the practice of summarily denying motions for new trial sought under the provisions of Code Civ.Proc. Section 953e, and if on appeal from such denial reviewing courts take the course of least resistance and affirm the order of denial because the matter is deemed one within the discretion of the trial court, the succor afforded by Section 953e is as effectually denied the appellant as it would be if no such statute existed. Such cannot have been the intent of the legislators in enacting this provision.

[6] In the present case, it is difficult to see wherein the appellant's attorney acted in any manner different from that which might reasonably be expected under the existing circumstances. The appeal was initiated in customary and timely manner; there were the usual telephonic conversations with the reporter concerning progress; the attorney was advised that no rights were being prejudiced and that the opposing attorney consented to the delay. As soon as knowledge of the reporter's sudden death came to the attorney's attention, the motion for new trial was filed. If, then, the appellant has acted in a reasonable manner, and by the sudden death of the reporter has been denied the use of a stenographic transcript for use on appeal, it appears that the conditions described in Code Civ.Proc. Section 953e are present and that under the circumstances here existing a denial of the new trial provided for in that section must be deemed unreasonable.

[7] The respondent's principal contentions, as contained in a supplementary brief, are that a reporter's transcript was not needed, and that appellant exercised no diligence and has shown no good cause for the relief asked. In this connection it is asserted that "defendant took no steps to

secure a record under the provisions of Rule 4(e) on appeal." Such rule provides that: "If, without fault of the appellant, the reporter refuses or becomes unable or fails to transcribe all or any portion of the oral proceedings designated by the parties, the clerk shall mail notice" thereof to the parties, whereupon a motion may be made "for leave to prepare a settled statement of such portion of the oral proceedings." However, as pointed out by appellant, such rule provides that "this remedy is in addition to any remedy given by law," and therefore any failure to move for a settled statement should not be considered a penalizing circumstance in connection with appellant's motion for new trial under Code Civ.Proc. Section 953e. Furthermore, it is difficult to see how the appellant could prepare an adequate statement of the evidence, or indeed, under any appellate procedure, intelligently present her contention that the judgment was contrary to the evidence, without the aid of a transcript or some other equivalent data non-existent in this case. It may also be noted that no notice of the reporter's death was given by the clerk as provided for in Rule 4(e), which fact, as appellant observes, delayed action at least two weeks.

[8] It is further stated in respondent's supplementary brief, that "Up to June 30, 1944, defendant could have proceeded for a bill of exceptions. Up to July 22, 1944, defendant could have proceeded for an agreed statement. Up to June 22, 1944, appellant could have proceeded for a settled statement. Up to June 24, 1944 appellant could have proceeded under Section 953a, C.C.P." All this, however, seems quite beside the point since on the dates mentioned the reporter was alive and apparently in good health, the reporter's costs had been paid on June 29, 1944, and without any extension of time the transcript was not due until July 29, 1944. Doubtless, appellant would have taken other and different steps had it been known that the reporter was about to die, but certainly no want of diligence or other penalizing circumstance can be predicated upon this lack of omniscience.

[9] In this connection it may be noted that neither in the affidavits nor briefs filed, does respondent's attorney deny appellant's direct assertions that the reporter's delay was agreeable to the respondent; nor does such attorney anywhere state that the reporter did not communicate with him in reference to such delay. Such a waiver of the time requirement for preparing the transcript had been specifically asserted several times, namely in appellant's affidavits for a new trial and in opposition to the motion to terminate proceedings; also in the affidavit of the reporter's transcriber and again in the appellant's opening brief. All this, however, brought forth no denial or even comment from respondent's attorney other than the cryptic statement: "Nor do unfounded innuendoes that the attorney for respondent consented to the delays aid appellant." In view of this situation it is not unreasonable to suppose that the delay in preparation of the transcript was with the tacit approval if not with the express consent of the respondent.

The remedial aspect of Code Civ.Proc. Section 953e must not be lost sight of. This section was added to the Code in 1931 for the purpose of changing the rule announced in Diamond v. Superior Court, 189 Cal. 732, 210 P. 36 which had held that a new trial could not be granted on account of the death of a court reporter since this was not then one of the statutory grounds for new trial. See 25 Calif. Law Review, page 114. Obviously, Section 953e confers no absolute right to a new trial, and each case must stand upon its own merits. In the various cases cited by respondent where a new trial was held properly denied, there was either an unconscionable delay of many months or other facts quite divergent from those in the instant case, hence those cases cannot be considered authority governing the present decision. Where, as in the present case, an appellant has proceeded in the customary manner to perfect an appeal, has acted with reasonable promptness upon learning of the reporter's death, and the contentions of appellant are dependent upon voluminous evidence taken during a three day trial, the emergency situation contemplated by Section 953e seems to be present. Under these circumstances a denial of the new trial provided for in such section exceeds the bounds of judicial reason and therefore must amount to an abuse of discretion. This is more particularly true where any delay in preparation of the transcript appears to have been waived or consented to by respondent's attorney.

[10] As was said in Litvinuk v. Litvinuk, —— Cal.2d ——, 156 P.2d 446, 448, "an

appellate court listens more readily to an appeal from an order denying relief than to one attacking a ruling granting relief * * * and such a policy is especially desirable in a divorce proceeding, where the state is an interested party." In the case at bar a marriage existing for twenty-one years was dissolved at the behest of a husband who, as appellant maintains, was "shown to be at least as culpable as his mate and with the shocking consequence that she has no further legal claim upon him for support and maintenance. The shock is now intensified to an almost unbelievable degree by the action of the lower court in denying to her any further recourse to a judicial tribunal in her efforts to right what she considers to be a great wrong against her."

For the reasons heretofore noted, the order appealed from is reversed and the court below is directed to grant a new trial under the provisions of Section 953e of the Code of Civil Procedure.

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71 Cal.App.2d 142

BAIRD et al. v. LASCY et al.

Civ. 12927.

District Court of Appeal, First District, Division 2, California.

Oct. 3, 1945.

Rehearing Denied Nov. 2, 1945.

1. Principal and agent 🔑157

Where agent assumes to act for two opposing parties without disclosing his dual capacity, either party may repudiate and defend against resulting contract as having been procured by constructive fraud.

2. Principal and agent 🔑23(1)

Evidence failed to establish that in negotiating contract by which, after principal contractor had absconded, subcontractors agreed to waive liens and permit completion of building under new contract and accept proportional reduction of claims, secretary of contractors' association represented owners as well as subcontractors so as to justify repudiation of waiver contract on ground of constructive fraud.

3. Principal and agent 🔑23(1)

That secretary of contractors' association, who negotiated contract by which subcontractors after principal contractor had absconded, agreed to waive liens and permit completion of building under new contract and accept proportional reduction of claims obtained contract to complete building, did not show that he represented owners as well as subcontractors in procuring waiver contract so as to entitle subcontractors to repudiate such contract on ground of constructive fraud.

4. Mechanics' liens 🔑279

Subcontractors, seeking to avoid contract by which they waived liens on ground it was obtained by fraud and to foreclose materialman's lien notwithstanding such waiver had the burden of proving such fraud.

5. Mechanics' liens 🔑281(1)

Subcontractors, seeking to avoid contract by which they waived liens on ground it was obtained by fraud and to foreclose materialman's lien notwithstanding such waiver, failed to sustain burden of proving such fraud.

◆

Appeal from Superior Court, San Mateo County; Andrew R. Schottky, Judge.

Suit by Floyd L. Baird and others, copartners, doing business as F. L. Baird Lumber Company, against Al Lascy, M. A. Lascy, Welker N. Cochran, and Volta Cochran, to foreclose a materialman's lien. Judgment was entered against original contractor, Lascy, for the amount of the lien and in favor of the defendants Cochran, quieting their title to the real property free from the claim of lien, and plaintiffs appeal.

Judgment affirmed.

Alfred J. Harwood, of San Francisco, for appellants.

Charles Reagh, of San Francisco, for respondents.

NOURSE, Presiding Justice.

The plaintiffs sued to foreclose a materialman's lien in the sum of $262.26. Judgment was entered against the original contractor Lascy for the amount of the lien, and in favor of the defendants Cochran quieting their title to the real property free from the claim of lien.

The defendants contracted with Lascy to build a house on the property for the total cost of $8500. They secured a loan of $7000 from a bank to finance the construction. Lascy absconded leaving $5253.40 owing to the subcontractors. A Mr. Byrnes, who was secretary of a contractors' association to which a number of the subcontractors belonged, proposed to them that they waive their liens, permit the completion of the building under a new contract, and accept a proportional reduction of their claims within the amount which might be saved after the completion. A contract for that purpose was prepared and signed by the owners and all but two of the subcontractors. Thereafter the signatory subcontractors gave to Byrnes a written power of attorney to settle with these two; this was done and the building was completed under a contract between the owners and Byrnes. The plaintiffs thereafter repudiated their agreement and brought this action to foreclose their lien. The contracts were set up by defendants in their answer. The trial court found that they were in all respects valid and denied plaintiffs' claim that they were obtained by fraud.

[1-5] Appellants' attack upon the judgment rests solely upon this conclusion that the contracts were not tainted with fraud. They cite and reply upon Gordon v. Beck, 196 Cal. 768, 239 P. 309, and similar cases holding that where an agent assumes to act for two opposing parties without disclosing his dual capacity either party may repudiate and defend against the resulting contract as having been procured by constructive fraud. There is no quarrel with the decisions nor with the principle of law which they follow. They are just not applicable to the case at hand. There is no evidence that Byrnes was the agent of respondents in the procurement of the contracts. He represented the subcontractors and sought their signatures, not upon the suggestion of respondents, but with the implied cooperation of the bank which had an outstanding loan on the premises. The fact that the owners were asked to sign first does not raise even a suspicion of fraud. The fact that they gave Byrnes a contract to complete the building has no bearing. The contract for the waiver of the liens, which is the one in dispute, expressly provided that the owners would procure someone to complete the building. But the fact that this someone turned out to be Byrnes is not evidence that Byrnes was the owners' agent for the other purpose of securing the signatures to the waiver contract. At the conclusion of the trial, after having accorded appellants full opportunity to prove their charge of fraud, the trial court stated that there was no satisfactory evidence "that there has been any fraud on the part of anyone here." The burden of such proof was of course upon the appellants—a burden which they failed to sustain.

The judgment is affirmed.

GOODELL, J., and DOOLING, Justice pro tem, concur.

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71 Cal.App.2d 35

STUCKER et al. v. McMAINS et al.

Civ. 14786.

District Court of Appeal, Second District, Division 1, California.

Sept. 28, 1945.

1. Automobiles 🔑175(1)

The test for determining whether a publicly owned motor vehicle is at a given time an authorized emergency vehicle responding to an emergency call, so as to be excluded from traffic restrictions, is not whether an emergency in fact exists, but whether a vehicle is then being used in responding to an emergency call. Vehicle Code, §§ 44, 454, 554, St.1941, p. 1374; St.1937, p. 168; St.1941, p. 2725.

2. Evidence 🔑23(1)

The court took judicial notice of state of war existing on January 7, 1943, and of the military activity in California with respect to necessity for a police escort for an army convoy of trucks moving on the public highway.

3. Automobiles 🔑175(1)

Highway patrolman operating a motorcycle and escorting one unit of a convoy of 100 army trucks was "operating an authorized emergency vehicle", and "responding to an emergency call", so as to be excluded from restrictions of traffic regulations. Vehicle Code, §§ 44, 454, 554, St.

1941, p. 1374; St.1937, p. 168; St.1941, p. 2725.

See Words and Phrases, Permanent Edition, for all other definitions of "Operating an Authorized Emergency Vehicle" and "Responding to an Emergency Call".

4. Automobiles ⚿244(16)

Evidence that state highway patrolman was operating an authorized emergency vehicle and responding to an emergency call and was displaying required red light and sounding his siren as he entered intersection where he was struck by defendants' truck, which failed to yield right of way, authorized judgment for wrongful death. Vehicle Code, §§ 44, 454, 554, St.1941, p. 1374; St.1937, p. 168; St.1941, p. 2725.

DORAN, J., dissenting.

Appeal from Superior Court, Los Angeles County; Harold B. Jeffery, Judge.

Action by Muriel Virginia Stucker and Gary Joel Stucker, a minor, by Muriel Virginia Stucker, his guardian ad litem, against Ralph McMains and Arrow Rock Company to recover for the wrongful death of Joseph A. Stucker, deceased, which occurred when decedent was struck by a truck owned by corporate defendant and driven by individual defendant. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Leonard Wilson, of Los Angeles, for appellants.

Sims, Wallbert & Iasigi, of Los Angeles, for respondents.

YORK, Presiding Justice.

Joseph A. Stucker, a member of the California Highway Patrol, met his death on January 7, 1943, while directing traffic at the intersection of San Fernando Road and Sunland Boulevard, in the city of Los Angeles, when his motorcycle was struck by a 1941 Ford dump truck owned by defendant corporation and being operated by defendant McMains. The surviving wife of decedent, individually and as guardian ad litem for her minor son, by the instant action alleging negligence on the part of defendants, seeks the recovery of damages for loss of services, support, society, companionship and protection. The answer denied the allegations of negligence and set up the special defense of contributory negligence on the part of decedent in the operation of his motorcycle at the time and place of the accident.

At the trial, plaintiffs relied on the theory that decedent, as a member of the California Highway Patrol, was operating an authorized emergency vehicle, as defined by section 44 of the Vehicle Code, St.1941, p. 1374, and was responding to an emergency call at the time in question, and that defendant McMains by his failure to yield the right of way and otherwise comply with the requirements of section 554 of the Vehicle Code, St.1941, p. 2725, was guilty of negligence which was the proximate cause of the collision.

The jury returned its verdict in favor of plaintiffs for $20,000, and from the judgment which followed defendants have perfected this appeal.

The evidence adduced at the trial herein reveals that on January 7, 1943, Officers Stucker and Condiff, both members of the California Highway Patrol, were instructed by their superior officer, Sergeant Clarence M. Martin, to escort a group of sixteen trucks, which was the first unit of a convoy of over one hundred Army trucks. The two officers mounted their motorcycles at Adams Airport in Roscoe preparatory to leading the first contingent of the convoy over a route laid out to their destination at Camp Haan in Riverside County. They proceeded along Sherman Way and Vineland Avenue to the junction of the latter with Sunland Boulevard; thence east on Sunland, the two officers riding abreast in front of the convoy, until they were about 75 feet west of the intersection of Sunland and San Fernando Road, when Officer Stucker took the lead and entered the intersection about thirty feet in advance of Officer Condiff. Said intersection was about two miles from Adams Airport, their starting point. Officer Condiff testified that when they were about 100 to 150 feet west of the automatic traffic signal on the southwest corner of said intersection, it was set at "Go," and when they reached a point 70 to 75 feet west thereof, the signal changed to "Stop"; that as he approached the intersection he "observed the traffic and there were several cars stopped on San Fernando Road northbound. I observed no traffic on San Fernando Road southbound at the moment I looked. Officer Stucker entered the intersection and I noticed this truck immediately afterwards"; that the truck was traveling at a speed of 30 to 35 miles per hour, and that Officer Stucker was proceeding into the intersection at a speed of from 10 to 15 miles per hour. Officer Condiff further testified that "the truck ran into the left side" of the motorcycle and that Officer Stucker "was thrown clear up over the left-hand fender and down the side of the truck to the pavement"; that the sirens on both motorcycles were "going full blast" from the time they were 150 feet west of the intersection until the collision occurred, and that the red light on Officer Stucker's motorcycle was still burning after the collision. The accident occurred at 11:30 a. m. on a dry, clear but windy day.

Appellant McMains testified that he was driving a ten wheel dump truck loaded with 10½ tons of sand southerly on San Fernando Road; that he was traveling in the traffic lane adjacent to the center line at a speed of 20 to 25 miles per hour as he approached the intersection of San Fernando Road and Sunland Boulevard; that when he was thirty feet north of the north curb line of Sunland, he looked to the right (west) and saw no traffic. In reply to the question, "When you looked to the * * * left, did you see any traffic approaching from the east on Sunland?, said witness stated: "Well, I don't remember." He also testified that it was a cold, windy morning and that he had both windows of his driver's cab closed; that when he first saw the signal governing traffic at the intersection in question it was set at "Stop" and he was coasting, waiting for the signal to change; that when he reached a point 75 to 100 feet north of the intersection, the signal changed to "Go"; that as he entered the intersection he saw Officer Stucker coming into the intersection facing to the right but that said Officer "never throwed up his hand to me or looked at me," and that he heard the siren and saw the officer at "the same instant."

Appellants urge:

"1. That the motorcycle driven and operated by deceased at the time and place in question did not come within the purview of section 44 of the Vehicle Code in that it was not responding to 'an emergency call', and

"2. Therefore, said deceased could not avail himself of the exceptions and exemptions of section 454, and

"3. Hence, not having the benefit of these two exceptions, he came within the category of any driver upon the road and subject to the rules of the road applicable to all motorists."

On the date of the accident, section 44 of the Vehicle Code read as follows:

"44. 'Authorized Emergency Vehicle.' An 'authorized emergency vehicle' is a vehicle of any of the following types:

"(a) A vehicle publicly owned and operated by a police or fire department or traffic law enforcement officer in responding to emergency calls or in traffic patrol duty.

"(b) A motorcycle, either publicly or privately owned, operated by a police or traffic law enforcement officer in enforcing the provisions of this code. * * *"

Pursuant to section 454, Vehicle Code, St.1937, p. 168, the driver of an authorized emergency vehicle shall be exempt from those "regulations contained in Chapters 6 to and including Chapter 13 of Division IX of this code * * *

"(a) * * * *whenever any said vehicle is being driven in response to an emergency call* or when used in the immediate pursuit of an actual or suspected violator of the law, or when responding to but not upon returning from a fire alarm.

"(b) Said exemptions shall apply only when the driver of said vehicle sounds a siren as may be reasonably necessary as a warning to others and at night time when the vehicle is equipped with at least one lighted lamp displaying a red light to the front. * * * but said exemptions shall not relieve the driver of any said vehicle from the duty to drive with due regard for the safety of all persons using the highway, nor shall the provisions of this section protect any such driver from the consequences of an arbitrary exercise of the privileges declared in this section."

[1] As was stated in the case of Coltman v. City of Beverly Hills, 40 Cal.App. 2d 570, 572, 105 P.2d 153, 154: "The test for determining whether a publicly owned motor vehicle is at a given time an authorized emergency vehicle responding to an emergency call is not whether an emergency in fact exists at the time but rather whether the vehicle is then being used in responding to an emergency call. Whether the vehicle is being so used depends upon the nature of the call that is received and the situation as then presented to the mind of the driver. Head v. Wilson, 36 Cal. App.2d 244, 97 P.2d 509."

The order to escort the army convoy was given to decedent and Officer Condiff by their superior officer, Sergeant Clarence M. Martin, a member of the California Highway Patrol, who testified that the trucks "were loaded with personnel and their duffel bags and camping equipment that they usually carry," and that he told said officers "to take the first unit of this serial and proceed over the route laid out, to their destination", which was Camp Haan located in Riverside County a distance of over sixty miles from the starting point.

The trial court instructed the jury "that on May 27, 1941, the President of the United States proclaimed that an unlimited national emergency existed in the United States and that on the date of the accident here in question said unlimited national emergency continued to exist.

"This fact of which the court takes judicial notice, is now in evidence to be considered by you in arriving at your verdict."

[2, 3] At the time here in question, it was a matter of common knowledge that this country was engaged in a world conflict; that the coastal territory of California had been declared a theatre of operation and an army training center; that the army was engaged in training thousands of soldiers in this district and that Camp Haan was a training camp; that the army possessed thousands of trucks which it used on the public highways to transport soldiers and equipment from point to point; that when the army moved large convoys of trucks loaded with personnel and equipment over the highway system of the state, speed and safety were necessary to insure their expeditious arrival at a particular destination; that an army convoy of trucks could not travel with speed and safety to itself or to the public without a police escort; that on January 7th darkness descends much earlier than later in the year, and that Camp Haan was located some sixty miles from Adams Airport. With these facts in mind, it would appear that in considering the evidence that decedent and Officer Condiff were given instructions by their superior officer to escort the first unit of the convoy of one hundred trucks loaded with men and equipment from Adams Airport to Camp Haan, the jury was justified in concluding that such movement was being made in connection with the defense of this country, and that speedy and unimpeded progress was required in order that the convoy should arrive at its destination before sundown. Hence, a combination of circumstances existed which called for immediate action on the part of the officers, who were instructed to escort the convoy, and from which circumstances an inference arose that the officers were operating emergency vehicles in response to an emergency call. The movement of men and equipment during the national war emergency was of sufficient importance to dwarf into insignificance those cases wherein it has been held that fire fighting apparatus, ambulances and police cars were emergency vehicles responding to emergency calls. See Raynor v. City of Arcata, 11 Cal.2d 113, 77 P.2d 1054; Lucas v. City of Los Angeles, 10 Cal.2d 476, 75 P.2d 599; Coltman v. City of Beverly Hills, 40 Cal.App.2d 570, 105 P.2d 153, and cases therein cited; also, sec. 44, Vehicle Code.

[4] Contrary to appellants' contention, it was conclusively established that the motorcycles being operated by decedent and Officer Condiff were sounding their sirens as they entered the intersection and were displaying red lights in conformity with the provisions of section 454 of the Vehicle Code. While the witnesses McMains and Simmons testified that they did not hear the sirens, their testimony also discloses that they had their cab windows closed and therefore were unable to hear that which they should have heard.

An examination of the record herein reveals that the cause was fairly tried; that the jury was adequately instructed and that the evidence supports the verdict and the judgment.

For the reasons stated, the judgment is affirmed.

WHITE, J., concurs.

DORAN, J., dissents.

WAGNOR v. BLUME et al.

No. 12573.

District Court of Appeal, First District,
Division 1, California.

Oct. 1, 1945.

Rehearing Denied Oct. 31, 1945.
Hearing Denied Nov. 29, 1945.

1. Quieting title 🔑44(4)

In action to quiet title to land, evidence supported finding that plaintiff owned land under mesne conveyances from a realty syndicate, to which parties' common source of title had conveyed all his interest in land before conveying it to defendants' predecessor in title.

2. Deeds 🔑115, 118

In action to quiet title to ten-foot wide strip of land parallel to railway company's right of way, evidence was sufficient to show that right of way was 40 feet, not 60 feet, wide, so that quitclaim deed to defendants' predecessor in title from parties' common source of title after his conveyance of land to plaintiff's predecessor in title by deed erroneously excepting 60-foot right of way did not pass title to disputed strip to defendants' predecessor.

3. Boundaries 🔑3(3)

Monuments are controlling over conflicting calls in a deed.

4. Boundaries 🔑3(6), 5

A known boundary line may be a "monument" as well as a physical object upon the ground, and, when such boundary line is used as a monument, the true boundary line is indicated rather than the conventional line, and as such controls distance call.

See Words and Phrases, Permanent Edition, for all other definitions of "Monument".

5. Boundaries 🔑3(3)

Where deed under which plaintiff deraigned title first described property by four monuments, and distances and calls were given afterwards as particulars of the general description, even though calls did not show a closed description, they were not controlling over the monuments.

6. Quieting title 🔑10(2)

In action to quiet title, fact that one of deeds in plaintiff's chain of title named as grantee the "Mercantile Trust Company of San Francisco", whereas the commissioner's certificate of sale referred to the "Mercantile Trust Company of California", and fact that commissioners's deed made no identification of particular action to which it referred, did not constitute missing links in plaintiff's chain of title.

7. Quieting title 🔑44(4)

In action to quiet title, plaintiff's failure to produce judgment and execution needed to support commissioner's alleged certificate of mortgage foreclosure sale of disputed land or commissioner's deed to purchase as link in plaintiff's chain of title from parties' common grantor did not defeat plaintiff's claim of title, since deeds in such chain themselves were prima facie evidence of title. Code Civ.Proc. § 1928.

8. Quieting title 🔑44(1)

Proof by one party to action to quiet title that he has better title from common source than other party makes out prima facie case for party offering such proof and casts on other party burden of establishing superior title from some other source.

9. Quieting title 🔑35(2)

One suing to quiet title to land under common grantor rule need not plead intent to rely on such rule.

10. Quieting title 🔑10(2)

The fact that corporation, owning another parcel of land than that involved in suit to quiet title, joined previous owner of land claimed by plaintiff in executing single deed of both parcels for convenience did not render common grantor rule inapplicable in plaintiff's favor.

11. Quieting title 🔑10(2)

Where first deed in chains of title of parties to action to quiet title was a grant, existence of several quitclaim deeds in such chains did not render common grantor rule inapplicable in plaintiff's favor.

12. Stipulations 🔑18(4)

Where defendants' counsel stipulated, during trial of action to quiet title, that plaintiff would not have to locate any exceptions in deeds in parties' chains of title, other than exception of railway right of way, defendants could not complain of plaintiff's failure to locate other exceptions.

13. Estoppel 🔑25

One suing to quiet title to strip of land parallel to railway right of way was not estopped from asserting that right of way was only 40 feet wide because of erroneous references to 60-foot right of way in deeds, maps, and other instruments, parties to which were not before court, as such references could not prevail over right of way as located. Code Civ.Proc. § 1962, subd. 2.

14. Deeds ⚷38(1)
Quieting title ⚷36, 47(2), 52

Descriptions of land in deeds or in complaint, findings, and judgment in suit to quiet title thereto are sufficient, if competent surveyor can locate land on ground from such descriptions, with or without aid of extrinsic evidence.

◆

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by Lila Wagnor against N. A. Blume and others to quiet plaintiff's title to a strip of land. From a judgment for plaintiff, the defendants appeal.

Affirmed.

Prior opinion 159 P.2d 55.

Robert E. Knowlden, of Berkeley, and Johnson & Harmon and Johnson, Harmon & Stirrat, all of San Francisco, for appellants.

T. P. Wittschen, Matthew Wahrhaftig, and Ridley Stone, Jr., all of Oakland, for respondent.

KNIGHT, Justice.

Prior to 1929 litigation was started over the title to long strips of land ten feet wide, adjoining the two sides of and running parallel to the right of way of the Atchison, Topeka and Santa Fe Railway Company, as it runs through the City of Albany in the County of Alameda; and in 1941 the present action was brought by the respondent, Lila Wagnor, to quiet title to a portion of the strip, 3000 feet long, lying on the east side of the right of way, and extending from Solano Avenue, formerly Main Street, south to Cordonices Creek. The answer of appellants disputed respondent's title thereto and alleged that the appellant N. A. Blume was the owner of the property. The real issue presented, upon which the decision in the case turned, was whether the right of way granted to the Santa Fe's predecessor in 1884 was forty or sixty feet in width. Respondent claimed that it was forty feet wide, whereas appellants claimed it was sixty feet wide. The Santa Fe was not made party to the action, but it appears from the record that it has always taken the position that the width of its right of way through Albany was and is but forty feet. This same issue as to the width of the right of way has been twice previously litigated; first, in an action brought by C. M. MacGregor against Bertha McKenzie Knowlden et al. (MacGregor v. Knowlden, 102 Cal.App. 42, 282 P. 438, decided in 1929, hearing by the Supreme Court denied); and again in an action brought by the appellant N. A. Blume against MacGregor et al. (Blume v. MacGregor, 64 Cal.App.2d 244, 148 P.2d 656, decided in 1944, hearing by the Supreme Court denied). In each of those cases it was held that the right of way was but forty feet wide. In the present case the evidence relating to the width of the right of way was the same as that upon which the judgments in those cases rested; and here, as in those cases, the basis of the trial court's decision was that the right of way was but forty feet wide. Accordingly, judgment was entered in favor of respondent and against appellants, and from that judgment this appeal is being prosecuted.

A reading of the decisions rendered on those two appeals will give a full comprehension of all the background facts of the present case, except for certain matters which will be hereinafter noted. In the first case, MacGregor v. Knowlden, supra, there were four parcels of land involved: No. 1, the strip north of Main Street (now Solano Avenue) and west of the right of way; No. 2, the strip north of Solano Avenue and east of the right of way; No. 3, the strip south of Solano Avenue and west of the right of way (part of which was again involved in Blume v. MacGregor, supra), and No. 4, the strip south of Solano Avenue and east of the right of way, which strip is involved in the present case. In the first case it was held that the right of way was forty feet wide, and MacGregor prevailed as to Parcels 1, 2 and 3 (with one exception not here involved), and as against MacGregor, Knowlden prevailed as to Parcel 4, this holding being based on the fact that MacGregor's title stopped on the west side of the right of way. Such holding, however, is not determinative of the issues presented in the present case. Subsequent to the rendition of the decision on the first appeal, Blume succeeded to the rights claimed by Bertha McKenzie Knowlden; and in the second case Blume relitigated the issues presented in the first case, and it was again held that the right of way was forty feet wide. As stated, the same evidence relating to that issue was introduced in the present case, and for the third time it was held that the right of way was and is forty feet wide. After having examined the record herein and considered the points urged by appellants in support of the appeal, we find no reason to question the soundness of the conclusion reached on either of the other appeals as to the width of the right of way.

Both parties herein trace their titles back to a common grantor, George Sterling. Tracing the two chains of title in more detail, and going back of the Sterling title, the record shows the following: In 1884 the Pacific Improvement Company, owner of two-thirds, and Maria Hall, owner of one-third (her interest later being acquired by H. W. Carpentier), made identical deeds conveying to the California and Nevada Railroad Company a right of way over lands of which the grantors were then the owners. Certain calls in the description were omitted from those two deeds, but on the two former appeals the effect of such omission was fully considered, and it was determined that for the reasons set forth therein the right of way was fixed at forty feet. In 1906 Pacific Improvement Company and Carpentier conveyed their interests to George Sterling in lands on both sides of the right of way previously granted, including the lands in dispute, and excepting 5.73 acres "for the right of way to The California and Nevada Railroad Company Feb. 23, 1884." In 1906 Sterling and his wife conveyed by deed to the North Berkeley Land Company three parcels of land, including a 52.30-acre parcel which ran from Cordonices Creek (the southern boundary of the property in dispute) north to Main Street, under a description which read in part as follows: "Beginning at a point formed by the intersection of the center line of Cordonices Creek with the easterly line of the right of way of the Atchison, Topeka and Santa Fe Railway * * *" and excepting therefrom a 300-foot strip "parallel to the right of way of the Atchison, Topeka and Santa Fe Railway * * *." The other two parcels are not here involved. On June 8, 1908, Sterling and his wife and the North Berkeley Land Company conveyed to the Realty Syndicate 25.67 acres, part of which had been included in the former deeds, and which also included the 300-foot strip which had been excepted from the former conveyance. The point of beginning in this deed is "the most southern corner of that certain 52.30 acre tract of land heretofore conveyed to the North Berkeley Land Company by George and Carrie R. Sterling."

It is under this 1908 deed from Sterling to the Realty Syndicate that respondent deraigns her title. While the point of beginning in this deed differs from the point of beginning in the deed from Sterling to the North Berkeley Land Company covering the 52.30-acre tract, yet this point of beginning, as stated in the deed, is "the most southern corner of that certain 52.30 acre tract of land heretofore conveyed to the North Berkeley Land Company by George and Carrie R. Sterling" and the description then goes on to read, "down the center of Cordonices Creek along the Southern boundary line of the said 52.30 acre tract * * *" and thence *"to the Southwestern corner of the said 52.30 acre tract;* thence along the Western boundary line of said tract * * *." (Italics added.) A comparison of the descriptions in the 1906 deed and the 1908 deed will show that the point of beginning in the 1906 deed is the same point referred to in the 1908 deed as "Southwestern corner of the said 52.30 acre tract"; therefore, the west line of the 52.30-acre tract is also the west line of the 25.67-acre tract of the 1908 deed, and this west line of both tracts is the east line of the railroad right of way.

The remaining deeds in respondent's chain of title all tie to the same western line of the 25.67-acre tract, which, in turn, is the eastern line of the right of way. The devolution of title from the 1908 deed is as follows: The Realty Syndicate conveyed a smaller parcel of 3.24 acres, including the strip in dispute, to San Francisco-Oakland Terminal Railways in 1914, which mortgaged the property to Mercantile Trust Company in that year, and when this mortgage was foreclosed a certificate of sale was issued and later a deed to Messrs. Goodfellow, Olney and Brobeck, who in 1923 conveyed to Key System Transit Company. The latter conveyed the land to The Oakland Bank as trustee to secure a bond issue in 1923, and the lien created thereby was in turn foreclosed and a commissioner's certificate and then a deed were issued in 1931 to Railway Equipment and Realty Co. Ltd. The Key System Transit Company also quitclaimed the property to the Railway Equipment and Realty Co. Ltd. in 1930. This company then conveyed the property described in the second cause of action to respondent, and the property in the first cause of action to National Service Company, which thereafter conveyed it to respondent.

[1, 2] Appellants' chain of title did not start until 1925. During that year Bertha McKenzie Knowlden obtained a quitclaim deed from Sterling covering the strip in dispute. In 1930 she conveyed to Bernice Kump, who in 1939 conveyed to the appellant N. A. Blume (the other appellants are encumbrancers claiming under Blume). Thus if, as held in all three cases, the right of way was forty and not sixty feet wide, then Sterling's grant to respondent's predecessor in 1908 extended to the easterly boundary of such forty-foot right of way; and that being so Sterling, in 1925, retained no title to the ten-foot strip which he purported to quitclaim to Bertha McKenzie Knowlden; and the trial court herein so held. Specifically it found that Carpentier and the Pacific Improvement Company and Sterling were, and each of them was, a common source of title under which respondent and the appellants claimed, and that they claimed from no other source; that prior to the deed from Sterling to Bertha McKenzie Knowlden, Blume's predecessor, Sterling had parted with all his right, title and interest in and to the ten-foot strip to the Realty Syndicate, and that by mesne conveyances from the latter title now vested in the respondent.

The evidence is amply sufficient to support the trial court's decision. In addition to the facts hereinabove narrated and the matters of record set forth in the decisions rendered on the two former appeals, deeds and pertinent maps were here produced by Santa Fe officials showing a right of way of only forty feet. There was also evidence showing that the right of way as it presently exists is in the same position as it was in 1906, and there was a location on the ground of the center line of the single track on the right of way, from which it was demonstrated that the right of way was but forty feet wide.

[3-5] At the oral argument on the appeal counsel for appellants pointed out that the 1908 deed under which respondent deraigned title, besides containing the description hereinabove quoted, described the property therein conveyed by metes and bounds; and he contended that a checking of the calls set forth in the deed proved that the description by metes and bounds did not close. This same point was made on the appeal in MacGregor v. Knowlden, supra; and as the court there pointed out the property was first described by four monuments, and the distances and calls were given afterwards as particulars of the general description. One of the monuments was the boundary line of the right of way; another was the county road; the third was the "Southwestern corner of that certain 25.33 acre tract described in 2nd Exception in that certain deed from George and Carrie R. Sterling to J. H. Spring dated December 7, 1906 and recorded in Liber 1248 of Deeds at page 342, Alameda County Records"; and the fourth was the center of Cordonices Creek. The court then went on to hold in conformity with the well-settled rule that monuments are controlling over conflicting calls; and in referring to the right of way boundary line as a monument the court said (102 Cal.App. at page 50, 282 P. at page 441): "A known boundary line may be a monument as well as a physical object upon the ground (Bartlett Land [& Lumber] Co. v. Saunders, 103 U.S. 316, 26 L.Ed. 546, [see, also, Rose's U. S. Notes]), and when such boundary line is used as a monument, the true boundary line is indicated rather than the conventional line (Umbarger v. Chaboya, 49 Cal. 525, 538.)" Therefore, even though, as appellants contend, the calls did not show a closed description they were not controlling over the monuments.

Appellants also urge numerous technical points for reversal. But an examination of them shows that they are without merit. Among them are the following:

[6] They contend that there are missing links in respondent's chain of title in that one of the deeds named as grantee the Mercantile Trust Company of San Francisco, whereas the commissioner's certificate of sale refers to the Mercantile Trust Company of California, and that the commissioner's deed, so far as the copy introduced in evidence shows, makes no identification of the particular action to which it refers. Obviously the trial court was justified in holding that these matters did not constitute a break in respondent's chain of title.

[7] They further contend that respondent failed to produce the judgment and execution needed to support the alleged commissioner's certificate of sale or the commissioner's deed; but the deeds them-

selves were prima facie evidence of title. Code Civ.Proc. sec. 1928.

It is also contended that the respondent failed to meet the burden of proof in that she introduced no evidence to show that the property described in the quitclaim deeds (the last link in respondent's chain, by which she acquired title) was conveyed by any other deed in the chain. This question again depends on whether the right of way was sixty or forty feet, and the determination that it was forty feet ties it in with the other deeds.

[8] It is next contended that respondent failed to prove a proper case for the "common grantor" rule to apply, one point being that the trial court erred in finding that the parties claimed under a common source of title. The same point was made in Blume v. MacGregor, supra, and it was held that a plaintiff makes a prima facie case by evidence connecting the defendant with a common source of title and proving in himself a better title from that source; and that where both parties derive title from a common source the burden is placed upon the party having the inferior title from the common source, if he relies upon title from another independent source, to prove that the title acquired from the independent source is paramount to the title in the common source; the proof by one party of better title from a common source makes out a prima facie case for him, and the burden of establishing a superior title from some other source is then cast upon the other party.

[9] Another point urged is that respondent should have pleaded that she was going to rely on the rule of common grantor. Such would not appear to be necessary. No authority has been cited so holding, and in Blume v. MacGregor, supra, where the cross-complainant relied upon the rule of common grantor, there was no such pleading.

[10] The claim is made that because the North Berkeley Land Company is a party to one of the deeds the rule of common grantor cannot be applied; but, as respondent points out, the parties owned separate parcels of land, and apparently joined in giving a single deed simply for convenience. Under such circumstances, no reason appears why respondent would be denied the application of the common-grantor rule.

[11] Appellants argue that the rule of common grantor does not apply because there are several quitclaim deeds in the alleged chains of title. However, as respondent points out, although there is some authority for the statement that when the first deed out is a quitclaim, the rule should not apply. Here the first deed out was a grant, and therefore the rule can be applied.

[12] Also in this regard appellants seem to contend that respondent's failure to locate some of the exceptions in the deeds prevented the application of the common-grantor rule. The record shows that during the trial counsel for appellants stipulated that respondent would not have to locate any exceptions other than the exception of the right of way. Appellants therefore are in no position to complain of the failure to locate any other exceptions.

[13] Appellants argue that respondent is estopped under the provisions of section 1962, subdivision 2 of the Code of Civil Procedure, which provides as follows: "The following presumptions * * * are deemed conclusive: * * * The truth of the facts recited, from the recital in a written instrument between the parties thereto, or their successors in interest by a subsequent title." The reason for this argument is that in certain deeds and maps the right of way is referred to as being sixty feet wide. However, as respondent states, the various parties to the written instruments to which appellants allude are not the parties here before the court. There are erroneous references to a sixty-foot right of way in the various maps and instruments, but these cannot prevail over the actual located monument, the right of way itself.

[14] Appellants claim that the descriptions in the complaint, findings and judgment are so uncertain and ambiguous that the extent of the land adjudged to respondent cannot be ascertained. However, as held in Blume v. MacGregor, supra [64 Cal.App.2d 244, 148 P.2d 661]: "In general if a competent surveyor can take the deed and locate the land on the ground from the description contained therein, with or without the aid of extrinsic evidence, the description will be held to be sufficient." Such was the case here; therefore there is no merit in the contention.

The various other points made are of lessor importance and do not call for any discussion. Suffice it to say that they are either incidental to those already discussed and decided, or have been examined and found to be wholly without merit.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concur.

On Petition for Rehearing.

PER CURIAM.

The petition for rehearing is denied.

For the reason that such petition is scandalous in nature it is ordered stricken from the files.

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71 Cal.App.2d 127

In re PHILIPPI'S ESTATE.

WILSON v. TOMALINO.

Civ. 3405.

District Court of Appeal, Fourth District, California.

Oct. 2, 1945.

Hearing Denied Nov. 29, 1945.

1. Wills 🔑312

Where petitions for probate of two wills of testator and contests thereof were filed, proper course was to try questions of validity of both wills at same time, instead of hearing only petition for probate and contest of last will on theory that probate thereof would render moot all questions concerning earlier will.

2. Courts 🔑212

An appeal from order granting will proponent's motion for new trial after jury's verdict denying probate of will is a probate matter and must be taken to Supreme Court, not District Court of Appeal.

3. Courts 🔑476

Where jurisdiction of appeal lies in Supreme Court, District Court of Appeal should refrain from taking jurisdiction over any phase of case by a writ, though Constitution vests original jurisdiction to issue writs in both of such courts.

4. Courts 🔑476

On appeal from order admitting last will to probate, District Court of Appeal will not consider questions presented by earlier will, petition for its admission to probate and contest thereof pending appeal to Supreme Court from order granting motion by proponents of such will for new trial after jury's verdict denying probate thereof.

5. Wills 🔑384

On appeal from order admitting to probate a will not mentioning or providing for testator's surviving children, only duty of District Court of Appeal is to determine whether will is testator's last will and not to attempt to interpret it, though it seems probable that testator's estate may pass to such children as pretermitted heirs. Probate Code, §§ 90, 91.

6. Descent and distribution 🔑47(1)

The property of decedent, whose will makes no provision for his surviving children, vests under statute in such pretermitted children on testator's death, subject to his debts, expenses of his last illness and funeral, and expenses of administration, which is necessary to determine property remaining to be distributed to heirs. Probate Code, §§ 90, 91.

7. Descent and distribution 🔑47(1)
Wills 🔑229

Testator's pretermitted children may assert their rights to proper portions of testator's estate at time of hearing of petition for distribution thereof or by proceedings in equity, but cannot contest probate of will, as they take adversely thereto under statute. Probate Code, §§ 90, 91.

8. Wills 🔑73

A will need not dispose of any of testator's property to be entitled to probate.

9. Wills 🔑77

A document, to be decedent's last will, must clearly show that decedent intended it to take effect only after his death and intended thereby to make disposition of his property in favor of party claiming thereunder.

10. Wills 🔑384

On appeal from order admitting will to probate, duty of District Court of Appeal is not to interpret will, but only to determine of what it consists, though it contains dispository clauses and appoints executors.

11. Wills 🔑206

A will stating that testator wanted to leave to named person "all my personal and property" was properly admitted to probate as attempting and intended to create revocable disposition of testator's property, to take effect on his death, without passing any present interest in such property.

12. Wills ⚿384

Where petition for probate of earlier of two wills executed by testator was heard separately from hearing on petition for probate of later will, and appeal to Supreme Court from order granting motion by proponent of earlier will for new trial after jury's verdict denying probate thereof was pending at time of hearing in District Court of Appeal on appeal from order admitting later will to probate, trial court's failure to hear both probate petitions and contests at same time was not sufficiently prejudicial to contestant to require reversal of order before District Court of Appeal.

13. Wills ⚿384

On appeal from order admitting testator's last will to probate and appointing administratrix of his estate with will annexed, appellant's argument that previous will was not revoked by last will, and hence was entitled to probate, presented questions not involved in case before District Court of Appeal, which will express no opinion concerning them.

◆

Appeal from Superior Court, San Bernardino County; Franklin G. West, Judge.

Proceeding by Mary Tomalino for probate of the last will of L. Philippi, also known as Lorenzo Philippi and Lorenzo Filippi, deceased, contested by Fred A. Wilson. From an order admitting the will to probate and appointing petitioner as administratrix of testator's estate with the will annexed, contestant appeals.

Affirmed.

Fred A. Wilson, of San Bernardino, in pro. per.

Lane & Casey, of Los Angeles, for respondent.

MARKS, Justice.

This is an appeal from an order admitting the will of L. Philippi, deceased, to probate and appointing Mary Tomalino administratrix of the estate with the will annexed.

L. Philippi, a resident of San Bernardino County, died on August 8, 1943, leaving an estate of the value of upwards of $45,000.

Philippi seemed to be a maker of wills, the evidence indicating that he executed four or five between January 1, 1943, and the time of his death. Only two of these wills have been produced. He executed one or two early in the year, another on April 23, 1943, which has been offered for probate, still another a few days prior to August 5, 1943, which counsel for certain parties state was in existence at the time of his death but which may have been lost thereafter. It has not been produced. The last will dated August 5, 1943, was admitted to probate in this proceeding. The order admitting it to probate and appointing an administratrix with the will annexed is under attack in this appeal.

Deceased left surviving him his two children, Domenico Phillippi, his son, and Margarita Phillippi, his daughter, as his sole heirs at law.

On September 2, 1943, the will dated April 23, 1943, was filed for probate by Fred A. Wilson, an attorney at law who had prepared it and who had been the attorney for deceased for about two years. He was named as executor without bond, and sole devisee of the estate with the stipulation that he "may devote the same or such portion thereof to worthy persons, institutions and causes, or distribute the same or any portion thereof to such persons, institutions and causes in such proportions and in such manner as in his judgment exclusively shall insure that my estate will not be dissipated, but on the contrary will be used for worthy purposes." This will expressly revoked all former wills and disinherited the two children of the testator. A contest was filed to the probate of this will by the children of deceased. We will hereafter refer to it as the April will.

On September 11, 1943, Mary Tomalino filed the will of August 5, 1943, with her petition for its probate and her appointment as administratrix with the will annexed. Fred A. Wilson and Domenico Phillippi filed separate contests. The contest and objections to the probate of the will by Domenico Phillippi were subsequently withdrawn in open court. We will hereafter refer to the will dated August 5, 1943, as the August will.

Counsel state in their brief and in the oral argument that the two children filed objections to the probate of the August will which were withdrawn during the trial and that they thereafter joined in the request for its probate and nominated Mary Tomalino as administratrix. We find in the record no contest of this will filed by the daughter nor any such nomination of Mary Tomalino as administratrix nor any request for the admission of the August will to probate by either of the children.

The August will is in words and figures as follows:

"Aug-5, 1943

This is my last will: I am having Mary Tomalino a dear friend write this for me as my hand is shakey. I want to leave to Mary Tomalino all my personal and property.

L. Philippi.

Witness: Bartolomeo Filippi
Witness: Charlotte Enid Howell, R. N."

Bartolomeo Filippi was a long time friend of deceased and the father of Mary Tomalino. Charlotte Enid Howell was a nurse who attended deceased for several months during his last illness. It is probable that she was named as sole beneficiary in the will which we have referred to as having been lost after the death of L. Philippi. The record contains no other information as to this will.

No question is raised as to the mental capacity of deceased nor to the due execution of the August will. The evidence is ample to sustain the findings of the trial court to the effect that Philippi was of sound and disposing mind on August 5, 1943, and that the will of that date was executed in strict accordance with all legal formalities. It seems clear that the August will was the last testamentary act of the deceased.

[1, 2] The petitions to probate the two wills and the contests were set for trial at the same time. The trial judge heard the petition to probate the August will and the contest of it but did not hear the petition and contest of the April will except incidentally in connection with the probate of the August will. He merely found in effect that the admission to probate of the August will rendered all questions concerning the April will moot and that therefore "it is unnecessary for this Court to make any Finding thereon." As was said in Re Estate of Thompson, 185 Cal. 763, at page 777, 198 P. 795, at page 800, "The proper course under our practice was to try the matter of the validity of the two wills at the same time." However, we are informed that the petition to probate the April will, and the contest, were actually tried while the matter before us was on appeal; that by a verdict of a jury probate of the April will was denied; that proponent's motion for new trial was granted; that an appeal was taken from that order but that the record on appeal has not yet been prepared. That appeal being in a probate matter it must be taken to the Supreme Court.

[3, 4] It has long been the policy in this State that where the jurisdiction of an appeal lies in the Supreme Court a District Court of Appeal should refrain from taking jurisdiction over any phase of the case by a writ even though the Constitution vests original jurisdiction to issue writs in both courts. Collins v. Superior Court, 147 Cal. 264, 81 P. 509; In re Estate of Turner, 39 Cal.App. 56, 177 P. 854; Gunder v. Superior Court, 100 Cal.App. 334, 279 P. 822; Foster v. Superior Court, 4 Cal.App.2d 466, 41 P.2d 187. The reasons for this policy apply with equal force to the situation in which we find this case and so far as practicable we will refrain from comment on the questions presented by the April will, the petition for its admission to probate and the contest of it.

[5] By this elimination of consideration of the April will we have but one question before us, namely: Is the instrument of August 5, 1943, a will that is entitled to be admitted as such to probate, its due execution being admitted? In this connection an important consideration is that it was admitted by all parties and found by the trial court that deceased left surviving him as heirs at law two children who were not mentioned or provided for in the instrument. That they were pretermitted heirs seems evident from the record now before us. Secs. 90, 91, Probate Code. Thus while the August will is complete on its face and leaves all of decedent's property to Mary Tomalino, it seems probable that on final distribution the estate may pass to the children. However, as held in Re Estate of Martin, 31 Cal.App.2d 501, 88 P.2d 234, our only duty at this time is to determine if the August will is in fact the last will of deceased, and not to attempt to interpret it.

From the foregoing premise appellant argues that as the August will does not dispose of any of the property of the deceased, it, in effect, is no will at all as there is nothing in it to be given effect. In support of this argument he relies on the language used in 26 Cal.Juris. 921, 68 Corp.Juris. 607, In re Strelow's Estate, 117 Neb. 168, 220

N.W. 251, and Medina County Nat. Bank v. Foreman, 27 Ohio App. 400, 161 N.E. 366, and the same case reported in 119 Ohio St. 17, 162 N.E. 42.

The cited text of California Jurisprudence contains the statement that as far as the pretermitted heir is concerned, "the will is regarded as not existing." When construed exactly this may be considered as a correct statement of the law as it is well established that the pretermitted child takes by virtue of the statutes without regard to the will. Clearly the language does not mean that because there is a pretermitted heir the whole world may regard the will as nonexisting.

The language of the text of Corpus Juris is broad and if construed liberally might sustain the contention of appellant, but an examination of the cases cited in the footnotes shows the intent of the author in making the statement that "an instrument which disposes of no property is not valid as a will * * *." The cases cited deal with instruments that do not attempt to make testamentary disposition of any property. To illustrate, the case of In re Estate of Meade, 118 Cal. 428, 50 P. 541, 62 Am. St.Rep. 244, is cited. The instrument there offered for probate was a letter written by the deceased to an undertaker, principally directing that her body be cremated. It was denied probate because the letter was not intended to be a will and was not testamentary in character.

In the case of In re Strelow's Estate, supra, the statements relied upon by appellant dealt with a will leaving the estate of deceased to his brother who predeceased the testator. The Nebraska court said that because of this fact "the 1909 will was bereft of its every intended usefulness, and by its own terms had finished its purpose, had lapsed, and was without force or effect." [117 Neb. 168, 220 N.W. 254.] However, it is important to note that this holding was based on the court's construction of a Nebraska statute and also does not seem to us necessary to the decision. The testator died in 1926 leaving a last will executed in 1925 which was offered for probate by the named executors. The remarks were made concerning a prior will executed in 1909 which seems to have been superseded by the later will.

The case of Medina County National Bank v. Foreman, reported in 27 Ohio App. 400, 161 N.E. 366, was decided by the Court of Appeals of Ohio. The opinion contains language bearing out the contention of appellant. However, when the case reached the Supreme Court of Ohio (119 Ohio St. 17, 162 N.E. 42) that court held that where the devisee, leaving no lineal descendents, predeceased the testator, the bequest lapsed. It did not hold the will void but merely that the bequest had lapsed which is in accordance with the California rule. Sec. 92, Probate Code; In re Estate of Meade, supra. As was said in Re Estate of Hickman, 101 Cal. 609, 36 P. 118, 119: "The fact that the sole beneficiary under the will had departed this life prior to the death of the testator, if a fact, was not one to be determined as a preliminary question affecting the probate of the will."

[6] Appellant argues that the pretermitted children of deceased will take the entire estate by reason of the statute; that such estates vested in them immediately upon the death of their father, leaving nothing upon which the will can operate; that, therefore, the purported will is a complete nullity and should not be admitted to probate.

That the property of a deceased father vests in his pretermitted children upon his death, there being no other lineal heirs, is not an exact statement of the law. The estate vests, subject to his debts, expenses of last illness, funeral expenses and expenses of administration. Administration of an estate is necessary in order to determine the property remaining to be distributed to the heirs. In Re Estate of Grazzini, 31 Cal.App.2d 168, 87 P.2d 713, the deceased died testate leaving two adopted children who were entitled to succeed to the entire estate as pretermitted heirs to the exclusion of the devisees named in the will. The will, although effectively disposing of no property and apparently appointing no executor, was admitted to probate and it was held that the oldest adopted daughter was entitled to letters of administration with the will annexed.

[7] It is true that pretermitted children do not take under the will but under the statute. It is also true that such children cannot contest the probate of such a will as they take adversely to it. In re Estate of Sankey, 199 Cal. 391, 249 P. 517; In re Estate of Grazzini, supra. The pretermitted child may assert his right to the proper portion of his ancestor's estate at the time of the hearing of a petition for its distribution (In re Estate of Price, 56 Cal.App.2d

335, 132 P.2d 485), or by proceedings in equity (In re Estate of Klepsch, 36 Cal. App.2d 483, 97 P.2d 987), but may not contest the probate of the will.

[8] That a will must make a testamentary disposition of property in order to entitle it to probate is not a correct statement of the law as it is not necessary that it dispose of any of the property of the deceased. "The fact that a testator nominates an executor, but without giving a legacy or devising any part of his property, makes it none the less a will." In re Estate of Hickman, supra. In the same case it was held that if the sole beneficiary had predeceased the testator a question was presented which "was not one to be determined as a preliminary question affecting the probate of the will."

[9] In Re Estate of Button, 209 Cal. 325, 287 P. 964, 967, it was said: "In order for a document to be the last will and testament of a deceased person, it must, in addition to meeting all other legal requirements, clearly show that the decedent intended it to take effect only after his death, and it must satisfactorily appear therefrom that the decedent intended by the very paper itself to make a disposition of his property in favor of the party claiming thereunder. [In re] Estate of Meade, 118 Cal. 428, 50 P. 541, 62 Am.St.Rep. 244; [In re] Major's Estate, 89 Cal.App. 238, 264 P. 542; [In re] Estate of Beffa, 54 Cal.App. 186, 188, 201 P. 616; [In re] Estate of Spitzer, 196 Cal. 301, 307, 237 P. 739, 742. The latter two of the foregoing cases express the rule as follows: 'It is undoubtedly the general rule enunciated by the leading case of Habergham v. Vincent, 2 Ves.Jr. 231, and oft repeated, that the true test of the character of an instrument is not the testator's realization that it is a *will*, but his intention to create a revocable disposition of his property to accrue and take effect only upon his death and passing no present interest.'" See, also, In re Estate of Miller, 128 Cal.App. 176, 17 P.2d 181.

[10] In speaking of the duty of a court when hearing an appeal from an order admitting a will to probate, it was said in Re Estate of Martin, supra [31 Cal.App.2d 501, 88 P.2d 237]: "The will contains dispository clauses and also appoints executors, but it is not our duty at this time to interpret the will and we are not attempting to do so. It is our duty only to determine of what the will consists."

[11] When measured by these rules we are of the opinion that the August will was properly admitted to probate. Certainly it cannot be disputed that the testator attempted and intended to create a revocable disposition of his property to take effect upon his death without passing any present interest in the property of his estate. The effect to be given the will is a matter for future determination.

[12] It might be suggested that the trial court committed error in not hearing the petitions to probate the two wills and the two contests at the same time. As we have already indicated this is according to the usual practice. However, as the petition to probate the April will was separately heard, and as the proceedings in that matter are pending and the questions presented will be finally decided at some future date, we can find no sufficient prejudice in the adopted procedure to require a reversal of the order now before us. If it be determined that the August will did not revoke the April will and that both of the wills should be admitted to probate, appropriate orders can be made at the proper time.

[13] Appellant argues that as the August will contained no revocatory clause, did not appoint an executor, and will not ultimately dispose of all or any of the property of the deceased, it is not inconsistent with the April will and did not revoke it. In re Estate of Iburg, 196 Cal. 333, 238 P. 74. From this he argues that the April will is entitled to probate, citing In re Estate of Marx, 174 Cal. 762, 164 P. 640, L.R.A.1917F, 234, and In re Estate of Kaufman, 25 Cal.2d 854, 155 P.2d 831. In each of those cases prior and subsequent wills were both admitted to probate as the last testament of the deceased.

This argument presents questions not involved here and which would be properly before a court hearing the petition to probate and the contest to the probate of the April will. The revocation or lack of revocation of that will can have no direct bearing on the admission to probate of the August will. As questions concerning the probate of the April will are not before us we should express no opinion concerning them.

The order now before us is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

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SECOND SERIES

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PEOPLE ex rel. BENWELL v. FOUTZ.

L. A. 19356.

Supreme Court of California.

Sept. 25, 1945.

1. Justices of the peace 🔑1

Although since the constitutional amendment of 1911 the justices' courts are no longer constitutional courts, but are merely included within such inferior courts as Legislature may establish, justices of the peace remain judicial officers within the constitution. Const. art. 6, §§ 1, 10, 15.

2. Justices of the peace 🔑8

The terms "township" and "judicial" are not mutually exclusive and hence a judicial officer such as a justice of the peace can be a township officer without violating the constitutional provision against his exercise of powers of the legislative or executive departments of the state.

See Words and Phrases, Permanent Edition, for all other definitions of "Judicial" and "Township".

3. Constitutional law 🔑60

Legislature cannot delegate a power that it does not possess.

4. Justices of the peace 🔑8

The statute declaring an office to be vacant when the incumbent is absent from state without required permission and the statute providing that a township officer may secure from county board of supervisors permission for absence, if applied to judicial officers such as justices of the peace, would be in violation of Constitution providing that Legislature shall have no power to grant leave of absence to any judicial officer. St.1943, pp. 956, 969, §§ 1063, 1770(f); Const. art. 6, § 9.

5. Judges 🔑7

The constitutional provision that Legislature shall have no power to grant leave of absence to any judicial officer and that any such officer who shall absent himself from state for more than sixty days shall forfeit his office does not merely forbid a grant of leave of absence to judicial officers beyond a period of sixty days, but also for a shorter period. Const. art. 6, § 9.

6. Justices of the peace 🔑8

A justice of the peace who was absent from the state for about three weeks without consent of the board of supervisors, and who was not on business for the state, county or township, did not thereby forfeit his office so as to authorize the board to fill a vacancy, since a justice of the peace is a "judicial officer" within the constitutional provision who does not forfeit his office unless he is absent from the state for more than 60 consecutive days. St.1943, pp. 956, 969, §§ 1063, 1770(f); Const. art. 6, §§ 1, 9, 10, 15.

See Words and Phrases, Permanent Edition, for all other definitions of "Judicial Officer".

In Bank.

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Quo warranto by the People, on the relation of Leon Benwell, against Stanley A. Foutz to determine defendant's right to the office of Justice of the Peace of Signal Hill Township, Los Angeles County. From an adverse judgment, defendant appeals and petitions to have execution of judgment stayed by a writ of supersedeas.

Affirmed and writ denied.

Prior opinion, 155 P.2d 868.

Frank H. Jaques, of Long Beach, for appellant.

J. H. O'Connor, Co. Counsel, S. V. O. Prichard, Asst. Co. Counsel, and Ernest Purdum and Jesse J. Frampton, Deputies Counsel, all of Los Angeles, as amici curiae on behalf of appellant.

Robert W. Kenny, Atty. Gen., Charles W. Johnson, Supervising Deputy Atty. Gen., and Albert D. White, Shibley, Wanzer & Litwin and Geo. E. Shibley, all of Long Beach, for respondent.

TRAYNOR, Justice.

The relator was elected Justice of the Peace of Signal Hill Township, County of Los Angeles, for a term of four years beginning January 4, 1943. On August 3, 1944, he went to Mexico City as a delegate to the Inter-American Bar Convention. On August 29, 1944, one week before his return to this state, the Board of Supervisors of Los Angeles County declared his office vacant and appointed defendant to fill the vacancy. A proceeding in quo warranto was then instituted to test defendant's right to the office. Defendant appeals from a judgment of the trial court restoring the relator to the office and seeks to have the execution of the judgment stayed by a writ of supersedeas.

Section 1063 of the Government Code, St.1943, p. 956, provides: "No county or township officer shall absent himself from the State for more than five days unless either: (a) Upon business for the State, county or township, (b) With the consent of the board of supervisors of the county. In no case shall such officer absent himself from the State for more than two months without the consent of the board of supervisors, with the written approval of the Governor, nor shall such absence continue for a period exceeding six months in any one year." Section 1770 of the Government Code provides: "An office becomes vacant on the happening of any of the following events before the expiration of the term: * * * (f) His absence from the State without the permission required by law beyond the period allowed by law. * * *"

It is conceded that the relator was absent without the consent of the board of supervisors, and that he was not on business for the State, county or township. No question is raised as to the power of the board of supervisors to fill a vacancy in the office to which the relator was elected. The relator contends, however, that there was no vacancy at the time of defendant's appointment on the ground that a justice of the peace is a judicial officer within the meaning of article VI of the state Constitution and sections 1063 and 1770 of the Government Code cannot apply to judicial officers without violating section 9 of that article. That section provides: "The Legislature shall have no power to grant leave of absence to any judicial officer; and any such officer who shall absent himself from the State for more than sixty consecutive days shall be deemed to have forfeited his office. * * *"

[1] As originally enacted, the Constitution expressly vested part of the judicial power of the state in "justices of the peace." Art. VI, § 1. As amended in 1911 that section omitted any reference to justices of the peace, and justices courts are now merely included within "such inferior courts as the Legislature may establish." Art. VI, § 1; see Robertson v. Langford, 95 Cal.App. 414, 422, 273 P. 150. The amendment, however, has in no way affected the status of justices of the peace as judicial officers within the meaning of the Constitution. Before the amendment they were "as much judicial officers as any Justice of this Court, or any Judge of the Superior Court." People v. Ransom, 58 Cal. 558, 560. After the amendment they remained "part of the constitutional judicial system of the state" (Proctor v. Justice's Court, 209 Cal. 39, 41, 285 P. 312, 313) and "judges within the meaning of said judicial council amendment [article VI, section 1a], as well as within the meaning of other provisions of said article VI." Edler v. Hollopeter, 214 Cal. 427, 429, 6 P.2d 245, 246. Although section 1 of article VI of the Constitution no longer mentions justices of the peace, sections 10 and 15 of that article continue to refer to them as judicial officers.

[2] The relator contends that a judicial officer cannot also be a township officer. With regard to elections this contention must be upheld, for the Elections Code, which defines a justice of the peace as a judicial officer, § 31 St.1939, p. 52, and a township officer as a county officer, § 37, expressly excludes judicial officers from the

section defining county officers, § 35. A justice of the peace, however, is clearly a township officer within the meaning of section 4014 of the Political Code, which provides: "The officers of a township are: two justices of the peace * * *." In People v. Chaves, 122 Cal. 134, 54 P. 596, this court held that justices of the peace were included within the scope of section 25(21) of the County Government Act of 1893 (Stats. 1893, p. 346), which authorized county boards of supervisors to "fill, by appointment, all vacancies * * * in * * * township offices * * *." In People v. Cobb, 133 Cal. 74, 65 P. 325, this court held that the title of the County Government Act of 1897 (Stats. 1897, p. 452), "An act to establish a uniform system of county and township governments" included an adequate reference to the tenure and election of a justice of the peace within the meaning of section 24 of article IV. In Sanchez v. Fordyce, 141 Cal. 427, 75 P. 56, section 56 of the County Government Act of 1901 (Stats. 1901, p. 686), which provided that "in townships having a population less than six thousand, there shall be but one justice of the peace and one constable" was held constitutional within the meaning of section 5 of article XI, which confers upon the Legislature the power to provide for the election or appointment of such township officers as convenience may require. In Cox v. Jerome, 31 Cal.App. 97, 159 P. 884, the court held that a justice of the peace was one of the officers contemplated by section 9 of article XI, which provided that the compensation of any "county, city, town, or municipal officer" shall not be increased during his term of office. Section 4 of article XI of the Constitution originally directed the Legislature to "provide for township organization[s]." The Legislature, however, never made such provision and that section was repealed in 1933. The townships into which section 4015 of the Political Code authorizes boards of supervisors to divide their respective counties are merely geographical subdivisions for the purpose of electing justices of the peace and constables. Kahn v. Sutro, 114 Cal. 316, 332, 46 P. 87, 33 L.R.A. 620. It is clear, therefore, that "township" and "judicial" are not mutually exclusive terms and that a judicial officer can be a township officer without violating the constitutional provision against his exercise of powers of the legislative or executive departments of the state.

[3, 4] Once it is established that a judicial officer may be a township officer, it remains to be determined whether sections 1063 and 1770(f) of the Government Code relate to all township officers or, as contended by the relator, only to those township officers that are not judicial officers. Section 1770(f) declares an office to be vacant when the incumbent is absent from the state without the permission required by law. The section deals, therefore, with officers who can secure permission to leave the state. Section 1063 provides that a township officer may secure such permission from the county board of supervisors. The Constitution, however, forbids the Legislature to grant a leave of absence to any judicial officer. Since the Legislature cannot delegate a power that it does not possess, a county board of supervisors has no power to grant leaves of absence to judicial officers. Therefore, if a judicial officer were subject to section 1770(f) he would be liable to forfeit his office for not securing a permission that the Constitution forbids the county board of supervisors to grant him.

Defendant contends, however, that the history of section 1063 makes it clear that the section was intended to apply to all township officers. He notes that section 2 of the Government Code specifies that the provisions of that code shall be construed as continuing and restating similar provisions of existing statutes, and that the Political Code (Stats. 1907, p. 354) and the County Government Acts of 1897 and 1883, supra, which contained provisions similar to section 1063 (Pol. Code, § 4313, § 64 of the act of 1897, p. 475, and § 67 of the act of 1883, p. 316) expressly declared that justices of the peace were township officers. Pol.Code, § 4014, § 56 of the act of 1897, and § 58 of the act of 1883. Assuming that section 1063 was intended to apply to justices of the peace, it remains to be determined whether such an application is constitutional.

In contending that it is constitutional, defendant attempts to distinguish a leave of absence and a mere absence from the state. A leave of absence does not necessarily involve absence from the state, and an officer may be absent from the state without having been granted a leave. The question is, however, whether the Legislature intended that the consent to an absence from the state by a township officer should be anything but a leave of absence. Defendant contends that a leave of absence relieves an officer from the obligation of performing his official duties, whereas a mere permission to be absent does not relieve him from that obligation. Since a judicial officer, however, must exercise his judicial powers within the state (People v. Ruef, 14 Cal.App. 576, 626, 114 P. 48, 54), section 1063 can be given the meaning contended for by defendant only by excluding judicial officers from its application, for the Legislature could not have intended to allow an officer to leave the state, and thus place himself in a position in which he could not perform his duties, and at the same time have intended that he should remain under obligation to perform those duties. It follows that if the Legislature intended section 1063 to apply to judicial officers, it must also have intended that compliance with the requirements of that section would relieve those officers of their official duties. If the permission that an officer secures has no effect upon his official duties, it can affect him only in his capacity as private citizen. A private citizen, however, does not need permission to leave the state, and the Legislature could hardly have intended that an officer should obtain legislative consent to his absence unless that consent relieved him from the obligation to perform his duties. The legislative consent contemplated by section 1063 must therefore be regarded as a leave of absence, and the constitutionality of that section as applied to justices of the peace must be tested accordingly.

[5] It is contended that the Legislature is merely forbidden by section 9 of article VI to grant leaves of absence to judicial officers beyond a period of sixty days, but that, since the Constitution is not a grant of power but a limitation upon the Legislature, it may control the absence of judicial officers by granting or withholding leaves of absence within the sixty-day limitation. The language of the first clause of section 9, however, is unqualified, and the framers of the Constitution could hardly have indicated more plainly that under circumstances like those in the present case the Legislature was to have "no power to grant leave of absence to any judicial officer." The two clauses of section 9 in question were adopted in substantially their present form some ten years after the decision in People v. Wells, 2 Cal. 198 (see Cal. Const. 1849, art. VI, § 5, as amended in 1862). In that case this court held that a constitutional office can become vacant only by some express provision of the Constitution and that the Legislature has no power to declare what shall constitute a vacancy in such an office. Had the framers of the Constitution wished to allow the Legislature the power that People v. Wells had denied it, they would have given section 9 a different wording. It is immaterial that the Legislature has powers over justices of the peace that it does not possess over other judicial officers, for section 9 cannot be given one construction when applied to justices of the peace and another when applied to other judicial officers. Whatever other powers the Legislature has over justices of the peace, it has no power to grant them leaves of absence, for that field is covered by the Constitution.

[6] In view of our decision that the relator is entitled to the office to which he was elected in January, 1943, defendant's petition for a writ of supersedeas is denied.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., concur.

27 Cal.2d 31

BENNETT v. THE STATE BAR OF CALIFORNIA.

L. A. 18785.

Supreme Court of California.
Sept. 28, 1945.

1. Attorney and client 🔑54

Findings of Board of Governors of State Bar absolving attorney of moral turpitude and of blame for failure of court to ascertain state of record in certain criminal proceedings and attributing failure of attorney to acquaint court with state of record to excusable neglect were inconsistent with further finding of a violation of a duty on part of attorney and such findings together with evidence failed to support recommendation that attorney be publicly reprimanded.

2. Attorney and client 🔑53(2)

Evidence was sufficiently clear and convincing to establish that transaction on which disciplinary proceedings were predicated created an attorney and client relationship between attorney and person from whom he received money so as to give Board of Governors of State Bar jurisdiction.

3. Attorney and client 🔑46

The existence of a partnership relationship between attorney and person from whom he received money, rather than a strictly attorney and client relationship, did not constitute a defense to disciplinary proceedings for an alleged diversion of funds to a use other than that specified.

4. Attorney and client 🔑44(1)

The fact that liability as between attorney and his client was a civil one did not relieve attorney of amenability to disciplinary proceeding since the point at issue in such proceeding was whether attorney, in his management of affairs, had shown himself to be a person worthy of trust and duly appreciative of ethics of legal profession.

5. Attorney and client 🔑58

Where attorney failed to refute conclusions of Board of Governors of State Bar that attorney was untruthful in his testimony regarding disposition of deposit moneys, that he diverted funds to another purpose, that he violated duty to return them promptly upon request, and that delay in making restitution until after complaints had been lodged was unjustifiable, attorney was suspended for one year.

◆

In Bank.

Proceedings on petition of Frank B. Bennett to review a recommendation of the Board of Governors of the State Bar of California that petitioner be suspended for one year in one matter and that he be publicly reprimanded in another matter.

Petitioner suspended for one year and recommendation for public reprimand dismissed.

Edgar G. Langford, of San Diego, for appellant.

Charles C. Crouch, of San Diego, and Jerold E. Weil, of Los Angeles, for respondent.

PER CURIAM.

The petitioner seeks a review of the recommendation of the Board of Governors of the State Bar that in one matter he be publicly reprimanded and in another that he be suspended from the practice of the law in this state for the period of one year.

The petitioner was admitted to the bar in this state in June, 1919, and has engaged in practice in the county of San Diego. In February, 1943, he was charged in three counts with the commission of acts involving moral turpitude (State Bar Act, § 6106, St.1939, p. 357), and the violation of the rule prohibiting commingling of clients' money with personal funds (Rules of Professional Conduct, rule 9). Hearings before the local administrative committee resulted in a recommendation to the Board of Governors that the petitioner be disbarred. On modified findings the Board of Governors originally recommended to this court the disbarment of the petitioner. Thereafter the court on its own motion remanded the proceedings to the Board of Governors for the taking of additional evidence with reference to the matters involved in the first two counts. After further hearings the Board of Governors adopted new findings on all three counts, recommending a public reprimand as to counts 1 and 2 and a one-year suspension as to count 3. The several matters will be reviewed in the light of the final findings and recommendations presented by the board.

Counts 1 and 2, as to Garber and Ryan.

[1] These counts are based on the petitioner's applications to Municipal Judge John J. Brennan to modify the sentences imposed on Francis G. Garber and John Jerome Ryan and to discharge them.

Garber and Ryan, both serving with the United States Navy, were arrested on July 11, 1942, in the city of San Diego and were charged with being lewd and dissolute persons in violation of Penal Code, section 647, subd. 5. Unrepresented by counsel, they were arraigned before Judge Brennan and on advice of police officers pleaded guilty. Each received a straight sentence of 120 days in the county jail. While they were confined a mutual acquaintance of Ryan and the petitioner sought the latter's services in obtaining their release. The petitioner learned that the commitment was under sentence imposed by Judge Brennan. Judge Brennan and the petitioner had occupied the same suite of offices for a number of years, although they were not partners. Petitioner told the friend of Ryan of his personal acquaintance with the judge and the fact of his former association, but with no suggestion that he could bring any influence to bear on the matters except as warranted by the facts. The petitioner agreed to accept a fee of $200 from each man. He received $200 from Ryan. Garber paid $25 which he borrowed for the purpose, and gave a note for $175 for the balance.

It was the custom of Judge Brennan in imposing sentences to reserve jurisdiction by suspending the last day of the sentence; but in the cases of Garber and Ryan he had omitted to do so. It was also his policy to return service men to their outfits before the termination of their sentences if the background and character of the men appeared to warrant it. The petitioner was familiar with the custom and the policy. Although he knew that the court would have no jurisdiction to modify a straight sentence (Pen.Code, § 1215), he did not have any definite information as to the sentences imposed. Relying on Judge Brennan's custom to retain jurisdiction, he did not make an investigation of the records to determine the nature of the sentences. There was considerable inconvenience to practitioners in making such an investigation. The department presided over by Judge Brennan was crowded with business and the court records were not kept in the courtroom but at a distance in the same building. Lawyers were not permitted free access but were required to request the clerk to obtain the record, and such request would have interfered with the work of the court. The petitioner relied on the court to determine what the sentences were and to do what was proper in the circumstances. He presented to Judge Brennan the results of his investigation of the background and character of his clients together with the facts concerning their connection with the naval forces, and informally applied for their release, making several such informal appearances. In conformity with his policy Judge Brennan, being satisfied of the merit of the showing, signed an order in each case suspending the remainder of the sentences and releasing the men on condition that they leave San Diego immediately and not return for two years unless as members of the armed forces of the United States. In making the orders Judge Brennan relied on his clerk and assumed and acted under the belief that he had followed his usual custom of reserving jurisdiction. Inasmuch as he had not done so the men were rearrested after their release and served the balance of their terms. Subsequently the petitioner learned that Garber had not repaid the $25 borrowed to make the initial payment on the agreed fee and the petitioner remitted the amount to the lender.

The foregoing is taken from the findings of the Board of Governors. The board also found that all of the proceedings in the Criminal Department of the San Diego Municipal Court presided over by Judge Brennan were informal; that in the checking of the records he relied on his clerk, who prepared the modifications of sentences and presented them to him for signature; that in the circumstances, there was not impropriety on the petitioner's part because of the way in which he made application for relief. It was also found that the petitioner made no representations as to the state of the record, or as to the sentences which had been imposed; that he did not misrepresent or impose on the court in this respect by way of affirmative statement, nor did he accept employment knowing that nothing could be done; that petitioner was not as to counts one and two guilty of conduct involving moral turpitude. Nevertheless, the board recommended that the petitioner be publicly reprimanded, basing the recommendation on the further finding of negligence and violation of duty both to clients and to the court in not ascertaining the state of the record and the terms of the sentences imposed.

The findings of the board are inconsistent with each other and with the recommendation. The board absolved the petitioner of moral turpitude, and of blame for the failure of the court to ascertain the state of the record at the time the orders of suspension were signed, and attributed the failure of the petitioner to acquaint the court with the state of the record to excusable neglect. The finding of a violation of duty on the part of the petitioner is dissipated by the board's other findings, and there is no substantial basis in the evidence for the recommendation that the petitioner be publicly reprimanded as to counts one and two.

Count 3, the Batts Matter.

In April, 1942, a colored woman by the name of Fanny Batts employed the petitioner as an attorney to obtain a lease for her of the Pacific Hotel which had been evacuated of Japanese and whose effects were about to be sold at auction by the Alien Property Custodian. She was an intelligent woman and experienced in business matters. On April 3d she deposited the sum of $100 with petitioner for which he gave her a receipt marked "a/c legal services." Subsequently there was a change of relationship, whereby it was understood that they form a partnership to obtain a lease in the petitioner's name; that the business be operated by Fanny Batts; that the petitioner furnish additional moneys needed; and that if the lease on the Pacific Hotel could not be obtained, some other suitable lease would be sought. In pursuance of this agreement Fanny Batts deposited with the petitioner, as funds to apply on the rent, $300 in July, and $237 in October, 1942, making a total of $637 including the $100 paid in April. The petitioner was unable to obtain a lease on either the Pacific Hotel or a second contemplated place, and the suggestion by him of a third property was rejected by Fanny Batts because the house was without adequate plumbing. In January, 1943, because of failure to secure a lease, she requested a termination of the business arrangement and a return of the funds deposited, including the first deposit of $100. Previously, in December, 1942, the petitioner had refunded $75 promptly on request. But in January he failed to accede to her request to return the balance of the moneys. He gave her $12 in cash and a note for $550 on a printed form payable "ninety * * *" after date without interest. She returned that note to him and received a ninety-day note which the petitioner neglected to sign. Finally, on January 7th he delivered a signed ninety-day note with the representation that it would be paid sooner, probably in two or three days. When payment was not forthcoming, and on January 16th, she complained to the district attorney's office and to the San Diego Bar Association. On January 26, 1943, after he learned of Mrs. Batts' complaints, the petitioner paid her the balance of $550 and the note was cancelled. He admitted that he had no bank account nor any separate file or drawer for trust funds, but asserted that during the entire period of these negotiations he kept the money entrusted to him by Fanny Batts in his pocket in the same roll with his own money. A series of small unsatisfied judgments against the petitioner and a course of borrowing money from loan companies is disclosed by the record, although there is no direct evidence that he borrowed to meet payment of the note. When asked whether he had borrowed for that purpose he said, "No. What if I did? I didn't necessarily use it for this. I borrow money all the time." The petitioner testified that he did not see anything unethical in giving a note upon termination of the partnership, instead of using the funds which he said he had in his pocket.

The board found that the petitioner did not keep intact and in specie the funds received from Mrs. Batts, but that he diverted the funds from the purpose for which they were deposited except as to the amounts of $75 and $12 previously returned. The board treated the transaction as a partnership matter, and considered the funds deposited as partnership funds. It concluded that it was the petitioner's duty to hold them intact for the specific purpose of investment in a partnership venture and that upon failure of the venture to mature it was his duty to return the money promptly on demand; that he failed in his duty by (1) diverting the funds from the purpose for which they were deposited; and (2) by failing without justification to repay the money promptly upon demand. The board considered as favorable to the petitioner that there was no evidence that he overreached Mrs. Batts, or that he treated her unfairly, or that he intended to take advantage of her; that he never actually refused to repay the moneys deposited, including the original $100, although he performed legal services; and that he treated her more than fairly when, without compulsion, he included in the repayment the original $100 paid on account of legal services. The board also took into consideration as unfavorable the fact that there had been a prior disciplinary proceeding which resulted in disciplinary action in the form of a public reprimand.

[2-4] The petitioner contends that there is no clear and convincing evidence that he was employed as an attorney in the Batts matter, so as to give the board jurisdiction. He urges that his own statement in that regard is a "mere conclusion of law," that the acts agreed to be done by him were such as any qualified business man could perform, and that he made no charge for such services. The contention is without merit. The evidence that he was employed as an attorney at the inception of the relationship is as clear and convincing as his own oral and written admissions can make it, and the board found that he never definitely dropped his character as an attorney in the matter. However, considering the relationship as that of partners, the inhibition against diverting the funds to another than the use specified, and the failure to repay promptly on demand under the circumstances, would justify disciplinary measures in a state bar proceeding, although the relationship may not be strictly on an attorney and client basis. The existence of the partnership did not constitute a defense in the proceeding. In re Cruickshank, 47 Cal.App. 496, 501, 190 P. 1038. The fact that the liability as between the attorney and his client was a civil one did not relieve him of amenability to disciplinary proceedings. Maggart v. State Bar, 7 Cal.2d 495, 61 P.2d 451; Jacobs v. State Bar, 219 Cal. 59, 25 P.2d 401. As stated in Narlian v. State Bar, 21 Cal. 2d 876, 884, 136 P.2d 553, citing Marsh v. State Bar, 2 Cal.2d 75, 39 P.2d 403, the point at issue is whether the petitioner, in his management of this affair, has shown himself to be a person worthy of trust and duly appreciative of the ethics of the legal profession.

[5] The petitioner has failed to refute the conclusions of the board that he was untruthful in his testimony regarding disposition of the deposit moneys, that he diverted the funds to another purpose, that he violated his duty to return them promptly upon request, and that the delay in making restitution until after complaints had been lodged was unjustifiable and did not absolve him from discipline. The record bears out the further express conclusions of the board that the petitioner is not fully alive to his duties and obligations as an attorney at law, is not aware of the degree of good faith and fidelity required of him. The disciplinary action recommended as to count three was therefore warranted.

It is ordered that the proceeding as to counts 1 and 2 be dismissed; and that as to count three the petitioner be suspended from the practice of law in this state for a period of one year, effective thirty days after the filing of this order.

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27 Cal.2d 38

LITVINUK v. LITVINUK.

L. A. 18795.

Supreme Court of California.

Oct. 1, 1945.

1. Appeal and error 🔑110

An order of the superior court denying motion for new trial is not appealable. Code Civ.Proc. § 963.

2. Appeal and error 🔑345(1), 870(6)

The superior court's order denying motion for new trial is reviewable on appeal from the judgment, but right to such review is terminated by expiration of time to commence appeal from judgment. Code Civ.Proc. §§ 939, 956.

3. Divorce 🔑181

Appeal from divorce judgment and from order denying motion for new trial must be dismissed where notice of appeal was not filed until long after expiration of 30 days from entry of such order. Code Civ.Proc. § 939.

4. Divorce 🔑165(5)

Where defendant's attorney filed notice of motion to be made on December 16 to vacate interlocutory divorce decree and to reopen the matter for further proceedings, but did not appear on December

16 and no motion was made, there was nothing before superior court requiring a ruling.

5. Trial ⚿377(2)

Trial court has a sound discretion to reopen case for introduction of additional evidence after submission or even after making of a minute order directing judgment.

6. Appeal and error ⚿113(1), 873(2)

The superior court's order denying motion to reopen cause for further proceedings before entry of judgment or rendition of decision is not appealable but is reviewable only on appeal from the judgment. Code Civ.Proc. §§ 956, 963.

7. Appeal and error ⚿113(2)

Generally, appeal may not be taken from nonappealable order by device of moving to vacate order and then appealing from ruling denying the motion.

8. Appeal and error ⚿113(2)

Appeal from order denying motion to vacate an appealable order or judgment will not be entertained where purpose of motion was to change trial court's decision on the same facts.

9. Appeal and error ⚿113(2)

If grounds on which party sought to have judgment vacated existed before entry of judgment and would have been available on appeal therefrom, appeal will not lie from order denying the motion.

10. Divorce ⚿177

Appeal from order denying defendant wife's motion under statute to vacate husband's interlocutory divorce decree on grounds of mistake, inadvertence, and surprise must be dismissed where grounds urged, including denial of continuance, and husband's unsuccessful divorce action in another state, would have been available on appeal from the judgment. Code Civ.Proc. §§ 473, 956.

◆

In Bank.

Appeals from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action for divorce by Paul Litvinuk against Anna Litvinuk, wherein plaintiff obtained an interlocutory decree. From the judgment for plaintiff and from orders denying motions to vacate the interlocutory decree, to obtain a new trial, and to vacate the decree under Code Civ.Proc. § 473, on grounds of mistake, inadvertence, and surprise, defendant appeals.

Appeals dismissed.

Prior opinion 156 P.2d 446.

A. P. Coviello and John C. Miles, both of Los Angeles, for appellant.

Ernest Best and William Ellis Lady, both of Los Angeles, for respondent.

EDMONDS, Justice.

Paul Litvinuk sued for a divorce. His wife, who was then living in Pennsylvania, came to California and filed an answer denying the charges made against her. When the case came on for trial, she was present but her counsel did not appear because he was then engaged in the trial of a criminal case before another judge of the same court. Following the denial of a continuance, the husband was awarded an interlocutory decree, and the wife has appealed from the judgment and also from several orders denying motions to set it aside and have a trial on the merits.

According to the affidavit of A. P. Coviello, on October 6, 1942, Mrs. Litvinuk retained him as her counsel. At that time, he declared, the case was set for trial on March 15, 1943, and he had no knowledge of any motion to be made for its advancement. On October 9th the husband's attorney served a notice of motion for an earlier date of trial. There was then no substitution of counsel on file, and the notice was served upon the attorneys of record.

On October 16th the motion, which was unopposed, was granted and the case was reset for November 23d. According to an affidavit of the attorney for Mr. Litvinuk, it was on October 16th, after the hearing of his motion that Mr. Coviello informed him of the change of counsel; also, although the substitution was dated October 5th, it was not signed by counsel then representing Mrs. Litvinuk "until a week or ten days after October 16th." But there is no denial of Mr. Coviello's assertion concerning the date of his employment, nor is it asserted that the change of attorneys was made for the purpose of delaying the trial.

On November 23d when the case was called for hearing, Mr. Coviello moved for a continuance upon the ground that he was actually engaged in the trial of the criminal case. The motion was denied by the acting presiding judge, but after the ruling was made, the case could not be heard; it was then continued to December 4th, with the order that if Mr. Coviello could not then be present, other counsel should be obtained.

On December 4th, Mr. Coviello was still engaged in the criminal case and made a motion, supported by affidavit, for a short continuance. The motion was denied; but again, because of other cases having priority, the Litvinuk case went over to December 7th, when it was transferred by the presiding judge to a trial department of the court. Mr. Coviello was still engaged in the criminal case and he so informed the court through a clerk who appeared for that purpose. A continuance was denied and, in the absence of Mrs. Litvinuk's attorney, the court heard the testimony of her husband and a witness produced by him for the purpose of corroboration.

At the conclusion of this testimony Judge Stutsman ordered Mrs. Litvinuk to "take the stand." Upon being told by her that, "I can't understand without my attorney here; I would like to have him here," the judge replied: "The record shows your attorney has had plenty of chance to be here * * * You get up on the stand and I will be your attorney." Again Mrs. Litvinuk remonstrated, "But my attorney, I want him to be here, please." After the judge repeated that the attorney "has had plenty of chance to be here," he asked: "Do you want to tell me about your side of the case?" Mrs. Litvinuk answered, "I can't tell it without my attorney." "All right," said Judge Stutsman, "Decree granted to the plaintiff." Custody of the child was awarded to Mrs. Litvinuk and her husband was ordered to pay $4.00 per week for the child's support but no provision was made for the maintenance of the wife.

Later, on the same day, Mr. Coviello gave notice of a motion, to be heard on December 16, to vacate the minute entry ordering a decree of divorce in favor of the respondent and to reopen the case. Accompanying the notice of this motion was an affidavit of Mrs. Litvinuk declaring that her husband, shortly before coming to California had instituted an action for divorce in the State of Pennsylvania where they had formerly resided, and upon a trial Mr. Litvinuk was denied a divorce. She also stated that when the court proceeded with the hearing of the divorce proceeding, her counsel was still engaged in the trial of the criminal case which had occasioned the prior continuance and, for that reason, was not present to represent her. Ernest Best, the attorney for Mr. Litvinuk, in a counteraffidavit, did not deny that at the time the divorce proceeding was called for trial, opposing counsel was employed in the defense of a client charged with murder but, he said as thirty-eight persons were being prosecuted and Mr. Coviello represented only one of them, by reason of "a working agreement with another counsel in the case" he was able to leave the trial from time to time "and do other work that is necessary." Mr. Best also asserted "that to his knowledge no action was ever filed for divorce in the State of Pennsylvania where the divorce was denied."

Mr. Coviello unaccountably failed to appear on December 16th and the court's minutes record that "Said motion is denied." Immediately thereafter findings and a decree of divorce were signed and filed. The judgment was entered December 18th. On January 4th, the appellant filed a motion for new trial upon substantially all of the statutory grounds. The motion was denied. Following the ruling, Mrs. Litvinuk gave notice of a motion, under section 473 of the Code of Civil Procedure, to vacate the decree upon the grounds of "mistake, inadvertence, and surprise." With the notice there was served a verified proposed cross-complaint for separate maintenance, charging Mr. Litvinuk with willful neglect. This pleading included allegations concerning the Pennsylvania proceeding asserted to have been tried and determined in the wife's favor. The motion was submitted for decision upon affidavits and, on April 9th, was denied.

On April 21, Mrs. Litvinuk filed a notice of appeal (1) from the judgment; (2) from the order denying the appellant's motion to vacate and set aside the interlocutory decree and to reopen the matter for further proceedings; (3) from the order of the trial court denying her motion for a new trial; and (4) from the order denying the appellant's motion to vacate and set aside the interlocutory decree under section 473. But in the appellant's opening brief, no points or authorities are presented as a basis for the reversal of the judgment, or of any of the challenged orders except the one by which the court denied relief under section 473 of the Code of Civil

Procedure. As to that ruling, the denial of a divorce in the Pennsylvania proceedings, says the appellant, constitutes a valid defense to the present action and, accordingly, she is entitled to "her day in court." Moreover, the argument continues, because of the interest of the state in safeguarding marital relations, public policy is against "easy" divorces. For these reasons, it is concluded, "the trial court erred and abused its discretion in denying the motion under section 473."

In support of the rulings in his favor, the respondent contends that as his wife did not appeal from the judgment of divorce and the determinations of the trial court upon the motion to vacate and the motion for a new trial within the time provided by law, the only matter which may now be considered is the propriety of the order denying the motion made pursuant to section 473 of the Code of Civil Procedure. Concerning that ruling, he takes the position that because the grounds for the motion existed at the time of the entry of the interlocutory decree of divorce and could have been presented upon an appeal from it, Mrs. Litvinuk is precluded from urging the same points upon an appeal from the order denying relief.

[1, 2] A notice of intention to move for a new trial must be filed within ten days after receiving written notice of the entry of judgment. Code Civ.Proc. § 659. Mrs. Litvinuk complied with this requirement and her motion was denied.

Although an order denying a motion for a new trial is not appealable, (Code Civ. Proc. § 963; City of Los Angeles v. Glassell, 203 Cal. 44, 262 P. 1084; Regoli v. Stevenson, 179 Cal. 257, 176 P. 158), its propriety may be reviewed upon an appeal from the judgment. Code Civ.Proc. § 956; Citti v. Bava, 204 Cal. 136, 266 P. 954; Marr v. Southern Cal. Gas Co., 194 Cal. 332, 228 P. 534. However, the expiration of the time within which an appeal from a judgment must be commenced terminates the right to have such an order reviewed. Lawson v. Guild, 215 Cal. 378, 10 P.2d 459; Bates v. Ransome-Crummey Co., 42 Cal. App. 699, 184 P. 39.

[3] Ordinarily an appeal must be taken within sixty days from entry of the judgment, Code Civ.Proc. § 939, but where a notice of motion for new trial is seasonably filed "the time for appeal from the judgment shall not expire until thirty days after entry in the trial court of the order determining such motion for a new trial * * *." Code Civ. Proc. § 939. The judgment in favor of the respondent was entered in December. The ruling denying the motion for a new trial came a month later but not until the following April was the notice of appeal filed. Accordingly, the appeal from the judgment and the appeal from the order denying the motion for a new trial must be dismissed.

[4-6] The specification in the notice of appeal of "the order denying defendant's motion to vacate and set aside the interlocutory decree and to re-open the matter for further proceedings," evidently refers to a ruling which followed the filing of a notice of motion to be made on December 16th for that purpose. As Mr. Coviello did not appear at the time fixed and no motion was made, there was nothing before the court requiring a ruling (Estate of Corcofingas, 24 Cal.2d 517, 521, 150 P. 2d 194; Milstein v. Sartain, 56 Cal.App.2d 924, 930, 931, 133 P.2d 836), but an order was nevertheless entered denying the motion described in the notice. Although it is within the sound discretion of the trial court after submission to reopen a case for the introduction of additional evidence (San Mateo P. M. Co. v. Davenport R. Co., 218 Cal. 702, 712, 713, 24 P.2d 787; Parker v. Swett, 188 Cal. 474, 479, 205 P. 1065), even after the making of a minute order directing judgment (Bazet v. Muggett Bar Placers, Inc., 211 Cal. 607, 611, 612, 296 P. 616; Carr v. International Indem. Co., 58 Cal.App. 614, 617, 618, 209 P. 83), an order denying a motion to reopen a cause for further proceedings before the entry of judgment or rendition of the decision is not an appealable order but it is reviewable only upon appeal from the judgment. Code Civ.Proc. §§ 956, 963; Phenegar v. Paolini, 27 Cal.App. 381, 393, 149 P. 1008; Eddy v. American Amusement Co., 21 Cal. App. 487, 495, 132 P. 83. Mrs. Litvinuk did not take such an appeal and that order may not now be reviewed.

[7-9] Considering the appeal from the order denying the motion to vacate the judgment under section 473 of the Code of Civil Procedure, as a thing prohibited directly may not be done indirectly, it is the general rule that an appeal may not be taken from a nonappealable order by the device of moving to vacate the order and appealing from a ruling denying the mo-

tion. Estate of Spafford, 175 Cal. 52, 165 P. 1; Estate of Keane, 56 Cal. 407. Nor will an appeal from an order denying a motion to vacate an appealable order or judgment be entertained when the purpose of the motion was to change the decision of the trial court upon the same facts. Bell v. Solomons, 162 Cal. 105, 121 P. 377; Alpers v. Bliss, 145 Cal. 565, 79 P. 171. Stated differently, if the grounds upon which the party sought to have a judgment vacated existed before the entry of judgment and would have been available upon an appeal from the judgment, an appeal will not lie from an order denying the motion. Mather v. Mather, 22 Cal.2d 713, 720, 140 P.2d 808; Estate of Richards, 17 Cal.2d 259, 267, 109 P.2d 923.

[10] The record discloses that Mrs. Litvinuk's motion to vacate the interlocutory decree of divorce upon the grounds specified in section 473 of the Code of Civil Procedure was to be based upon "all of the records, files and papers in the above entitled action; this notice of motion, and the affidavits of defendant filed concurrently herewith; together with the proposed Cross-Complaint herein." Permission to file the new pleading was never granted, but it is of no importance so far as a determination as to Mrs. Litvinuk's rights are concerned for it is practically a recital of the facts concerning the Pennsylvania divorce proceedings as they were stated in her affidavits in support of the motions to reopen the cause for further proceedings and for a new trial. No affidavit of Mrs. Litvinuk was filed "concurrently" with the notice of motion. Subsequently, however, Mr. Coviello filed his own affidavit in which he related the circumstances surrounding his employment by Mrs. Litvinuk and the subsequent course of events concerning the trial of the divorce action, substantially in the same form as those facts were presented in his affidavit in support of the motion for a continuance and the affidavit of Mrs. Litvinuk in support of the motion to reopen the cause for further proceedings. In other words, the facts appearing in the affidavits supporting the motion under section 473 presented no issues other than those raised by the affidavits and other papers filed in the divorce action and available for consideration upon an appeal from the judgment.

Nor does it appear from the notice of motion that additional grounds available upon appeal from the judgment were before the trial court upon the motion made under section 473. That motion was based upon the grounds that (1) Mrs. Litvinuk was prevented by her husband and his attorney from producing evidence at the trial of the divorce action; (2) the trial court abused its discretion in denying a continuance; and (3) judgment was taken through the excusable neglect, mistake, inadvertence and surprise of Mrs. Litvinuk. All of these grounds were available to Mrs. Litvinuk upon appeal from the judgment. Each of them was urged in support of her motion for a new trial, and the notice of motion to reopen the cause for further proceedings discloses it was to have been made upon the ground of excusable neglect. Under these circumstances, the purported appeal from the order denying Mrs. Litvinuk's motion under section 473 of the Code of Civil Procedure must be dismissed.

The appeal from the judgment and from each of the specified orders is dismissed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, and SPENCE, JJ., concur.

SCHAUER, Justice.

I concur in the judgment of dismissal of the appeal but in fairness to the trial court and in order that the basis for its action may be more fully portrayed deem it proper to add the following observations.

It should be noted that the record supports the conclusion that the defendant deliberately engaged in a campaign for unnecessary delay. It must be remembered that the trial court found in favor of the plaintiff and every factual issue on the motions with which we are concerned must be deemed to have been resolved in favor of plaintiff.

The complaint was filed on May 21, 1942; the answer, on August 28, 1942. Trial was originally set for March 15, 1943, but on October 16, 1942, on motion of the plaintiff regularly noticed and made, the court ordered the trial date advanced to November 23, 1942. We must presume that this order was made on good cause shown and that the order so adjudicates. At the time of such order Mrs. Litvinuk was represented by attorneys Craig and Weller and Paul A. Amos, but on the same day Mr. A. P. Coviello, who was even then engaged in the trial of a criminal case, representing one of thirty-eight defendants charged with murder, a trial which he must have known would be protracted, accepted the substitution of himself as attorney for Mrs. Litvinuk. On November 23, 1942, the day set for trial of this action, he moved for its continuance on the ground that he was engaged in the very trial in which he was engaged when he accepted employment in the case. This move, the trial court was warranted in finding, was contemplated by him when he accepted the employment.

The record shows the following from the affidavit of Mr. Best (attorney for plaintiff): "that affiant talked to said attorney (Coviello) in his office and over the telephone several times before the date of trial in November, 1942 and about two weeks before said date informed said attorney that he would oppose any motion of said counsel for a continuance on the date of trial for the reason among other things that he was not the original counsel, was engaged in a long trial and was so before he took the case and so forth; that at said time, said attorney stated that *that was a privilege of any counsel.* * * *" (Italics added.)

However, on November 23d, on Mr. Coviello's motion, over the objection of plaintiff, the trial was postponed until December 4th, the presiding judge specifically ordering at that time that on December 4th "the counsel for the defendant A. P. Coviello, was to try the case or to have the defendant represented by some other counsel who was prepared to go ahead with the trial." Mr. Coviello heard this ruling made. In addition thereto, on the same day, November 23, 1942, he was served by mail with notice in writing that the trial had been continued to December 4, 1942, "with the understanding that if the attorney A. P. Coviello cannot be present in person to represent the defendant at said time that he have some other attorney to represent the defendant or that the defendant have some other counsel to represent her at said time."

Notwithstanding this notice, on December 4th Mr. Coviello, without any showing of diligence or effort to comply with the court's order, sought a further postponement and although his motion was at first denied, the trial was eventually continued to December 7th. On that date, the trial court having indulged defendant and her counsel two full weeks of delay, and ample opportunity to have procured other counsel, proceeded to trial. I am satisfied that there was no abuse of discretion in so proceeding. However, for the reasons stated in the majority opinion, we have no occasion to pass on the merits of the trial court's action as the appeal must be dismissed.

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27 Cal.2d 47

LA PRADE v. DEPARTMENT OF WATER AND POWER OF CITY OF LOS ANGELES et al.

L. A. 19040.

Supreme Court of California.

Oct. 1, 1945.

1. Municipal corporations 🔑218(8)

Under provision of Los Angeles city charter that no civil service employee may be discharged except for cause, employee must be accorded a full and formal hearing.

2. Municipal corporations 🔑205, 206

If Los Angeles Board of Civil Service Commissioners finds that charges against discharged employee of water and power department were not sustained, Board must so conclude.

3. Municipal corporations 🔑205, 206

In proceedings before Los Angeles Board of Civil Service Commissioners on charges against employee of water and power department, evidence was required to be adduced to sustain charges against employee, and burden did not rest upon employee to refute the charges made.

4. Municipal corporations 🔑205, 206

If no evidence is adduced sustaining discharge of civil service employee in water and power department, Los Angeles Board of Civil Service Commissioners must find that the discharge was not justified.

5. Officers 🔑103

Administrative tribunals, exercising quasi judicial powers which are required to make determination after hearing, cannot act on their own information, and nothing may be treated as evidence which has not been introduced as such.

6. Municipal corporations 🔑205, 206

The action of Los Angeles Board of Civil Service Commissioners, concerning discharge of employee of water and power department based upon report of investigators, even if such report was competent evidence, when forming basis for Board's determination, was a denial of a hearing, unless report was introduced into evidence and employee was given opportunity to cross-examine maker thereof and refute it.

7. Municipal corporations 🔑205, 206

Where determination of Los Angeles Board of Civil Service Commissioners concerning discharge of employee of water and power department was based upon investigator's report, which although on file with Board was not introduced in evidence at a hearing at which employee was present, the employee was denied required hearing.

8. Certiorari 🔑21
Mandamus 🔑70

Where a local administrative tribunal exercises quasi judicial powers, its action may be reviewed by either mandamus or certiorari.

9. Certiorari 🔑64(1)
Mandamus 🔑172

In review of action of a local administrative tribunal in exercise of its quasi judicial powers, whether by mandamus or certiorari, the chief issues are whether the person affected has been accorded a hearing, and, if so, whether there is any evidence to support determination of local tribunal.

10. Certiorari 🔑68
Mandamus 🔑172

In proceedings to review action of local administrative tribunal in exercise of its quasi judicial powers, whether by mandamus or certiorari, the court should confine itself to the showing made before the administrative tribunal with regard to sufficiency of the evidence.

11. Municipal corporations 🔑218(8)

Under Los Angeles city charter, Board of Civil Service Commissioners is vested with power to make determination of whether there is a basis for discharge of civil service employee.

12. Mandamus 🔑187(10)

Where it was shown in mandamus proceeding that required hearing before Los Angeles Board of Civil Service Commissioners had been denied discharged employee of water and power department or that evidence was insufficient to sustain Board's action, and it was still possible for Board to hold a hearing or exercise its discretion, matter would be remanded to Board for further consideration rather than having a trial de novo in superior court requiring that court to exercise independent judgment on facts which should be determined by the Board.

SHENK, EDMONDS, and SPENCE, JJ., dissenting.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Proceeding in mandamus by Zerah H. La Prade against Department of Water and Power of the City of Los Angeles, and others to compel reinstatement of petitioner, who was a discharged civil service employee. From a judgment for petitioner, the respondents appeal.

Judgment modified and affirmed.

Prior opinion, App., 147 P.2d 420.

Ray L. Chesebro, City Atty., S. B. Robinson, Chief Asst. City Atty., and G. Ellsworth Meyer, Deputy City Atty., all of Los Angeles, for appellants.

David Sokol, of Los Angeles, for respondent.

A. L. Wirin, of Los Angeles, and Arthur Garfield Hays and Osmond K. Fraenkel, both of New York City, amici curiae on behalf of respondent.

CARTER, Justice.

Petitioner Zerah La Prade was successful in the trial court in a proceeding in mandamus to compel his reinstatement as a civil service employee of the Department of Water and Power of the City of Los Angeles, hereinafter referred to as the department.

Petitioner had attained civil service status as an employee in the department. On August 28, 1942, the department served upon petitioner and filed with the Board of Civil Service Commissioners of the city, hereinafter referred to as the board, a notice of discharge, pursuant to section 112 of the Los Angeles City Charter. The grounds for the discharge consisted of an accusation that petitioner had published and caused to be published in The Civil Service Sentry, a publication of the Municipal Civil Service Association, distorted and misleading statements concerning the department which caused dissatisfaction and dissension among the employees. On the same day, in reply to the notice of discharge, petitioner delivered to the board a letter in which he "categorically" denied all of the charges and requested the right to personally appear before the board. On September 1, 1942, he delivered another letter to the board, supplementing the letter of August 28th, demanding an investigation of the charges. On September 10, 1942, the board sent to petitioner a notice that his "appeal from discharge" with report and recommendation for action of the manager of the board would be submitted at a meeting of the board on September 15, 1942. That time was postponed to September 16, 1942. At that meeting, according to the findings of the trial court, "petitioner appeared and the matter of his discharge being called up, petitioner was asked by the Board if he wished to make a statement, to which he replied that on advice of counsel he would make no statement other than his denials in his two letters until an investigation was made as requested. Thereupon the Board voted to take the matter of discharge under advisement along with report of investigation then on file and next hereinafter set forth in substance." It further appears that when the department's representatives present at the meeting were asked what they had to offer, they stood mute. The report of the investigation by a representative of the board was filed with the board on September 1, 1942, but from all that appears in the record *it was never introduced in evidence nor was a copy exhibited to petitioner at the meeting on September 16th.* The report was introduced in the court below and had attached to it a copy of the publication above-mentioned, and stated according to the court's findings, that it "did not appear over Mr. La Prade's name as alleged, and in which he (the investigator) recommended that the charges filed did not constitute a proper and sufficient cause for discharge and that the Board order restoration of petitioner to his position." On September 18th, petitioner made written demand for reinstatement. On September 22d, at a meeting of which petitioner had no notice, consideration of petitioner's discharge "together with the report of investigation of September 1st, was taken up and, according to the minutes kept and recorded of such meeting, a motion was made, seconded and unanimously carried to sustain the discharge of petitioner by the Board of Water and Power Commissioners." At a meeting of the board on September 25th the board added an amendment to their minutes of September 22d and on September 28th sent to petitioner a notice that the matter of his discharge had been considered on September 22d and the discharge was sustained. From the foregoing proceedings it is obvious that *there was no evidence whatsoever introduced at any meeting of the board to substantiate the charges made against petitioner,* unless it be said that the report of the investigator was introduced at the meeting on September 22d. *But petitioner was not notified of or present at that meeting.* Assuming that the report was proper evidence (it should be said that it could not sustain the charges because it found that petitioner was not responsible for the publication), it was on file with the board before the meeting on September 16th, but it was not introduced in evidence at that time. Petitioner was wholly justified in refusing to make any statement at the September 16th meeting inasmuch as the burden was on the department to establish cause for the discharge and until some showing had been made, petitioner was not required to proceed. (This proposition will be discussed later herein.) With the foregoing factual background we turn to the law applicable thereto.

[1-4] The Los Angeles City Charter provides that no civil service employee may be discharged except for cause. (Los Angeles City Charter, § 112(a).) Under that provision the employee must be accorded a full and formal hearing. Steen v. Board of Civil Service Com'rs, 26 Cal.2d 716, 160 P.2d 816. If the board finds that the charges are not sustained it must so conclude. Steen v. Board of Civil Service Com'rs, supra. In any proceeding of this character evidence must be adduced to sustain the charges. It is not incumbent on the employee to proceed. The burden does not rest upon him to refute the charges made. If no evidence is adduced sustaining the discharge the board must find that the discharge was not justified. See Walker v. City of San Gabriel, 20 Cal.2d 879, 129 P.2d 349, 142 A.L.R. 1383; Swars v. Council of the City of Vallejo, 64 Cal.App.2d 858, 149 P.2d 397; Abrams v. Daugherty, 60 Cal.App. 297, 212 P. 942; Garvin v. Chambers, 195 Cal. 212, 232 P. 696; Childress v. Peterson, 18 Cal.2d 636, 117 P.2d 336; McDonough v. Goodcell, 13 Cal.2d

741, 91 P.2d 1035, 123 A.L.R. 1205; Petersen v. Civil Service Board, 67 Cal.App. 70, 79, 227 P. 238. Thus, it is said in Swars v. Council of the City of Vallejo, supra, 64 Cal.App.2d at page 864, 149 P.2d at page 400, where the issue was the removal of a civil service employee:

"And if, as alleged by petitioner, there was no evidence adduced before that Commission to support the charges against him, the Commission lacked jurisdiction. * * * Furthermore, the burden was on respondents to show that the Commission did have jurisdiction * * * and no presumptions can be indulged in favor of the orders of the Commission as an inferior tribunal." And in Walker v. City of San Gabriel, supra, 20 Cal.2d at page 881, 129 P.2d at page 35, 142 A.L.R. 1383, where the council had revoked petitioner's license:

"It is well settled that a board commits an abuse of discretion when it revokes a license to conduct a legitimate business without competent evidence establishing just cause for revocation, and that hearsay evidence alone is insufficient to support the revocation of such a license." In the instant case no evidence of any kind was introduced before the board. The board must have, as before seen, and as indicated by its minutes, based its determination on the report of its investigator. The question then arises, aside from the question of the sufficiency of that evidence, whether petitioner was accorded the hearing to which he was entitled. See Steen v. Board of Civil Service Com'rs, supra.

[5-7] Administrative tribunals exercising quasi judicial powers which are required to make a determination after a hearing cannot act on their own information. Nothing may be treated as evidence which has not been introduced as such, inasmuch as a hearing requires that the party be apprised of the evidence against him in order that he may refute, test and explain it. Interstate Commerce Com'n v. Louisville & N. R. R. Co., 227 U.S. 88, 33 S.Ct. 185, 57 L.Ed. 431; Morgan v. United States, 298 U.S. 468, 56 S.Ct. 906, 80 L.Ed. 1288; United States v. Abilene & S. Ry. Co., 265 U.S. 274, 44 S.Ct. 565, 68 L.Ed. 1016; Baltimore & O. R. Co. v. United States (Chicago Junction Case), 264 U.S. 258, 44 S.Ct. 317, 68 L.Ed. 667; Crowell v. Benson, 285 U.S. 22, 52 S.Ct. 285, 76 L. Ed. 598; Carstens v. Pillsbury, 172 Cal. 572, 158 P. 218; Cowell Lime & Cement Co. v. Industrial Accident Comm., 211 Cal. 154, 294 P. 703, 72 A.L.R. 1118; Bandini Estate Co. v. Los Angeles County, 28 Cal. App.2d 224, 82 P.2d 185; Olive Proration, etc., Com. v. Agricultural, etc., Comm., 17 Cal.2d 204, 210, 109 P.2d 918. And the action of such a tribunal based upon the report of an investigator, assuming it is competent evidence, see Walker v. City of San Gabriel, supra, when forming the basis for the tribunal's determination, is a denial of a hearing, unless it is introduced into evidence and the accused is given an opportunity to cross-examine the maker thereof and refute it. (Ekern v. McGovern, 154 Wis. 157, 142 N.W. 595, 46 L.R.A.,N.S., 796; see case cited supra.) For illustration it is said in Morgan v. United States, supra, 298 U.S. at page 479, 56 S.Ct. at page 911, 80 L.Ed. 1288:

"Congress has required the Secretary to determine, as a condition of his action, that the existing rates are or will be 'unjust, unreasonable, or discriminatory'. If and when he so finds, he may 'determine and prescribe' what shall be the just and reasonable rate, or the maximum or minimum rate, thereafter to be charged. That duty is widely different from ordinary executive action. It is a duty which carries with it *fundamental procedural requirements.* There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact. *Nothing can be treated as evidence which is not introduced as such.* United States v. Abilene & So. Ry. Co., supra. Facts and circumstances which ought to be considered must not be excluded. Facts and circumstances must not be considered which should not legally influence the conclusion. Findings based on the evidence must embrace the basic facts which are needed to sustain the order." (Emphasis added.) Therefore, it must be concluded that in the instant case petitioner was denied a hearing. The board's determination was based upon the report of their investigation which although on file with the board was not introduced in evidence at the September 16th meeting. If it was introduced at the September 22d meeting the result is the same inasmuch as petitioner was not present and had no notice of the meeting. Olive Proration, etc., Com. v. Agricultural, etc., Com., 17 Cal.2d 204, 109 P.2d 918. It has squarely been held that papers in the files of the administrative tribunal, but not introduced into evidence may not be considered. United States v. Abilene & So. Ry. Co., supra.

There is, therefore, no escape from the conclusion that petitioner in the instant case was denied a hearing. The question remains, however, as to the proper disposition of the case.

[8-12] Where a local administrative tribunal exercises quasi judicial powers its action may be reviewed by either mandamus or certiorari. Walker v. City of San Gabriel, supra; Brant v. Retirement Board of San Francisco, 57 Cal.App.2d 721, 135 P.2d 396; Swars v. Council of City of Vallejo, supra; Ware v. Retirement Board, 65 Cal.App.2d 781, 151 P.2d 549. And in such a review the chief issues are whether the person affected has been accorded a hearing, and if so, whether there is any evidence to support its determination. Walker v. City of San Gabriel, 20 Cal.2d 879, 129 P.2d 349, 142 P.2d 1383; Swars v. Council of City of Vallejo, supra; cases cited, supra. In the review proceedings the court should confine itself to the showing made before the administrative tribunal with regard to the sufficiency of the evidence. See Swars v. City Council of City of Vallejo, supra; Universal Consol. Oil Co. v. Byram, 25 Cal.2d 353, 153 P.2d 746. The board is vested with the power to make the determination of whether or not there is a basis for the discharge. See Los Angeles Charter, § 112; Swars v. City Council of the City of Vallejo, supra; Ware v. Retirement Board, supra; Steen v. Board of Civil Service Comrs., supra; Universal Cons. Oil Co. v. Byram, supra. If a hearing has been denied or the evidence is insufficient to sustain the action of the board, and it is still possible for the board to hold a hearing or exercise its discretion, then the matter should be remanded to the board for further consideration rather than having a trial de novo in the superior court and requiring that court to exercise independent judgment on the facts which should be determined by the board. Universal Consol. Oil Co. v. Byram, supra; Bila v. Young, 20 Cal.2d 865, 129 P.2d 364; Ware v. Retirement Board, supra. Hence, the judgment ordering reinstatement of petitioner should be modified by directing the board to accord petitioner a full and fair hearing, and it is so ordered.

In view of the disposition which we have made of this case it becomes unnecessary for us to pass upon the question of the sufficiency of the charge against petitioner, and determine whether it is sufficient, if true, to constitute a basis for the discharge of petitioner from his position with the Department of Water and Power of the City of Los Angeles.

Respondent to recover costs on this appeal.

GIBSON, C. J., and TRAYNOR, and SCHAUER, JJ., concurred.

SHENK, Justice (dissenting).

I dissent. In my opinion the decision of the majority is contrary to the fundamental law of the city of Los Angeles, as set forth in section 112(a) of the city charter. That section prescribes the procedure on the discharge of a civil service employee. It provides that cause for removal "shall be stated in writing by the board or officer having the power to make such removal, discharge or suspension, and filed with the Board of Civil Service Commissioners, with certification that a copy of such statement has been served upon the person so removed, discharged, or suspended, personally, or by leaving a copy thereof at his last known place of residence if he cannot be found. Upon such filing such removal, discharge or suspension shall take effect. Within fifteen days after such statement shall have been filed, the said board, upon its own motion, may, or upon written application of the person so removed, discharged or suspended, filed with said board within five days after service upon him of such statement, shall proceed to investigate the grounds for such removal, discharge or suspension. If after such investigation said board finds, in writing, that the grounds stated for such removal, discharge or suspension were insufficient or were not sustained, and also finds in writing that the person removed, discharged or suspended is a fit and suitable person to fill the position from which he was removed, discharged or suspended, said board shall order said person so removed discharged or suspended to be reinstated or restored to duty. The order of said board with respect to such removal, discharge or suspension shall be forthwith certified to the appointing board or officer, and shall be *final and conclusive;* * * *" All that was required was an adherence to the law which the electors of the city under the authority of the Constitution have adopted for their own government. There is nothing constitutionally wrong with the charter provision. It is binding alike on the municipal boards, the employees of the city and the courts. Any change is a matter of municipal and not judicial concern.

The charter provisions as written were observed in this case. If it be assumed that by implication they required a hearing, as distinguished from an investigation, it cannot be doubted that the petitioner was granted a hearing. But he was content to rest the matter upon the issue that the charges did not constitute sufficient ground for removal. The notice served on him specified the following charges:

"Published and distributed or caused to be published and distributed over his own name and title in the 'Official Organ of the Municipal Civil Service Association' entitled 'The Civil Service Sentry', dated August 15, 1942, distorted and misleading statements concerning the Board of Water and Power Commissioners and the General Managers of the Department of Water and Power.

"Such published statements cause or tend to cause dissatisfaction and dissension among employees of the Department of Water and Power concerning their wages and working conditions, create or tend to create distrust of the Board of Water and Power Commissioners and the General Managers of the Department of Water and Power, and incite or tend to incite employees of the Department to action against the Department of Water and Power.

"As president of such association he has permitted, participated in, approved, and encouraged the publication and distribution of the issue of 'The Civil Service Sentry' above referred to, which issue contains:

"1. A statement which by innuendo refers to the Board and the General Managers as follows: 'Figures can't lie but liars can figure.'

"2. Statements which further cause or tend to cause dissatisfaction and dissension among employees of the Department of Water and Power concerning their wages and working conditions, create or tend to create distrust of the Board of Water and Power Commissioners and the General Managers of the Department of Water and Power, and incite or tend to incite employees of the Department to action against the Department of Water and Power."

The petitioner filed with the commission a communication in writing containing a "categorical denial" of the causes stated in the notice "as a basis for proper discharge," and requested that he be permitted to make a personal appearance in order that each member of the commission might have personal knowledge of his deportment and attitude. At the hearing on September 16th he presented himself, heard the charges read and when, in compliance with his desire to furnish evidence of his attitude and deportment, he was asked what he had to offer he refused "on advice of counsel" to do anything but rest on his previous denial.

At the time of that hearing the commission had before it the report of its staff investigator to which was attached a copy of the August 15, 1942, issue of The Civil Service Sentry, which contained a "Notice" addressed to "Fellow Workers," with the petitioner's name subscribed as "President," followed by an unsubscribed article. The subscribed "Notice" read:

"This issue of the Sentry is dedicated to the wage and salary problems of employees of the Department of Water and Power.

"These problems in this Department are different from those in other City Departments because salaries in most government employment are fixed by elected representatives of the people whose power to negotiate, mediate and arbitrate salary matters are strictly limited.

"The Department of Water and Power is not hamstrung by such limitations. It is a revenue producing agency. It is rolling in profit from war industries. If it does not choose to deal with employees in an open, realistic and fair manner on the wage question, there are remedies.

"For months the Board of Water and Power Commissioners has politely referred all wage adjustments to the General Managers, and then maintained the Board had no proposal before it on which it could act:

"Employees do not have to continue to put up with this kind of treatment. Employees can exercise their rights.

"The mass meeting Thursday night has been called at the request of our members who are tired of the dilatory way in which their requests for a blanket wage increase have been treated."

Immediately following the "Notice" was the unsubscribed article which was entitled "Figures Can't Lie but Liars can Figure." A continuation thereof on another page was entitled, "Wage Meeting Called for Water & Power Group." The text is lengthy and scandalous. It impugns the impartiality of the department's general managers and other officials, and makes other accusations.

The publication in the Sentry of the subscribed notice and the unsubscribed article constituted the basis of the charges against the petitioner.

The staff investigator's report called attention to the fact "that the specific reference 'Figures can't lie, but liars can figure', did not appear over Mr. LaPrade's name as alleged." It concluded "that the charges filed by the Board of Water and Power Commissioners do not constitute a proper and sufficient cause for dismissal." The commission was not required to make known to the petitioner the recommendation of the investigator. Nor was it controlled thereby if on independent investigation of the facts and of the deportment and attitude of the petitioner there existed legal cause for discharge. The charter provides that only if the board finds, in writing, that the grounds stated for discharge were insufficient or not sustained, and also finds in writing that the person discharged was a fit and suitable person to fill the position, the person discharged should be reinstated. Its order is "final and conclusive" upon certification to the appointing board. The commission did not find in writing that the charges were insufficient or not sustained, nor did it find that the petitioner was a fit and suitable person to be restored to duty. The commission sustained the discharge by an order entered in its minutes. By that order it determined that the charges were sufficient cause for discharge, and that the petitioner was not a fit and suitable person to be restored to his position.

Either ground of the commission's action was sufficient to effect a final discharge. By that action the matter should be concluded and the courts be foreclosed from further inquiry. Boyd v. Pendegast, 57 Cal.App. 504, 207 P. 713; McGinn v. Board of Health, 113 Cal.App. 228, 298 P. 118; cf. Garvin v. Chambers, 195 Cal. 212, 232 P. 696; Peters v. Sacramento City Employees Retirement System, 27 Cal.App.2d 10, 80 P.2d 179.

On the issue of whether the published matter constituted cause for removal, the petitioner invokes the privileges of freedom of speech and of the press. No one may deny to him the exercise of those privileges. But he cannot avoid responsibility for their abuse. Conceding his freedom to speak as in the published articles, the question then is whether the board acted arbitrarily in discharging him. Hayman v. City of Los Angeles, 17 Cal.App.2d 674, 679, 62 P.2d 1047; Christal v. Police Commission, 33 Cal.App.2d 564, 92 P.2d 416. The case of Hayman v. City of Los Angeles involved facts similar to those now presented, and called for the application of the same charter provisions. There the grounds stated in the notice of discharge were "Continuing to attempt to cause dissension among employees of the Refuse Collection Division by circulating a handbill protesting against the book of rules adopted by the Board of Public Works for the conduct of employees of said division." [17 Cal.App.2d 674, 62 P.2d 1049.] There also the petitioner invoked his constitutional rights of freedom of speech and assembly. Answering the contention that the stated grounds were insufficient and did not constitute a legal cause for discharge, the court said: "The right which is involved here is not that which petitioner thinks has been denied him, but is the right of respondents to exercise a reasonable supervision over city employees, to the end that proper discipline may be maintained and that activities among employees be not allowed to disrupt or impair the public service. Such is not only the right but the duty of the city and its several departments. In the exercise of this duty, they must be allowed a wide discretion and their acts are not subject to review by the courts until they have reached the point of illegality. We do not see how it could be said that it appears from the pleadings in the case that the action of the city engineer was capricious and arbitrary and that petitioner was dismissed without cause. If petitioner's activities had a tendency to create dissension and unrest among the city employees and to interfere with the enforcement of reasonable rules of conduct prescribed by the Board of Public Works, it is not for the courts to declare that a dismissal based upon these facts would be without cause and therefore without authority under the charter of the city. The grounds stated for petitioner's discharge were not legally insufficient. The implications from the facts stated in the notice of discharge tend to deny rather than to support petitioner's claim that the action was arbitrary."

It was the function of the defendant Board of Water and Power Commissioners to maintain order and cooperation among the numerous employees serving the public municipal needs, and it was its duty to prevent disruption of the public service. It was the duty of the petitioner to refrain from acts which might cause dissension among those employees and he was the proper person to explain to the commission his deportment concerning the published scandalous utterances. If there be a difference of opinion as to their effect on the petitioner's fellow employees that difference may be resolved, as here, by the commission against the petitioner. It is not for the court to say that the commission should have concluded otherwise. The commission was in a better position than the courts to determine whether such statements would tend to cause dissatisfaction and dissension among the employees of the department, or create distrust of the board and the general managers of the department, or incite employees of the department to insubordination. By the specific terms of that charter the determination of the commission is final and conclusive. In the absence as here of oppression or bad faith its discretion is limited only by the provisions of the charter and the defendants' sense of responsibility for the discipline and efficiency of the department. Ludolph v. Board of Police Com'rs, 30 Cal.App.2d 211, 218, 86 P.2d 118; Cronin v. Civil Service Comm., 71 Cal.App. 633, 236 P. 339.

It cannot be said as matter of law that the public statements of the petitioner would not have the tendency attributed to them by both municipal boards. In fact a cursory reading of those statements would indicate that they would have that tendency. That being so it should be concluded that the charges filed by the appointing board constituted legal cause for discharge.

The question of fitness for the position does not contemplate merely qualifications of skill in performing the duties of the office. Under civil service, fitness and suitability have a broader significance, and must be deemed to include a disposition to refrain from creating disorder or incitng dissension, and the commendable qualities of self-discipline and cooperation in maintaining standards of public service. A tendency to foment strife and discontent is a proper ground of unsuitability, and only if there is no room for difference of opinion and the charge appears clearly unsupported may it be held that the board acted arbitrarily or capriciously in discharging the employee. McNatt v. Lawther, Tex. Civ.App., 223 S.W. 503. The Civil Service Commissioners had the discretion to judge from the petitioner's public acts and from his manner at a hearing which he requested whether he was a suitable person to be retained in the service. The commission then had before it sufficient evidence adverse to the petitioner on the question of his suitability for the position. This evidence was in the form not only of his published utterances but also of his conduct before the board. Under these circumstances the courts may not substitute their judgment for that of the commissioners.

In my opinion the statutory procedure was observed, the petitioner's rights were not infringed, the charges against him constituted legal cause for removal, and the implied finding of unfitness and unsuitability was sustained. The questions of the sufficiency of the charges and of the fitness of the petitioner called for the exercise of the commission's discretion. The writ of mandate does not function as a writ of error. Grivi v. Superior Court, 3 Cal.2d 463, 45 P.2d 181. The scope of judicial inquiry is whether the local board had discretion to do or not to do a certain act and whether it acted arbitrarily or otherwise abused its discretion, for if it had discretion to act in other than a particular way, the exercise of discretion will not be disturbed. Bank of Italy v. Johnson, 200 Cal. 1, 31, 251 P. 784; Klevesahl v. Byington, 1 Cal.App.2d 671, 677, 37 P.2d 179; see, also, Naughton v. Retirement Board, 43 Cal.App.2d 254, 257, 110 P.2d 714, and cases cited; Dierssen v. Civil Service Comm., 43 Cal.App.2d 53, 59, 110 P.2d 513, and cases cited. When it appears as here that the exercise of the commission's discretion was called into action, and it cannot be said that such discretion should have been exercised in a particular way, the judicial function in this proceeding is exhausted. The trial court's conclusion that the commission's action justified judicial interference was therefore erroneous and its judgment should be reversed.

EDMONDS and SPENCE, JJ., concurred.

CONDOR CORPORATION v. CUNNINGHAM et al.

Civ. 14634.

District Court of Appeal, Second District, Division 1, California.

Sept. 28, 1945.

Rehearing Denied Oct. 24, 1945.
Hearing Denied Nov. 26, 1945.

1. Corporations ⚷414(4, 5)

Secretary-treasurer of corporation, who was in full control of affairs of corporation and whose main business was the collection of money due corporation, had authority to indorse checks payable to corporation for the purpose of depositing amount thereof to the corporation's credit. Civ. Code, § 3104.

2. Banks and banking ⚷130(3)

Where secretary-treasurer of corporation was authorized to indorse checks payable to corporation for purpose of depositing amount thereof to credit of corporation and checks indorsed by secretary-treasurer, the proceeds of which he misappropriated, were indorsed in same manner as checks which were deposited to credit of corporation, bank which collected checks from drawee bank on secretary-treasurer's indorsement, and which accepted checks indorsed by secretary-treasurer for deposit to his personal accounts, was not guilty of bad faith. Civ.Code, §§ 3104, 3136, 3137.

3. Corporations ⚷414(4, 5)

Where secretary-treasurer of corporation, when questioned by bank as to his authority to indorse checks for corporation, forwarded to bank a spurious resolution authorizing him to indorse corporation's checks and collect money therefrom, which resolution was properly certified and bore corporate seal, and which act of certifying resolution was within scope of his authority as secretary and binding upon corporation, bank was justified in accepting checks upon secretary-treasurer's indorsement. Civ.Code, §§ 3104, 3136, 3137.

4. Estoppel ⚷72

Where defalcation of secretary-treasurer of corporation, accomplished by indorsement of checks payable to corporation and misappropriation of proceeds thereof, was made possible by misplaced confidence on part of corporation rather than by negligence or bad faith on part of bank, which collected such checks from drawee bank upon secretary-treasurer's indorsement, corporation was required to suffer the loss under the principle that, where one of two innocent persons must suffer by the fraud or negligence of a third, whichever of the two has accredited him ought to bear the loss. Civ.Code, §§ 3104, 3136, 3137.

5. Banks and banking ⚷130(3)

Before bank can be held liable to corporation for funds credited to depositor's account on basis of depositor's indorsement of checks payable to corporation, in view of authority given depositor by corporation to indorse checks, there must be a showing of circumstances that reasonably support inference that depositor was committing a breach of his trust, and until such circumstances occur bank is not obligated to institute inquiry into conduct of depositor in order to protect those for whom depositor holds money or checks, but between whom and bank there is no privity. Civ.Code, §§ 3090, 3106, 3107, 3133, 3136–3138, 3140.

6. Banks and banking ⚷130(1)

When trust funds are deposited in the individual name of a trustee or fiduciary, bank incurs no liability in accepting checks for deposit unless it has actual knowledge of infirmity or defects, or circumstances are such that bank is chargeable with knowledge that depositor is violating his trust, or that action of bank in taking check for deposit occurred under circumstances which amount to bad faith. Civ. Code, § 3137.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by the Condor Corporation against Felix Cunningham and the Bank of America National Trust & Savings Association to recover a sum allegedly due as proceeds of certain checks payable to plaintiff and collected by defendant bank from drawee bank upon alleged unauthorized indorsement by individual defendant, wherein defendant bank cross-complained against individual defendant. From a limited judgment in plaintiff's favor against defendant bank, plaintiff appeals.

Affirmed.

Loeb and Loeb and Dwight W. Stephenson, all of Los Angeles, for appellant.

Hugo A. Steinmeyer and G. L. Berrey, both of Los Angeles, for respondents.

WHITE, Justice.

Plaintiff commenced this action to recover from defendants the sum of $29,350.87, allegedly due as the proceeds of certain checks, payable to plaintiff, and collected by defendant bank from the drawee bank upon the alleged unauthorized endorsement by defendant Cunningham, and to which endorsee the proceeds of said checks were paid.

We do not deem it necessary to a determination of the questions presented upon this appeal to set forth in minute detail the factual background upon which this litigation rests, and shall therefore epitomize from the record what we consider to be the salient facts necessary for consideration in the light of the questions of law with which we are here concerned. In that regard, it will suffice to say that plaintiff was a corporation, organized for the purpose of taking over the assets of another corporation which was in bankruptcy. Defendant Felix Cunningham was attorney for plaintiff corporation and, at the time of the transactions involved in this action, was also its secretary and treasurer. The office of plaintiff corporation was maintained at the law offices of defendant Cunningham, where the corporate seal and all records, books and files of the corporation were kept under the personal supervision and control of said Cunningham. The only other officer of the corporation was Simeon Aller, its president. In addition to the president, the corporate board of directors consisted of three other members. There were no permanent employees of plaintiff corporation, but from time to time the services of a bookkeeper in Cunningham's office were engaged. Meetings of the directors were not held at any particular place and usually occurred at a luncheon in some restaurant, at which defendant Cunningham would from time to time report to the directors "the amount of money received from different sources."

The assets of plaintiff corporation were interests in some 20 motion pictures which were being distributed by other corporations, and also certain claims against several motion picture distributing companies. Plaintiff corporation was not engaged in the business of producing or distributing any motion pictures, and its sole business was to liquidate the foregoing assets and distribute the proceeds to its stockholders, who were of two classes. Class "A" stockholders were the unsecured creditors of the aforementioned bankrupt corporation whose assets were taken over by plaintiff corporation. Class "B" stockholders consisted of the former stockholders of the bankrupt corporation.

All checks payable to plaintiff corporation came to defendant Cunningham's office and were received by him. As to the preparation and control of the minutes of meetings of plaintiff corporation, Cunningham, when testifying as a witness, was asked "The minute book was kept entirely, was it, under your control and supervision?" to which he replied "That is right."

On March 1, 1940, plaintiff corporation by resolution established an account at the South Hollywood Branch of defendant bank, and such resolution provided for the withdrawal of corporate funds by checks signed jointly by President Aller and defendant Cunningham, as secretary and treasurer. Defendant Cunningham testified that, at the same meeting on March 1, 1940, he was "authorized and directed * * * to collect corporate moneys and to put the same into the corporate bank account, and to carry on all the work necessary to maintain the Condor Corporation bank account and make it perform its functions."

For some years prior to the organization of plaintiff corporation, defendant Cunningham, in his own name, maintained two accounts at the Melrose and Irving Branch of defendant bank, one of which he characterized as "a general law office trust account," and which he used only "to deposit funds which came into my hands as trustee," such as collections wherein the checks were made payable to him and "I would deduct a fee or something like that and forward the balance to the client." The other was his personal account.

The confessed duplicity of defendant Cunningham commenced during February, 1940, and, up to the time his perfidy was discovered on Christmas Eve, 1941, he had misappropriated a total of $29,350.67 belonging to plaintiff corporation of which he was secretary and treasurer. This amount was represented by over 100 checks, all of which were made payable to plaintiff corporation and were by Cunningham endorsed "Condor Corporation by Felix Cunningham, Secretary and Treasurer." Bearing such endorsements the checks were either cashed or presented by Cunningham to the Melrose and Irving Branch of defendant bank for deposit in his "trustee" or "personal" account, were received by defendant bank, credited to Cunningham's account and disbursed through the medium of his personal checks drawn on the aforesaid accounts maintained by him personally. The proceeds from all of the checks deposited in his "trustee" or "personal" accounts were used by Cunningham for his personal benefit and none for the benefit of plaintiff corporation, except that, subsequent to the discovery of his defalcation, he did transfer from his two accounts by way of reimbursement the sum of $18,115.10, which leaves the amount sought to be recovered by plaintiff corporation in this action the sum of $11,235.77, with interest from December 24, 1941.

From the record it appears that from February 1940 defendant bank continued to receive from defendant Cunningham the aforesaid checks payable to plaintiff corporation and endorsed as above set forth until some time in May, when he presented for deposit a check for $9,000.10, or in June, when he tendered one of the checks in an amount of $12,495.14. Upon that occasion, which was after Cunningham had deposited some 20 checks payable to plaintiff corporation in one or the other of his said accounts, when he presented the check for deposit, he was referred to Charles Griffiths, Manager of the Branch of defendant bank where Cunningham maintained his aforesaid accounts. Defendant Cunningham stated to the Branch Manager that it was his desire to deposit the check in his "trustee" account and that the teller desired a "clearance" from Manager Griffiths before he would accept the check for deposit to defendant Cunningham's account. The Bank Manager informed defendant Cunningham that it would be necessary to have on file at the bank authority from plaintiff corporation empowering Cunningham to endorse checks made payable to the corporation and then deposit them in his account. Defendant Cunningham advised the Bank Manager that a resolution had been adopted authorizing him to do that very thing and that he would file a certified copy of such resolution with the bank. Following the aforesaid interview, defendant Cunningham, according to his testimony, "looked in the minutes and did not see such a resolution, *so I prepared or drafted a resolution which contained an authority to endorse, and certified it, and sent it down to the bank.*" (Emphasis added.) The unauthorized resolution lodged with defendant bank reads as follows:

> "Resolved further that Felix M. Cunningham be, and he hereby is elected treasurer of this Corporation to hold office until the first meeting of the Board of Directors after the next annual meeting of the stockholders or until his successor shall have been elected and shall have qualified.
>
> "Resolved further that Felix M. Cunningham, the treasurer of this Corporation, and Simeon Aller the president of this Corporation be, and they each hereby are, authorized to execute and acknowledge all documents pertaining to the business of this Corporation, *to endorse checks made payable to this Corporation,* to collect funds or properties belonging to this Corporation, and to do all other things and take all other necessary steps on behalf of this Corporation as are not otherwise provided for in the By-laws of this Corporation or by the Board of Directors." (Emphasis added.)

The record definitely reflects the fact that the aforesaid resolution was not at any time adopted by the Board of Directors of plaintiff corporation, and defendant Cunningham at no time advised the Board of Directors, or any member thereof, that he had prepared and filed with the bank such a resolution. While it must be assumed that the Board of Directors of plaintiff corporation knew that Cunningham was endorsing checks, because such instruments could not be collected and deposited to the credit of plaintiff corporation without endorsement, the evidence does indicate that the Board of Directors did not know that defendant Cunningham was endorsing some checks and depositing them in his own two accounts.

The default of defendant Felix Cunningham, for failure to answer plaintiff's complaint, was duly entered and his stipulation for judgment on the cross-complaint lodged against him by defendant bank having been filed, judgment was rendered against him in favor of plaintiff corporation for the sum of $20,350.77, with interest, and in favor of defendant Bank of America against cross-defendant Cunningham in the sum of $1,188.58. In so far as the judgment affected by this appeal is concerned, it was in favor of plaintiff and against defendant Bank of America for $1,103.60, and was arrived at upon evidence which showed that defendant Cunningham from time to time deposited Condor Corporation checks to his individual account while it was overdrawn. Sometimes he included funds of his own in the same deposit with Condor checks. At times Cunningham's funds, other than Condor Corporation checks, were sufficient to cover the overdraft, and at other times part of the Condor funds went into the overdraft. The aforesaid sum of $1,103.60 is the aggregate amount of Condor funds that were applied on overdrafts after first applying Cunningham's individual funds deposited at the same time. Upon the authority of a line of cases holding that, although an innocent party may receive a negotiable instrument under such circumstances from a trustee for cash or deposit to his account, such person cannot receive the instrument *in payment of a debt of the trustee to such third person* without being affected by any defect in the trustee's title, judgment was given against defendant Bank for such amounts.

Defendant Bank has not appealed from the judgment rendered against it, but plaintiff corporation appeals from the limited judgment in its favor on the ground that its recovery against defendant Bank should have been for the sum of $11,235.77, which represents the full amount of corporate funds embezzled by its secretary and treasurer, defendant Cunningham, and which were deposited by him in his own private accounts with defendant Bank and thereafter withdrawn and used for his own use and benefit.

The trial court found that defendant Bank was indebted to plaintiff corporation in the sum of $1,103.60 with interest in the amount of $84.90, or a total of $1,188.58, under plaintiff's first, third, fourth and fifth causes of action. As to the remainder of plaintiff's complaint, the court found that certain negotiable instruments were drawn by three persons in favor of plaintiff or endorsed to plaintiff; that said checks were drawn on banks other than defendant Bank of America; that plaintiff was entitled to the possession of said checks prior to the time when they were unlawfully converted by defendant Cunningham and by him negotiated to the defendant Bank. It was further found that defendant Cunningham cashed or deposited each check and delivered the same to defendant Bank of America, save and except some six checks totaling $75.27, which he collected through another bank; that defendant Cunningham appropriated all of the money so received to his own use and benefit.

The court further found that it was not true that defendant Cunningham took possession of said checks or any of them without right or authority, or that he endorsed each or any of said checks without authority, or that he cashed or deposited or delivered to the defendant Bank any of said checks without authority; but that it is true that without authority he appropriated all of the money thereby received to his own use and benefit and that said acts took place as to each check at or about the date thereof; that the total value of the checks so converted by the defendant Cunningham was and is the sum of $29,350.87; that demand has been made on the defendant Cunningham for repayment of said sum, and that no part thereof has been paid except the sum of $18,115.10, and that there is due and owing from the defendant Cunningham to the plaintiff the sum of $11,235.77 and interest thereon from December 24, 1941.

The court further found that at all times mentioned in the complaint Cunningham was secretary of the plaintiff corporation and as such secretary had custody of the seal of said corporation and it was within the scope of the authority of said Cunningham to state to persons interested and inquiring what resolutions, minutes and bylaws had been adopted by the board of directors of said corporation; that prior to the time when the checks mentioned in the complaint were endorsed and delivered by Cunningham to the defendant, he as the secretary to the plaintiff corporation delivered to the defendant Bank a copy of a resolution purporting to have been adopted by the board of directors of said corporation, which resolution purported to state that the said Cunningham was authorized to endorse checks payable to plaintiff; that the said copy was certified by Cunningham as secretary of said corporation to be a true and correct copy of a resolution theretofore adopted by the plaintiff corporation, and the said certificate of Cunningham was attested with the seal of the corporation; that the defendant believed that such resolution had in fact been duly adopted by said corporation and relied on said resolution and certificate of said Cunningham in accepting the checks endorsed by Cunningham; that no such resolution had been adopted by the corporation but Cunningham was in fact authorized by said corporation to endorse and collect checks payable to the said corporation as hereinabove set forth.

Two main questions are presented upon this appeal, the first of which is whether defendant Cunningham, the faithless secretary and treasurer of plaintiff corporation, had authority to endorse the checks here in question, and secondly, were the facts and circumstances here present such that defendant Bank can be held as a participant in Cunningham's misappropriation of funds on the ground that the circumstances surrounding the check transactions were sufficient to generate a knowledge on the part of the Bank or give notice to it of the infirmity of the checks? That Cunningham's title for the purposes he used the checks was defective cannot be questioned, because he negotiated them "in breach of faith" and "under such circumstances as amount to a fraud." Civ.Code, § 3136. But, unless defendant Bank had notice of such infirmity or defect, as such notice is defined by section 3137 of the Civil Code, then it follows that the depositary was clothed with the right of a holder in due course and held the checks free from any defect of title of prior parties. Civ.Code, § 3138.

[1-4] As to whether defendant Cunningham had authority to endorse the checks the query must be answered in the affirmative. He was in full control of the affairs of the corporation, whose main business was the collection of moneys due it from motion picture distributors. While the bylaws contained no provisions defining the duties of Cunningham as secretary and treasurer and did not authorize him to endorse checks, nevertheless there is evidence that all checks payable to plaintiff corporation came to defendant Cunningham and the board of directors were aware of the fact that he was endorsing such checks, because endorsement was necessary on checks that he honestly deposited in the corporation's bank account. In addition to this, Cunningham testified that he had authority to endorse the checks and there was no denial thereof. Obviously, defendant Cunningham was bound, as between him and the corporation which employed him, to endorse the checks only for the purpose of depositing the amounts thereof to the credit of plaintiff corporation, but can it be said that defendant Bank had knowledge or notice of any such instructions or obligation upon the part of Cunningham or that the Bank was in possession of such facts that its action in accepting checks endorsed by Cunningham for deposit to his individual accounts amounted to bad faith? Civ.Code, § 3137. There was no showing that the checks here in question were endorsed any differently from the checks which were deposited to the credit of defendant Corporation. Appellant cites numerous cases but in all of such cases it appears that the endorsement of the fiduciary was either a forgery or unauthorized. And when a signature is forged, or made without authority of the person whose signature it purports to be, it is wholly inoperative. Civ.Code, § 3104. We are persuaded that the trial court was justified in finding that Cunningham was authorized to endorse checks belonging to plaintiff corporation. In the instant action, we are also confronted with the fact that when defendant Bank requested of Cunningham that he file with it evidence of his authority to endorse and collect upon checks belonging to plaintiff corporation, he forwarded to the Bank a resolution properly certified and bearing the corporate seal, by which resolution Cunningham was empowered to endorse the corporation's checks and collect the money therefrom. True, this resolution was spurious, but his act in certifying the resolution as having been adopted by the corporate body was within the scope of his authority as secretary of the corporation and was binding upon the latter. National Bank of San Mateo v. Whitney, 181 Cal. 202, 207, 183 P. 789. Under all the facts and circumstances here present, it cannot be said that defendant Bank accepted the checks under such circumstances as ought to have put an ordinary man on inquiry to ascertain the true facts. We are impressed that it was not negligence or bad faith upon the part of defendant Bank, but the misplaced confidence on the part of plaintiff corporation in its secretary and treasurer Cunningham that made the wrong possible. Such being the case, under familiar principles of law "where one of two innocent persons must suffer by the fraud or negligence of a third, whichever of the two has accredited him ought to bear the loss." National Bank of San Mateo v. Whitney, supra, 181 Cal. at page 205, 183 P. at page 791. Therefore, the court was correct in holding that defendant Bank took the checks as a holder in due course.

[5] The weight of authority supports the holding that before defendant Bank can be held liable, in view of Cunningham's authority to endorse plaintiff corpo-

ration's checks, there must be a showing of circumstances that would reasonably support the inference that Cunningham was committing a breach of his trust. Until such circumstances occur, the Bank is not burdened with the duty or obligation to institute an inquiry into the conduct of its depositor in order to protect those for whom such depositor holds the money or checks, but between whom and the Bank there is no privity. Our views herein stated find support in Santa Marina Co. v. Canadian Bank of Commerce, 9 Cir., 254 F. 391; Civ.Code, §§ 3106, 3107, 3133, 3136, 3137, 3138, 3140, 3090; Southern Trust & Commerce Bank v. San Diego Savings Bank, 60 Cal.App. 215, 212 P. 385; United States Fid. & Guar. Co. v. First National Bank, 18 Cal.App. 437, 123 P. 352; White-Dulany Co. v. Craigmont State Bank, 48 Idaho 100, 279 P. 621; Maryland Casualty Co. v. City National Bank, 6 Cir., 29 F.2d 662; Rice v. People's Savings Bank, 140 Wash. 20, 247 P. 1009; Quanah A. & P. Ry. Co. v. Wichita State Bank, 127 Tex. 407, 93 S.W.2d 701, 106 A.L.R. 821.

[6] In the case of Walsh v. American Trust Co., 7 Cal.App.2d 654, 47 P.2d 323, upon which appellant places great reliance, the court expressly stated at page 659 of 7 Cal.App.2d, at page 325 of 47 P.2d, that the only direct testimony on the issue of the endorser's right or authority to endorse the check in question, if believed, established the lack of authority to so endorse. As hereinbefore pointed out no such situation exists in the case at bar. Nothing in the last cited case militates against our holding that where the evidence justified the finding of the court that the endorsements were made by Cunningham with authority, the defendant Bank became a holder in due course and took the instruments free from any defect of title of the fraudulent agent or trustee. Other cases cited by appellant are as readily distinguishable from the case with which we are here concerned, or are predicated upon a rule adopted in some jurisdiction which is contrary to the weight of authority supporting the principle enunciated herein, that, when trust funds are deposited in the individual name of a trustee or fiduciary, the Bank incurs no liability in accepting the checks for deposit unless it has actual knowledge of the infirmity or defect, or the circumstances are such that the Bank is chargeable with knowledge that the depositor is violating his trust, or that the action of the Bank in taking the check for deposit occurred under circumstances which amounted to bad faith. Civ. Code, § 3137.

Since the questioned findings are supported by the evidence and the findings support the judgment, it is ordered that the judgment appealed from be and it is affirmed.

YORK, P. J., and DORAN, J., concur.

Hearing denied; EDMONDS and TRAYNOR, JJ., dissenting.

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71 Cal.App.2d 70

FARMER et al. v. FAIRBANKS et al.

Civ. 14840.

District Court of Appeal, Second District, Division 3, California.

Sept. 28, 1945.

Rehearing Denied Oct. 25, 1945.
Hearing Denied Nov. 26, 1945.

1. Trial 🔑139(1), 143

The trial court has power to direct jury to render verdict for defendant when there is no substantial evidence tending to prove all controverted facts necessary to establish plaintiff's case or no substantial conflict in evidence, but entire absence of such conflict is unnecessary.

2. Appeal and error 🔑927(7)

In considering trial court's direction of verdict for defendants, appellate court must give plaintiffs' evidence all value to which it is legally entitled and indulge every legitimate inference and accept only portion of defendant's testimony most favorable to plaintiffs. Code Civ.Proc. § 2055.

3. Automobiles 🔑245(39, 40)

In action for motorist's death as result of collision with defendant's truck driven by codefendant, evidence was insufficient to take to jury questions of defendant driver's negligence in driving at excessive speed, failing to keep truck under proper control, and failing to keep proper lookout.

4. Trial 🔑178

While all reasonable inferences must be drawn from evidence and all conflicts resolved in plaintiffs' favor on defendants' motion for directed verdict, inferences cannot be based on conjecture, but must be based on facts legally proved. Code Civ. Proc. §§ 1958, 1960.

5. Automobiles ⚷242(7)

In action for death of driver of automobile colliding with defendant's truck driven by codefendant, burden rested on plaintiff to establish that some act or omission of defendants was proximate cause of collision.

6. Evidence ⚷519, 545

In action for motorist's death as result of collision with defendant's truck, state highway patrolman's testimony that tire marks extending up to or near point of impact were made by decedent's automobile was inadmissible as expression of opinion, for which no foundation was laid, on subject left to jury.

7. Appeal and error ⚷1050(1)

Admission of state highway patrolman's testimony that tire marks leading up to or near point of collision between automobile and truck were made by automobile was not prejudicial to parties suing truck owner and driver for death of automobile driver, in view of like testimony by other police officers without objection.

8. Witnesses ⚷387

Further inquiry on cross-examination of state highway patrolman for impeachment purposes, as to his testimony at prior trial respecting location and length of automobile skid marks observed by him after collision between automobile and truck, was properly denied in view of designation of points considered important in inquiry merely by reference "from here to here" at prior trial.

9. Appeal and error ⚷866(3)

In death action, issues as to decedent's contributory negligence and presumption that she exercised due care for her own safety are material to disposition of appeal from judgment on directed verdict for defendants only if there was sufficient evidence from which jury might have found as fact that defendant was guilty of negligence.

◆

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Action by Donald Burr Farmer and another against Harold A. Fairbanks and another for the death of Dorothy Farmer Martin as the result of injuries sustained in a collision between a truck driven by named defendant and an automobile driven by deceased. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Joseph D. Taylor, of Los Angeles, for appellants.

James V. Brewer and Kendall B. Perkins, both of Los Angeles, for respondents.

DESMOND, Presiding Justice.

Plaintiffs appeal from a judgment entered after the trial court granted defendants' motion for a directed verdict in their favor upon completion of the testimony offered by both sides. The appeal is presented upon a settled statement in lieu of both a reporter's and clerk's transcript pursuant to Rule 70, Rules on Appeal.

The action sought damages for the wrongful death of Dorothy Farmer Martin allegedly caused by injuries received in a collision of a truck and semi-trailer owned by defendant corporation, Safeway Stores, Inc., and an Oldsmobile coupe driven by the deceased. Plaintiffs Martin and Farmer are respectively the surviving husband of Mrs. Martin and her minor son by a former marriage.

The collision occurred on August 25, 1941, shortly after 9 o'clock p. m., at the intersection of Jefferson Boulevard and Centinela Avenue, a sparsely settled location in the county of Los Angeles. Centinela runs generally in a northerly-southerly direction, and terminates at the point where it intersects Jefferson. Jefferson is a through highway and runs in an easterly-westerly direction approaching the intersection from the east in a slight curve. The main traveled portion of each highway consists of a pavement 30 feet wide bisected by a white center line. On Jefferson this 30 foot strip is bounded on the north by a paved shoulder 16 feet wide and a gutter 6 feet wide. On a line 22 feet north of the 30 foot strip is a curb. The strip on Jefferson is bounded on the south by a dirt shoulder. On Centinela the 30 foot strip is bounded on each side by a dirt shoulder 22 feet wide and a curb has been placed 22 feet west of the paved strip. On the west side of Centinela at a point approximately 60 feet north of the north curb line on Jefferson is a stop sign which regulates traffic moving in a southerly direction, and on the northeast corner of the intersection stands a two story stucco building. Plaintiffs' Exhibit 12 shows the stop sign, the building and adjacent streets, while Plaintiffs' Exhibit 7 is a picture of the intersection showing both highways, a corner of the building and the stop sign just visible in the background. These pictures indicate that a driver, after passing the stop sign and approaching the north line of the intersection, would have an extensive view east and west and, of course, a driver proceeding to the west on Jefferson would have the same opportunity to observe conditions at the corner. Plaintiffs' Exhibit 6 clearly depicts the entire locality, showing all four corners of the intersection and also showing an arc light suspended above the center of the intersection. When the collision occurred, defendant Fairbanks, an employee of Safeway Stores, Inc., was driving the truck and semi-trailer toward the west on Jefferson, while the deceased, according to the complaint, was driving her coupe in a southerly direction on Centinela. Defendants' equipment, measuring 48½ feet in length, consisted of a truck or tractor, weighing 14,050 pounds, a jeep, weighing 3150 pounds, and a semi-trailer, weighing 12,780 pounds. In addition, the semi-trailer contained grocery freight for five different stores of defendant corporation with a load weight of about 28,800 pounds. In other words, the total weight of defendants' entire equipment was about 30 tons. Certain traffic officers, who arrived shortly after the collision and who testified at the trial, placed the point of impact in the northwest quadrant of the intersection, approximately 8 feet north of the center line of Jefferson and between 8 and 9 feet west of the center line of Centinela. No other witnesses testified to the contrary. After the impact defendants' equipment veered to the southwest and came to rest partly on the southerly dirt shoulder of Jefferson, about 34 feet west of the prolongation of the west curb line of Centinela. Its semi-trailer had overturned on its right side and was resting on top of decedent's automobile, pancaking it and causing the injuries which were fatal to decedent. Plaintiffs' Exhibit 14, a photograph taken immediately after the accident, shows the trailer superimposed upon the coupe which is almost flat on the ground; it also shows the tractor in a leaning position directly in front of the semi-trailer. Plaintiffs' Exhibit 13 is a picture of the underside of the overturned trailer and shows, at the left, the wheels of the tractor with the left rear wheel up in the air.

The appeal is predicated upon two main points: That the trial court erred (1) in granting the motion for directed verdict because there was evidence from which a jury might have found that the defendants were negligent, and (2) in ruling on the admission and rejection of testimony of Albert Ashton, a traffic officer who investigated the accident and who was a witness for defendants.

[1] The trial court has the power, in a proper case, to direct a jury to render a verdict in favor of the defendant when "there is no substantial evidence tending to prove all the controverted facts necessary to establish the plaintiff's case. It is not necessary that there should be an absence of conflict in the evidence. To deprive the court of the right to exercise this power, if there be a conflict, it must be a substantial one." Newson v. Hawley, 1928, 205 Cal. 188, 190, 270 P. 364, 365; Keller v. Markley, 1942, 50 Cal.App.2d 155, 156, 122 P.2d 614.

[2, 3] Since, on this appeal, the correctness of the trial court's action is challenged, we give minute consideration to the evidence which was presented, including certain exhibits which we consider vital to a decision upon the questions involved.

Defendant Fairbanks, only eyewitness to the collision, was called by plaintiffs under section 2055, Code of Civil Procedure. He testified, in substance, as follows: That when he started out with his load at 9 o'clock p. m., on the night of the collision, he watched a mechanic test the brakes and he, himself, also tested them and found them satisfactory before starting out; that when he was approximately 160 feet east of the center of the intersection where the vehicles collided [witness indicated the point as F-4 on Exhibit A] he saw headlights back of a school house on Centinela, which he estimated was approximately a quarter of a mile north of the center of the intersection; that in his opinion the car was going twice as fast as he was; that when he was opposite the middle of the building, located on the northeast corner of the intersection, he shifted into fourth drive and when he "got to the end of the building" he was going about 30 miles an hour; that he saw headlights "coming down" into Jefferson on Centinela when he was at a point opposite the westerly edge of the building; that it was coming fast and went through the stop sign; that the car was going "better than 50 miles an hour"; that approximately 30 feet east of the center of the intersection [witness indicated this point as F-2 on Exhibit A] he started to turn his equipment to the left, and shortly after he passed the western edge of the building and was approximately 15 feet east of the center of the intersection, he put on his brakes, and was going "about 25 miles an hour"; that his trailer did not go sideways after he started to turn to the left, for he could tell by the feel of the equipment. In explaining damage to the tractor's right front bumper and crushed headlight above the bumper on the right side, Fairbanks testified that the bumper and headlight hit the ground when the tractor went up on its nose. He testified:

"Q. What did the front bumper of your tractor hit? A. The only thing I know is when it went up on its nose and hit the dirt.

"Q. Did you see the front headlight of your car hit another car while you were in that intersection? A. No, sir.

"Q. Isn't it a fact, Mr. Fairbanks, that your front bumper scraped along the rear left fender of another car which loomed up ahead of you in that intersection? A. Not that I know of, no, sir.

"Q. By the Court: Why did you put on your brakes and do all of these things? A. Because those lights were coming straight at me down Centinela, coming through the stop sign."

Fairbanks stated that after the accident the first thing he did was to walk to the rear of the trailer and then to a watchman's shack at the airplane factory, just south of Jefferson and Centinela; that he asked someone where the telephone was and at this time he did not know there was a car underneath his semi-trailer; that he did not look for a car as he thought the car had glanced off and gone on; that after he telephoned, someone told him the car was underneath his semi-trailer.

On cross-examination Fairbanks testified that he had driven heavy equipment at various times since 1917 and real heavy equipment since 1927; that he did nothing to cause the trailer and equipment to overturn or "jackknife", the latter of which occurs "when * * * the rear wheels of your trailer either lock or slide and the back end of your trailer comes along to the left or to the right of your cab in an angle like that (indicating)"; that in his opinion the trailer was caused to turn over by the impact of some object against the jeep wheels which threw them out of line and made the trailer go to the left-hand angle; that as he approached Centinela he did not see any car close enough on Centinela to require a warning signal of any kind. In describing the movement made by the tractor when it came to a stop he stated, "Well, when it came to a stop, the tractor just went up on its right front fender and bumper pretty near—I thought it was going right straight over and then the weight of the load and the fifth wheel king pin brought it back and stopped it at an angle with its front wheels—I don't know just how high it was off the ground, eight or ten inches off the ground. Q. Both front wheels? A. No, just the left front wheel"; that when he got to the entrance of the intersection, his speed was 30 miles an hour and he immediately started to slow down "from the time I got to the entrance of the intersection, I seen the lights coming so fast I took my foot off the accelerator and started to move over to the south * * * to my left"; that the car made no stop up to the point of collision, nor did it sound any warning or horn and "it was going awfully fast"; that there were no cars to the west and ahead of his equipment; that he saw only one pair of headlights on Centinela at any time.

Among the witnesses called by the plaintiff were Robert E. Franklin, who ran a wrecking yard, and H. G. Pendell, who appeared as an expert. The former testified that he dismantled the Oldsmobile involved in this action and that he remembered the motor from the car and that there appeared to be no blemish upon it and he sold it as being in good running condition. H. G. Pendell stated that his business was "automotive," including running a repair shop and doing towing, and that he was also an automobile mechanic; that he had repaired heavy equipment such as had been described while he was in the courtroom; that he built tractors and operated them on the highway; that he had driven every type of tractor and truck and automobile and piece of equipment that will drive; that he visited the scene of the accident, arriving about 11 p.m. He stated further that after the heavy equipment had been taken away he removed the Oldsmobile from the scene of the accident and took it to his place of business; that although he did not examine the front end of the motor to determine whether the motor had been pushed back he knew the motor had not been pushed back; that at the scene of the accident he removed the drive shaft from the car, and if the motor had been pushed back, this would have been very difficult to do, but as it was, it was removed like any other car; that he examined the fuel pump, which is just back of the motor, and its outside appearance was perfect, there were no breaks or any defect in it; that he drove equipment similar to that here involved for Roberts & Bros. Circus for some months in testing it; that he was with Dundee Motor Truck Company for seven years and tested trucks for people to whom they were sold; that he was a consulting engineer traveling about the country for the Duplex Company of Lansing, Michigan, another truck company.

On voir dire examination by defense counsel the witness testified he had never actually driven a jeep of the type here involved, but had inspected that type; that it had been about 10 years since he had done any engineering in that line of work; that the jeep here involved was a relatively new type; that he was not a graduate engineer. Thereupon the following question was asked:

"Q. From your examination of the condition of the tractor and semi-trailer when you got there, did you form an opinion as to what made the semi-trailer go over? A. Yes.

"Q. And what is that opinion? A. That the truck was turned to the left and then back to the right."

Being shown defendants' Exhibit J, and his attention directed to a dark streak at the left end of the front bumper, the witness was asked whether that "wasn't rubber rubbed off on the bumper" and he testified it was impossible to say what made that dark streak; that he never looked for any rubber on the bumper and didn't observe any rubber there. The following testimony thereupon was given:

"Q. Now isn't it a fact that if a tractor and equipment of that kind was making a turn, a left oblique and was struck from the right with force by some object like a car, upon the right wheels or tires of the tractor, the right rear wheels of the tractor and the right wheel of the jeep, would that not cause it to turn over? A. Not while it was going to the left, you couldn't hit it hard enough with a steam engine to pull it over to the right in a 'V' shape. A steam engine would go clear through it * * * before it would turn it back on itself while it was on a 'V' to the left, a steam engine traveling 50 miles an hour.

"Q. It would be impossible, you would say? A. Yes, that is impossible to turn a 'V' back on itself. * * *

"Q. As a matter of fact, if it was turned to the right, it would be harder to turn it over—A. No, turning to the right it would turn itself over just as this one did."

F. G. Bramble, a licensed surveyor and for many years engaged in the business of making maps and diagrams for use in court proceedings, was called as a witness on behalf of plaintiffs. He identified a map he had prepared of the intersection of Centinela and Jefferson [offered and introduced into evidence as defendants' Exhibit A] and also certain photographs taken of the scene of the accident. On cross-examination this witness stated that at the former trial of the case he had been a defense witness and that he had made the original map and had taken the photographs at the request of defendants; also, that he did not look on Centinela or on the entrance to Centinela from Jefferson for any marks because he was only directed to look on Jefferson. In explaining Exhibit B, a tracing of Exhibit A and drawn to scale, but showing only skidmarks, gouge marks and sideways skidmarks of the type and kind usually found in automobile accident cases, this witness stated: "The marks which I found there in Jefferson at the intersection were one long set of marks made by a dual wheel, which is a wheel carrying two tires. These began about 2 feet west of the center line of Centinela * * * [and] about ten feet north of the center line of Jefferson. * * * They continue in a long arc for about sixty-five feet to the southerly edge of the pavement. There were two other marks branching off from these marks about midway between the easterly and westerly end of the first marks mentioned and running a little to the north of them for a distance of about 22 feet. * * * About seven feet south of the easterly end of the dual marks * * * which extended to the south edge of the pavement, were another set of dual tire marks apparently made by the left wheels of the same vehicle. That would be the left-hand wheels and they extended for a distance of fifteen feet only. Just south of the most northerly set of the dual tire marks and the longest ones was a heavy mark like a car's tire which was started with a turn at its beginning point at the most easterly end thereof, turning from north and south to east and west, going off in a southwesterly direction, considering Jefferson as running east and west, more west than south. This I have denoted as a tire mark. It was about 22 feet long and was a single mark which was similar to that which would be made by a pleasure automobile, such as the Oldsmobile involved in this accident. It was a tire mark, rubber showing on the pavement. This began about 8 feet west of the center line of Centinela * * * and a few inches south of the longest dual tire mark which I have described, and about 8 feet north of the center line of Jefferson. * * * About mid-distance of this latter mark * * * and about the width of an automobile to the south of it and going in a parallel line to the west and south on an angle more to the west, was another line showing a tire mark about five feet long. This was a single tire mark such as might be made by a pleasure automobile, and seemed to be more of a brush mark. Between this latter mark and the other single tire mark just described, which was 22 feet long, there was another mark extending in practically a westerly direction, turning south and then west, about 40 feet long, beginning near the end of the shortest dual tire mark and continuing across the path of the longest dual tire mark and to the west of it. This was a single mark like that which would be made by a pleasure automobile. To the west of the end of this mark about ten feet there appeared to be two scratches on the pavement which were parallel and about the distance of the width of the ordinary pleasure automobile wheels apart, to-wit: about 4 feet 9 inches or five feet, which extended to the edge of the pavement. At the end of the most northerly of these marks, which marks ran in an easterly and westerly direction and curving to the south, there was an oil spot on the pavement. There was another oil spot on the shoulder as indicated. There was another gouge mark in the intersection and a brush mark about in the center of Jefferson at the end of the lightest dual tire marks and about three feet west of them as indicated."

In an effort to determine whether any facts were brought out from which Fairbanks might be found to be the responsible cause of this accident, we have examined carefully the settled statement giving particular attention to the testimony of a number of witnesses who were on the scene immediately after the accident and made observations concerning skidmarks and tire marks which were noted both on Centinela Avenue and Jefferson Boulevard. Regardless of where the different witnesses placed the skidmarks or how they described them, we find nothing in all this testimony which would have justified the jury in fixing the blame for the accident upon the driver of the truck or from which it could have drawn inferences favorable to the plaintiffs' cause.

Giving to the plaintiffs' evidence all the value to which it is legally entitled and indulging in every legitimate inference and accepting only that portion of defendant Fairbanks' testimony under section 2055, Code of Civil Procedure, which is most favorable to plaintiffs, as we must do in considering the trial court's action in granting the directed verdict in favor of defendants (Smellie v. Southern Pacific Co., 1931, 212 Cal. 540, 558, 299 P. 529), we are of the opinion, after a careful consideration of all the evidence presented in the record before us, that there was no evidence of sufficient substantiability which would support a verdict for the plaintiffs if the jury had been given an opportunity to pass upon the matter. Appellants state that since they produced no eyewitnesses they were "relying upon photographs taken before the cars were removed from the scene of the accident, the condition of the cars after the collision, and parts of the testimony of Fairbanks, given when he was called under C. C. P. section 2055," but we are unable to find in the photographs, after a careful study of them, anything which might support or sustain their contentions or draw from them the inferences which they argue a jury might have drawn from them. Appellants argue unconvincingly that the jury might have inferred from the physical facts surrounding the accident, that the speed of the driver of the truck and trailer was greater than admitted by him and in violation of the basic speed law; that "the upset trailer under the circumstances, in the absence of a credible explanation, warrants an inference" that the driver failed to keep his equipment under proper control, and failed to keep a proper lookout.

[4, 5] There was nothing in the proved physical facts which would have justified an inference that the speed of the truck at this open intersection, upon a highway protected by boulevard stops, was a negligent one or that the driver was inattentive to his duties as he approached the intersection. The upset trailer, in itself, is not a sufficient fact, in the absence of some proof showing negligence on the part of the defendants, upon which to base an inference that the equipment was not properly under the control of the driver. Disregarding that portion of defendant Fairbanks' testimony which placed the position of the Oldsmobile just prior to the collision at a point unfavorable to plaintiffs' case, there is nothing in the evidence presented by plaintiffs which establishes the position of decedent's automobile in relation to defendants' equipment. Without proof of this essential fact how can it be concluded, inferentially, that defendant Fairbanks failed to act as a reasonably prudent person would have acted under the circumstances? While all reasonable inferences are to be drawn from the evidence and all conflicts to be resolved in plaintiffs' favor, nevertheless the inferences cannot be based upon speculation or conjectures, but must be based upon "a fact legally proved." Code Civ.Proc. secs. 1958 and 1960. To draw from plaintiffs' evidence the inferences which they would have us draw would be to decide a question upon mere speculation and not upon facts "legally proved." The mere fact that an accident happened in this case is not sufficient, of course, to establish defendants' negligence. The burden rested upon plaintiffs to establish that some act or omission on the part of defendants was the proximate cause of the accident. This burden, as appears from the foregoing résumé of the evidence, the plaintiffs have failed to sustain and their evidence lacks elements of proof essential to support a determination of negligence on defendants' part. This being true, there was no evidence requiring the submission of the case to the jury.

[6-8] We proceed now to a discussion of the other ground of appeal, relating to the court's admission and rejection of certain items of evidence. Among the witnesses called by defendant was Albert H. Ashton, who had been engaged in police work for 22 years, and for over seventeen years of that time, as an officer of the California Highway Patrol, he had been delegated to investigate traffic accidents. He testified that he went to the scene of the accident shortly after 9 o'clock with another officer and described the conditions which he noted in the highway, remarking upon certain tire marks extending in a southerly direction which led up to or near the point of impact. He was asked by the court whether, as a traffic expert, he could identify these marks as being made by any particular automobile. He answered "they were made by the Oldsmobile." Counsel for appellants objected "on the ground that question calls for an opinion on the very subject which is going to be left to the jury and no foundation has been laid." We think the objection was well taken but that no prejudicial error arose since Officer Kenezevich, testifying before Ashton, stated, without objection, that the tire marks were made by the Oldsmobile, and Officer Sullivan, testifying after Ashton, gave substantially the same testimony, also without objection. An effort was made to impeach Ashton by cross-examining him in regard to testimony which he gave at a prior trial respecting the location of the north and south skidmarks and the length thereof and whether or not they came in contact with the east and west skidmarks in the intersection. Reading the record, it appears that difficulty arose in the consideration of this question from the fact that at the prior trial designation of certain points considered important in the inquiry was made merely by a reference "from here to here." The court finally decided that there was so much confusion arising from this attempt at impeachment and the lack of proper identification of the points involved as to warrant him in sustaining an objection to further inquiry. We are satisfied that no error occurred in this regard.

[9] Inasmuch as the plaintiffs, in our opinion, have failed to establish a prima facie case of negligence on the part of the defendants, we need not consider either the question of contributory negligence or the presumption that plaintiff exercised due care for her own safety, for, as the court said in Keller v. Markley, supra, 50 Cal.App.2d 155, 163, 164, 122 P.2d 614, 618, these "are issues * * * material to the disposition of this appeal, only in the

event that there was sufficient evidence from which a jury might have found, as a question of fact, that defendant was guilty of negligence."

Judgment affirmed.

SHINN and PARKER WOOD, JJ., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

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71 Cal.App.2d 60

LARSON v. BOARD OF POLICE AND FIRE PENSION COM'RS OF CITY OF LONG BEACH et al.

Civ. 14798.

District Court of Appeal, Second District, Division 3, California.

Sept. 28, 1945.

Hearing Denied Nov. 26, 1945.

1. Workmen's compensation ⚿2086

Provisions in city charter that pensions therein provided for were intended to be in lieu of workmen's compensation, and that any person who would be entitled to a pension and who applied therefor should be deemed to have waived all provisions of Workmen's Compensation Act, did not bar widow of police officer who had been awarded workman's compensation by reason of officer's death from right to pension. St.1937, p. 265 et seq., § 3201 et seq.

2. Pensions ⚿1

Pension statutes must be liberally construed in favor of those to whom such rights are granted and such rights may not be taken away by strained construction.

3. Workmen's compensation ⚿11

Workmen's compensation is based on Constitution and legislation pursuant thereto which expresses the social public policy of the state to the effect that the unfortunate economic results caused by the injury or death of an employee shall in a measure be borne by society. St.1937, p. 265 et seq., § 3201 et seq.; Const. art. 20, § 21.

4. Pensions ⚿2

A pension generally represents an integral portion of the contemplated compensation for services rendered by the employee.

5. Municipal corporations ⚿187

Where police officer had made contributions over a period of years so that either he or his designated dependents upon his death might have a pension, the right thereto should not be denied unless such an intention is clearly and unmistakably expressed.

◆

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Action by Cecelia S. Larson against Board of Police and Fire Pension Commissioners of the City of Long Beach and others for a peremptory writ of mandate to compel the defendants to grant plaintiff a pension. From a judgment for plaintiff, defendants appeal.

Judgment affirmed.

Irving M. Smith, City Atty., and Nowland M. Reid, Asst. City Atty., both of Long Beach, for appellants.

Kenneth Sperry, of Long Beach, for respondent.

FOX, Justice pro tem.

This is an appeal from a judgment ordering the issuance of a peremptory writ of mandate to compel the defendants to grant the plaintiff a pension.

The plaintiff is the surviving widow of Engebret Larson, a sergeant of the Long Beach Police Department, who was killed in an automobile accident on February 25, 1942, while performing the duties of a police officer. Plaintiff and Mr. Larson had been married a number of years. Plaintiff has not remarried. Mr. Larson also left surviving three minor children, two of whom are under the age of eighteen, viz., David, age eleven, and Robert, age seventeen.

Mr. Larson had been in the continuous employ of the city of Long Beach as a member of its police department for more than eighteen years. The salary attached to the rank of sergeant at the time of his death was $225 per month. Plaintiff claims that she is entitled to a pension in an amount equal to one-half of the salary attached to the position held by the deceased at the time of his death, and that the amount accrued and unpaid at the time of filing her petition was $2,760.84. Plaintiff bases her right to a pension on the provisions of subdivision 4 of section 187 of the Long Beach City Charter, which reads as follows: "Whenever any member of the Police or Fire Department shall die as a result of an injury received during the performance of his duty, or from sickness caused by the discharge of such duty, or after retirement, or while eligible to retirement from such department, then an annual pension shall be paid in equal monthly installments to his widow, or child or children, or dependent parent or parents, in an amount equal to one-half (½) of the salary attached to the rank or position which such deceased person held in such department at the time of his death or one year prior to the date of his retirement from active duty in such department. Said pension shall be paid to the widow during her lifetime, and thereafter to any child or children surviving her, or to his child or children should there be no widow, until such child or children shall have attained the age of eighteen years, or to his dependent parent or parents during their lifetime or during such dependency, should there be no widow or child. Provided, however, that no widow of a pensioner shall be entitled to a pension unless she shall have been married to such deceased pensioner at least one year prior to the date of his death; and provided further, that if such widow, child or children, shall marry, then the pension paid to the person so marrying shall cease; and provided further, that should the dependency of such parent or parents terminate, then the pension paid to such dependent parent or parents shall cease."

It also appears by stipulation of counsel that plaintiff on her own behalf, and as guardian ad litem of her minor sons, David, Robert and John, filed with the Industrial Accident Commission "her application for adjustment of claim for compensation against defendant City of Long Beach and State Compensation Insurance Fund, its insurance carrier, for the death of her said husband, Engebret Larson, and that said Industrial Accident Commission, on or about the 20th day of April, 1942, made its Award against said State Compensation Insurance Fund as insurance carrier of the City of Long Beach in the total sum of Six Thousand Dollars ($6,000.00), payable to said Petitioner, Cecelia S. Larson, at the rate of Twenty-five Dollars ($25.00) a week beginning February 26, 1942, and continuing thereafter until the total amount of said Award is paid; that Petitioner has received and has accepted from said insurance carrier all sums of money which have become due as provided in said Award." This award, however, was subject to a lien of $250 for the reasonable value of the services rendered by petitioner's attorney in the proceedings before the Industrial Accident Commission. The award was made in favor of the petitioner and the three minor children. The city was "released and discharged."

On March 1, 1943, plaintiff filed her application for a widow's pension with the defendant Board. Her application was denied. The defendants endeavor to justify their position by reason of the provisions of section 188 of the Long Beach City Charter which reads as follows: "This provision is intended to be in lieu of and take the place, in so far as it applies, of the Workmen's Compensation, Insurance and Safety Act of 1917, of the State of California, and amendments heretofore or hereafter to be adopted, and any person who would be entitled to a pension under the provisions of this amendment and who applies for a pension hereunder shall be deemed to have waived all provisions under the Workmen's Compensation, Insurance and Safety Act of 1917; but should it be decided by the Supreme Court of the State of California that the provisions of the Workmen's Compensation, Insurance and Safety Act of 1917 cannot be waived, payments that may have been made hereunder shall be credited on the amounts allowed under said Act, and all pensions granted hereunder for causes included within the purview of said Workmen's Compensation, Insurance and Safety Act shall become null and void except as to such an amount as will, when added to the amount allowable under said Workmen's Compensation, Insurance and Safety Act, equal the total monthly pension herein provided for." The defendants insist that under the provision of this section the plaintiff has precluded herself from the benefits of the pension provisions of the charter because she applied for and accepted the aforesaid benefits, commonly referred to as workmen's compensation, from the State Compensation Insurance Fund (the city's insurance carrier) under the provisions of the Labor Code of this state, St.1937, p. 265 et seq., which has taken the place of the Workmen's Compensation, Insurance and Safety Act of 1917 referred to in the aforesaid charter section.

Under the facts alleged in plaintiff's amended petition, all of which the trial court has found to be true, plaintiff comes within the class of persons enumerated in subdivision 4 of section 187, supra, of the Long Beach City Charter and by the express provisions thereof is entitled to the pension which she seeks. The question then is: Does section 188, supra, of said charter deprive her of this right? In our opinion it does not.

[1, 2] To support their contention that plaintiff waived her right to a widow's pension by applying for and accepting workmen's compensation, the defendants particularly rely on the first part of section 188, supra, to the effect that this provision "is intended to be in lieu of and take the place," insofar as it applies, of the Workmen's Compensation Act, and that any person who would be entitled to a pension and "who applies for" the same "shall be deemed to have waived all provisions under the Workmen's Compensation" Act. These provisions, however, do not cover the situation here presented. They deal with the converse of our problem. These provisions do not say that workmen's compensation is intended to be in lieu of and to take the place of a pension under the City Charter, nor do they say that the acceptance of workmen's compensation benefits shall be deemed a waiver of pension rights. They cannot reasonably be so construed. The rule is clear that pension statutes are to be liberally construed in favor of those to whom such rights are granted, and that such rights may not be taken away by strained construction. Casserly v. City of Oakland, 1932, 215 Cal. 600, 12 P.2d 425; Dillard v. City of Los Angeles, 1942, 20 Cal.2d 599, 127 P.2d 917, 128 P.2d 537; McKeag v. Board of Pension Commissioners, 1942, 21 Cal.2d 386, 132 P.2d 198; Gibson v. City of San Diego, 1945, 25 Cal.2d 930, 156 P.2d 737.

[3-5] The payment of workmen's compensation and the allowance of pension benefits are supported upon entirely different principles. The former is based upon section 21 of Article 20 of the State Constitution and the legislation pursuant thereto, which expresses the social public policy of the state to the effect that the unfortunate economic results caused by the injury or death of an employee shall, in a measure, be borne by society. A pension, however, generally represents "an integral portion of the contemplated compensation" for the services rendered by the employee. Dryden v. Board of Pension Com'rs, 1936, 6 Cal.2d 575, 59 P.2d 104, 106; Snyder v. City, 1943, 58 Cal.App.2d 517, 136 P.2d 857. "A provision for a pension to his widow obviously benefits the member's economic status in a way similar to an increase of his wages * * *." Sweesy v. Los Angeles, etc., Ret. Bd., 1941, 17 Cal.2d 356, 361, 110 P.2d 37, 40. Where, as here, the employee has made contributions over a period of years so that either he or designated dependents of his upon his death might have a pension, the right thereto should not be denied unless such an intention is clearly and unmistakably expressed.

The defendants by their answers did not raise any issue as to whether the acceptance of workmen's compensation by the plaintiff effected a pro tanto reduction of the pension benefits to which she is entitled under subdivision 4 of section 187 of the City Charter, and it is not contended on the appeal that the judgment should have provided for such reduction or offset. We therefore express no opinion on that question.

The judgment is affirmed.

SHINN, Acting P. J., and PARKER WOOD, J., concur.

Hearing denied; EDMONDS, TRAYNOR, and SPENCE, JJ., dissenting.

71 Cal.App.2d 50

TYRA v. BOARD OF POLICE AND FIRE PENSION COM'RS OF CITY OF LONG BEACH et al.

Civ. 14353.

District Court of Appeal, Second District, Division 3, California.

Sept. 28, 1945.

Hearing Denied Nov. 26, 1945.

Limitation of actions 🔑95(1)

Workmen's compensation 🔑2086

Where retirement was conditioned on disability rendering retirement necessary and it appeared that compensable disability suffered by fireman in 1937 and preventing him from performing several of his duties was thought to be temporary until in February, 1940, when fireman learned for the first time that disability would permanently prevent him from performing his duties, right to retirement was not barred by three-year statute of limitations or because of acceptance of compensation. Code Civ. Proc. § 338, subd. 1; St.1937, p. 265 et seq. § 3201 et seq.

◆

Appeal from Superior Court, Los Angeles County; Stanley Nosk, Judge.

On rehearing.

Judgment reversed.

Prior opinion 155 P.2d 365.

Kenneth Sperry, of Long Beach, for appellant.

Irving M. Smith, City Atty., Nowland M. Reid, Asst. City Atty., and Clifford E. Hayes, Deputy City Atty., all of Long Beach, for respondents.

FOX, Justice pro tem.

By his petition for a writ of mandate the plaintiff sought to compel the defendant, Board of Police and Fire Commissioners, to retire him from active service in the fire department and to award him a pension under the provisions of subdivision 3 of section 187 of the Long Beach City Charter, upon the ground that he had sustained injuries while acting in the course of his employment as a fireman, as a result of which he became permanently and totally disabled from and after February, 1940. The trial court sustained an objection to the introduction of any evidence for the reason that the petition did not state facts sufficient to constitute a cause of action. The objection was based on the grounds that it appeared from the face of the petition: (1) That the relief sought was barred by the provision of subsection 1 of section 338, Code of Civil Procedure, and (2) that plaintiff had accepted the benefits of the Workmen's Compensation and Safety Act and was therefore not entitled to a pension under the provisions of the charter of the city of Long Beach. This is an appeal from the ensuing judgment of dismissal.

In his petition, which was filed August 26, 1942, plaintiff alleged that he was employed by the defendant city as a regular member of its fire department on September 1, 1929, and that he had been and was employed as a regular member of said department up to and including February 8, 1937; that on the last mentioned date, while engaged in discharging his duties as a fireman, he "fell from a step ladder which broke under him and thereby sustained an injury to his back; that at first said injury did not appear to be particularly serious, although it did incapacitate Petitioner from performing several of the duties required of him as a fireman, and necessitated a temporary cessation of his regular duties as a fireman; that at the said time the Defendant City was permissably self insured pursuant to the provisions of the Workmen's Compensation and Safety Laws of the State of California and commencing as of February 16, 1937, the Defendant City voluntarily paid to Petitioner compensation pursuant to said Workmen's Compenstion Act at the rate of $25.00 per week for a period of approximately 240 weeks up to the month of September, 1941." It is further alleged that, on or about March 4, 1942, in a proceeding before the Industrial Accident Commission wherein plaintiff was applicant and the city was defendant, said commission duly and regularly rendered an award and finding of fact wherein it was adjudged that applicant sustained injuries arising out of the aforesaid accident which "eventually resulted in a permanent disability of 100%" entitling applicant to receive in addition to the aforesaid $25 per week for 240 weeks from February 16, 1937 (which period ended prior to said commission's finding and award), the further sum of $15.38 per week for the balance of his life, together with any and all medical attention made necessary by said injuries. Plaintiff also alleged: "That throughout the period from February 8, 1937, to date Petitioner has been treated by doctors and surgeons provided for him by the Defendant City of Long Beach and in the month of October, 1939, underwent an operation to his back at their suggestion which said operation was performed with a view to relieving the lingering effects of said injuries and in the month of February, 1940, Petitioner was for the first time advised by his attending physicians that his disability was of a permanent nature and that he would never again be able to resume his duties as a fireman; that prior to said month of February, 1940, Petitioner was of the opinion and had been advised by his said attending physicians that his injuries were of a temporary nature and that he would be able to resume his duties within a short time."

The pertinent portion of the aforesaid charter provision reads as follows: "Whenever any member of the Police or Fire Department shall become physically disabled or by reason of bodily injuries received in, or by reason of sickness caused by the discharge of duties of such person in such department, or shall become so physically or mentally disabled as a result of such injury or sickness as to render necessary his retirement from active service, the commission shall order and direct that such person be retired from further service in such department; and thereafter such person so retired shall, during his lifetime, be paid from said pension fund a yearly pension equal to one-half (½) of the amount of the salary attached to the rank or position held by him in such department at the date of such retirement order." It is then provided that "any pension granted to any member of the Police or Fire Department for disability or sickness, or the result thereof * * * shall cease when the disability or sickness, or the result therefrom, ceases, and such person shall * * * be restored to active duty in such department. * * *"

Under the quoted provisions of the charter it was not necessary for plaintiff to be or to become *permanently* disabled in order to be eligible for retirement. His disability, however, must be such "as *to render necessary* his retirement from active service." (Italics added.) Measured by this test the petition fails to show on its face that the relief sought by plaintiff was barred by the statute of limitations which is three years in this case. Code Civ.Proc. sec. 338, subd. 1. He alleged "that *at first* said injury did not appear to be particularly serious, although it did incapacitate petitioner from performing *several* of the duties required of him as a fireman, and necessitated a *temporary* cessation of his regular duties as a fireman." (Italics added.) He further alleged "that prior to said month of February, 1940, Petitioner was of the opinion and had been advised by his said attending physicians that his injuries were of a temporary nature and that he would be able to resume his duties within a short time." These allegations certainly do not indicate that his disability was, prior to February, 1940, such "as to render necessary his retirement from active service." On the contrary, the clear implication is that he was able to perform certain of his duties. The injuries, according to his allegation, necessitated only "a temporary cessation of his regular duties" and in his opinion and that of his attending physicians were "of a temporary nature." The fact that the city as a self-insurer under the workmen's compensation and safety laws voluntarily paid plaintiff compensation thereunder, starting a week after the accident, does not establish that his injuries were such "as to render necessary his retirement." Nor does the finding of the Industrial Accident Commission, more than five years after the accident happened (and less than six months prior to the filing of the petition herein), that the injuries suffered by plaintiff "eventually resulted in a permanent disability of 100%" establish when his injuries became "such as to render necessary his retirement." It was not alleged in the petition that plaintiff's injuries developed to be such "as to render necessary his retirement" prior to February, 1940, and it therefore did not appear on the face of the petition that the cause of action accrued more than three years prior to the filing of the petition.

Under the quoted provisions of the city charter it was not necessary that the injuries which plaintiff received should be of such a character *at the time they were received* by him "as to render necessary his retirement." He would be entitled to retirement if he became so disabled *as a result* of such injuries. This idea is emphasized in the provision for restoration to duty for it is there provided that "any pension granted to any member of the Police or Fire Department for disability or sickness, or *the result thereof* * * * shall cease when the disability or sickness, or *the result therefrom,* ceases. * * *" (Italics added.)

On a retrial it will be a question of fact for the court to determine from the evidence when plaintiff's condition became "such as to render necessary his retirement from active service." We express no opinion as to what proof would be sufficient to establish that fact. That question is not before us.

Defendants contend that under the provisions of section 188 of the Long Beach City Charter, the plaintiff waived any right he might have to a pension by accepting workmen's compensation. The said section does not so provide. For a determination of that question see Larson v. Board of Police and Fire Pension Commissioners et al., Cal.App., 162 P.2d 33.

The judgment is reversed.

SHINN, Acting P. J., and PARKER WOOD, J., concur.

Hearing denied; EDMONDS, TRAYNOR, and SPENCE, JJ., dissenting.

71 Cal.App.2d 114

PEOPLE v. BRADLEY.

Cr. 1905.

District Court of Appeal, Third District,
California.
Oct. 1, 1945.

Hearing Denied Oct. 29, 1945.

1. Rape 🔑57(5)

Even if no specific intent was shown on part of defendant to rape one of three women whom he picked up in his automobile as distinguished from the others, defendant's indiscriminate actions toward them all were sufficient to warrant jury in concluding that there was an assault with intent to commit rape on each of them.

2. Rape 🔑16(7)

If assault with intent to commit rape had been committed by defendant on one of three women whom he picked up in his automobile, the abandoning of such attempt by defendant when he left such woman and climbed into back seat with another of the women did not purge him of consequences of his criminal conduct toward first woman.

3. Rape 🔑16(7)

If assault with intent to commit rape is made, it is no less a crime, though aggressor should abandon his intentions before consummation of the act.

4. Rape 🔑16(3), 53(3)

Where defendant placed knife against one of three women whom he picked up in his automobile, he committed an assault upon her person, and, under testimony as to defendant's statements and his conduct at the time, jury properly determined that defendant's action was an assault with intent to commit rape.

5. Rape 🔑57(5)

In prosecution for assault with intent to commit rape, what defendant meant to do and manner in which he intended to accomplish his purpose, whether by persuasion, force, or fear, were questions for jury.

6. Criminal law 🔑1159(3)

An appellate court will not disturb jury's finding on a question of fact simply because conflicting inferences may reasonably be deduced from the evidence.

7. Criminal law 🔑741(1), 961, 1160

The function of jury in first instance and of trial court after verdict is to determine what facts are established by the evidence, and before a verdict, which has been approved by trial court, can be set aside on appeal on ground of insufficiency of evidence, it must clearly appear that there is no substantial evidence to support the conclusion reached.

8. Assault and battery 🔑95
Criminal law 🔑1158(1)

In prosecution for assault with instrument likely to produce great bodily harm based on defendant's alleged attempt to run over the two prosecuting witnesses in automobile, strength or weakness of identification of automobile and incompatibility of and discrepancy in testimony, if any, were matters solely for jury in first instance and for trial court on motion for new trial.

9. Criminal law 🔑1160

Where trial court approves jury's finding of fact on motion for new trial, District Court of Appeal may not disturb such findings unless it can say, as a matter of law, that there is no evidence to support the conviction.

10. Criminal law 🔑572

An alibi is not a separate or affirmative defense, but merely negatives proposition required to be proven by the prosecution, that is, that defendant was personally present at place when the offense was committed.

11. Criminal law 🔑739(2)

Evidence presented questions for jury as to whether defendant was guilty of assault with intent to commit rape and of assault with an instrument likely to produce great bodily harm, as against defense of alibi.

12. Criminal law 🔑1159(5)

Where there is a conflict in regard to defendant's defense of alibi, question of whether defendant has established his alibi is one of fact, the determination of which, upon conflicting evidence, will not be disturbed on appeal.

13. Assault and battery 🔑92

Evidence supported conviction of assault with instrument likely to produce great bodily harm on two counts based both on defendant's attempt to run over girl who escaped injury and his attempt to run over girl who was struck by his automobile.

14. Assault and battery ⚷95

In determining whether defendant was guilty of assault with instrument likely to produce great bodily harm, jury could consider character of means used, manner of its use and purpose to be accomplished, the fact that defendant had previously made threats to commit serious bodily injury upon one of prosecuting witnesses, and other circumstances.

◆

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Samuel J. Bradley was convicted on two counts of assault with intent to commit rape and on two counts of assault with an instrument likely to produce great bodily harm, and he appeals.

Affirmed.

Lawrence J. Skirving and Archibald M. Mull, both of Sacramento, for appellant.

Robert W. Kenny, Atty. Gen., D. K. Lener and Jas. O. Reavis, Deputy Attys. Gen., and J. Q. Brown, Dist. Atty., and Edw. McDonnell, Deputy Dist. Atty., both of Sacramento, for respondent.

PEEK, Justice.

This is an appeal from a judgment after trial by a jury convicting defendant on four counts of assault on three women, two of said counts being for assault with intent to commit rape and two for "assault with an instrument likely to produce great bodily harm, an offense included within the charge of intent to commit murder," and from the order of the court denying defendant's motion for a new trial. The sole ground for appeal is the alleged insufficiency of the evidence to sustain the verdict and the judgment thereon. Appellant has not assailed the evidence with respect to count 4, and we therefore assume that he does not question the propriety of his conviction of the crime therein charged.

The three counts remaining involve an episode occurring on the evening of July 8, 1944, and extending into the early hours of the following day. Briefly it appears that three sisters, Rachael Chomin, Mildred Nelson and Rosemary Newell were waiting for a bus when the defendant, driving an automobile, stopped and offered to take them home, which offer they accepted. Mildred sat in the front seat with him while Rosemary and Rachael sat in the back. He drove by a devious course to a comparatively lonely spot on the outskirts of North Sacramento, stopped the car, turned to Mildred and put his arm over the back of the seat. In response to her question, "What is the big idea?" he replied, "I will tell you what the big idea is. One of you is going to put out, I don't care which," and, "Which one is it going to be, make up your minds." The women then started to get out of the car but as they did so defendant stuck a large sized pocketknife against the side of Mildred, threatening to stick the knife into her stomach if any of them moved. The girls entreated him to let them go, and after some argument he did let Rosemary get out of the car. Several times defendant repeated his demands, all the while holding the knife against Mildred. Rachael found a hammer in the back seat but before she could strike defendant he grabbed it from her, struck her with his fist, climbed into the back seat and stated: "Since you are so smart, I will just take you." He then tried to put his arms around her. Rosemary, who had returned to the car, grabbed him by the leg while Mildred hit him with her purse, and as a result the three of them were able to get defendant out of the car where the scuffle continued, during which defendant hit Rachael with his fist. The defendant finally told the women to walk up the road, which they did. A short distance from the car they began to run. After running about two blocks they heard the car coming behind them, and they turned into a lane leading to a house. Rosemary continued on to the house while Mildred and Rachael climbed through a wire fence into an adjacent field. Defendant drove through the fence, followed them into the field, struck Mildred and ran over her with the car. He then swerved the car quickly toward Rachael but she successfully avoided being hit. Thereupon he turned the car around and drove away.

Defendant's first contention is that the evidence does not support a finding of assault with intent to commit rape on Mildred, the sister who occupied the front seat. His argument is to the effect that no specific intent was shown to rape this girl as distinguished from the others; that no words of rape were used; that if there had been such an intention it was abandoned when he left her side and climbed into the back seat where Rachael was then sitting; that his words and actions were as consistent with robbery as rape; that he did not choose Mildred but actually did choose Rachael. The propriety of the verdict with respect to Rachael is not challenged.

[1] Even assuming that defendant is correct in that no specific intent was shown to rape Mildred as distinguished from the others, his admitted indiscriminate actions towards them all were sufficient to warrant the jury in concluding it was an assault with intent to commit rape on each of them. 40 C.J.S., Homicide, § 82. See also People v. Torres, 38 Cal. 141; Ragar v. State, 180 Ark. 1131, 24 S.W.2d 334; People v. Raher, 92 Mich. 165, 52 N.W. 625, 31 Am.St.Rep. 575.

[2-7] Nor is there merit in his contention that if there had been such an intention it was abandoned when he left Mildred and climbed into the back seat with Rachael. Such abandonment on his part has "not the slightest tendency to purge him of the legal consequences of his criminal conduct." People v. Stewart, 97 Cal. 238, 240, 32 P. 8, 9. For, as stated in the case last cited, "If an assault with the intent here alleged is made, it is no less a crime, though the aggressor should abandon his intentions before the consummation of the act." See also People v. Jones, 112 Cal.App. 68, 296 P. 317; People v. Bowman, 6 Cal.App. 749, 93 P. 198. When he placed the knife against Mildred he definitely committed an assault upon her person, and under the facts of the case, i.e., his statements and his conduct, the jury were entirely within their province in determining that this was an assault with intent to commit rape. "What the assailant meant to do, however, and the manner in which he intended to accomplish his purpose—whether by persuasion, force, or fear—is, as we have said, a question of fact to be determined by the jury; and an appellate court should not disturb their finding simply because conflicting inferences may reasonably be deduced from the evidence." People v. Norrington, 55 Cal.App. 103, 110, 202 P. 932, 935. The intent with which the assault herein charged was committed was exclusively for the jury to determine from all of the circumstances and acts of the defendant. People v. Mit Singh, 59 Cal.App. 64, 209 P. 1013. "It is the function of the jury in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence, and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground of the insufficiency of the evidence to support it, it must be made clearly to appear that upon no hypothesis whatever is there substantial evidence sufficient to support the conclusion of the trial court." People v. Tom Woo, 181 Cal. 315, 184 P. 389.

[8, 9] As a second ground of attack upon the sufficiency of the evidence to support the verdict and judgment, appellant contends that there was not sufficient evidence to identify the automobile used in the commission of the crime with the car admittedly owned by the defendant. A great deal of testimony was introduced on this question. It appears that several weeks after the offense had been committed, defendant, with the help of others, painted his car black. According to his witnesses it theretofore had been brown, chocolate brown, and dark brown. The prosecution witnesses described the color of the car used on the night in question and the paint found on defendant's car after the dark paint had been scraped off, as tan, light tan, brown, light brown, medium brown, sandy, rust and biege. It is to be noted that the jury might well have concluded that one of the complaining witnesses solved the problem in part, when in adhering to former testimony in which she had described the color as light tan, she explained on cross-examination: "Well, that is the way it looked in the moonlight."

The strength or weakness of the identification of the car and the incompatibility of and discrepancies in the testimony, if any there were, were matters solely for the jurors in the first instance, and for the consideration of the trial court on motion for a new trial. That court having approved the finding of the jury, this court may not disturb such finding unless we can say, as a matter of law, that there is no evidence to support the conviction. People v. Knight, 44 Cal.App.2d 887, 891, 113 P.2d 226; People v. Farrington, 213 Cal. 459, 2 P.2d 814; People v. Fleming, 58 Cal.App.2d 37, 136 P.2d 88.

[10-12] With respect to appellant's next contention "that he was home when the three women stated he was with them" we likewise are bound by the findings of the jury. "An alibi is not a separate or affirmative defense, but merely negatives the proposition required to be proven by the prosecution; that is, that the defendant was personally present at the place when the

offense was committed." People v. Spillard, 15 Cal.App.2d 649, 652, 653, 59 P.2d 887, 888. See also People v. Krug, 10 Cal.App.2d 172, 51 P.2d 445; People v. Pianezzi, 42 Cal.App. 2d 270, 108 P.2d 685. It is readily apparent from the record herein, as appellant admits, that a conflict in the evidence exists in this regard. Where such a conflict does exist the question of whether or not a defendant has established his alibi is one of fact, the determination of which, upon conflicting evidence, will not be disturbed on appeal. People v. Pianezzi, supra; People v. Krug, supra.

[13] Finally defendant contends that the evidence does not warrant the finding of an intent to run his car over the girl who escaped injury when her sister was struck while running across the field. This assumption of error again raises purely a question of fact, and although on this particular count the evidence to support a conviction was not as ample as that introduced relative to the other counts, there was sufficient evidence to warrant the jury in finding as it did.

[14] In arriving at its conclusion the jury could consider the character of the means used, the manner of its use and the purpose to be accomplished (People v. Valliere, 123 Cal. 576, 56 P. 433); the fact that defendant had previously made threats to commit serious bodily injury upon one of the sisters (People v. Fitzgerald, 51 Cal. App.2d 518, 125 P.2d 105); the circumstance that he must have been conscious of having committed upon them the crime of assault with intent to commit rape (People v. Wilson, 117 Cal. 688, 49 P. 1054), and the fact that there were no circumstances to negative the inference of an evil motive (People v. Fitzgerald, supra). The evidence clearly shows that the defendant actually did run over Mildred, and there is ample evidence that he fully intended to run over Rachael. The results of such an assault are not to be confounded with the manner in which it was made. Crosby v. People, 137 Ill. 325, 27 N.E. 49. As was stated in People v. Yslas, 27 Cal. 630, 631: "In the present case the defendant was guilty of an assault [with intent to commit murder] if he advanced on the prosecutrix in such a manner as to threaten immediate violence, notwithstanding she succeeded in making her escape without injury." The courts of this state have stated in numerous opinions that a reviewing court will not attempt to determine the weight of the evidence but will decide whether on the face of all the evidence it cannot be held that therefrom sufficient facts could have been found by the jury to warrant the inference of guilt, and before the verdict of the jury will be set aside it must be made to clearly appear that upon no hypothesis whatever is there any substantial evidence to support the conclusion of the jury. People v. Pianezzi, supra; People v. Perkins, 8 Cal.2d 502, 66 P.2d 631; People v. Spady, 1923, 64 Cal. App. 567, 222 P. 191; People v. Kneiling, 127 Cal.App. 151, 15 P.2d 561; People v. Newland, 15 Cal.2d 678, 104 P.2d 778.

All intendments being in favor of the judgment, we must conclude from the record before us that the judgment and order herein must be affirmed. It is so ordered.

ADAMS, P. J., and THOMPSON, J., concur.

MONHEIT v. CIGNA et al.

BERNARD v. MONHEIT et al. *

No. 12730.

District Court of Appeal, First District, Division 1, California.

Oct. 1, 1945.

Hearing Granted Nov. 29, 1945.

1. Taxation 🔑733

Deeds to state of lots sold thereto for nonpayment of delinquent general taxes did not extinguish street assessment liens covered by improvement bonds owned by one who purchased lots at foreclosure sale after state's sale thereof to another, as phrase "lien for taxes", in applicable statute, providing the tax deed to state conveys absolute title to property described free of all incumbrances except "lien for taxes" levied for municipal or district purposes, included liens for special assessments. Pol.Code, §§ 3771, 3787; § 3833 et seq., as added by St.1939, p. 1917; St.1911, p. 730, § 59 et seq. as amended.

See Words and Phrases, Permanent Edition, for all other definitions of "Lien for Taxes".

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* Subsequent opinion 168 P.2d 965.

2. Taxation ⚷785

A deed from state to purchaser of lands previously conveyed to state for nonpayment of delinquent general taxes did not extinguish street assessment liens, covered by improvement bonds, under statutes in effect on date of such deed. St.1911, p. 730, § 59 et seq., as amended; Pol.Code, §§ 3833.2, 3836.1, as added by St.1939, pp. 1917, 1921.

3. Taxation ⚷727, 785

The statutes providing that title to tax deeded lands conveyed by state to purchaser thereof should vest absolutely in grantee, free of all prior incumbrances except liens for direct assessments, were controlling as to nature and extent of title conveyed by state's deed of such lands during effective period of such statutes, which replaced repealed statute, providing that such deed should convey title free of all prior liens, taxes, assessments, or incumbrances, and was repealed by Revenue and Taxation Code. Pol.Code, § 3833 et seq., as added by St,1939, p. 1917; §§ 3833.2, 3836.1, as added by St.1939, pp. 1917, 1921; § 3897.

4. Municipal corporations ⚷579

A purchaser of lots at sale on foreclosure of street assessment liens, covered by improvement bonds held by him, three months after state's sale of lots, which had been conveyed to it for nonpayment of delinquent general taxes, acquired absolute title free of any tax liens. Gen.Laws 1931, Act 8199, § 75; St.1941, p. 906, § 6555; Pol.Code, §§ 3716, 3716.1, amended and added by St.1939, p. 2032.

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Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by A. M. Monheit against Antonio Cigna, R. B. Bernard, and others to quiet title to two lots, in which defendant Bernard filed a cross-complaint to quiet title thereto. From a judgment declaring both plaintiff and cross-complainant owners of interests in the lots subject to the other's rights, cross-complainant appeals.

Reversed, with directions.

Rode, Burnhill & Rode and Lincoln Rode all of Oakland, for appellant.

E. E. Grant, of San Francisco, for respondent.

KNIGHT, Justice.

The plaintiff, A. M. Monheit, brought this action to quiet title to several parcels of land in Alameda County. Included therein were two lots in the Las Palmas subdivision in Brooklyn Township; and the present appeal involves the title to those two lots. Plaintiff purchased the lots from the state as tax deeded lands, and his claim of title thereto was based on the deed issued to him by the state; whereas the defendant and cross-complainant, R. B. Bernard, claimed title to the lots under a deed issued to him as purchaser at a bond foreclosure sale held to foreclose liens imposed for street assessments. The cause was tried on a written stipulation of facts, and the trial court held in effect that each party was the owner of an interest in the lots subject to the rights of the other. Both parties appealed, but subsequently plaintiff's appeal was dismissed by this court in accordance with the provisions of Rule 17a of the Rules on Appeal for failure on the part of plaintiff, after having been given due notice, to file an opening brief. Such dismissal leaves for consideration only the appeal taken by the defendant and cross-complainant.

Briefly stated, the facts appearing from the written stipulation are these: Formerly the lots stood in the name of Antonio Cigna. He acquired the same in 1916. On August 3, 1927, two street improvement bonds were issued against the property, one against each lot; and the defendant and cross-complainant, R. B. Bernard, became the owner and holder of those bonds. They were issued pursuant to the provisions of part III of the Improvement Act of 1911, Stats.1911, p. 730, as amended. The term of each bond was fixed at five years from and after January 2, 1928, and the principal was made payable in five equal annual installments ending on January 2, 1933; furthermore the bonds provided that in the event of nonpayment of any installment the holder of the bonds was given the right to declare due the principal remaining unpaid and to cause the property to be sold to satisfy the bond lien. The general taxes levied against the lots for the fiscal year 1928-1929 were not paid, and pursuant to the provisions of section 3771 of the Political Code the lots were "sold to the State." There was no redemption within the statutory period allowed therefor, and on July 16, 1934, the lots were deeded to the state. Also, there was a failure to pay any of the annual installments due on the bonds, and on March 20, 1940, the defendant and cross-complainant, Bernard, as owner and holder of the bonds, demanded a sale of the property to satisfy the bond liens. However, before such sale was had, and on July 15, 1940, pursuant to the provisions of chapter VIIIa of title IX of part III of the Political Code, plaintiff purchased the lots from the state, as tax deeded lands, for the sum of $235, and received a deed thereto. Three months thereafter, and on October 16, 1940, the lots were sold to Bernard at bond foreclosure sale, his bid therefor being in the sum of $1,257.44. Certificates of sale were issued to him as such purchaser, and after a lapse of more than twelve months from the date of sale, to wit, on December 12, 1941, in conformity with the provisions of the 1911 street improvement act, as amended, the city treasurer issued and delivered to Bernard the deeds to the lots. The pertinent portions of the trial court's decree were: (1) That plaintiff was "the owner of all the right, title and interest acquired by the State" in the lots by virtue of the deeds made to the state by the Tax Collector of Alameda County, but that such "rights of the plaintiff" were subject to the rights of the defendant as purchaser of the property at the bond foreclosure sale; and (2) that the defendant was "the owner of the right, title and interest in said real property" covered by the bond liens, but that such rights were "subject to the aforesaid rights of the plaintiff."

[1] Two primary questions are presented by the present appeal. First, did the deed to the state for the nonpayment of the delinquent 1928-1929 general taxes extinguish the street assessment liens covered by the improvement bonds? The question should be answered in the negative.

In 1934, at which time the lots were deeded to the state for nonpayment of delinquent taxes, section 3787 of the Political Code declared: "Such deed conveys to the state the absolute title to the property described therein, free of all encumbrances, except any lien for taxes levied for municipal, or for irrigation, reclamation, protection, flood control, public utility or other district purposes, or for special assessments which are collected on tax-rolls, and except any lien or assessment for other amounts which by law are collected upon tax-rolls by or for account of municipalities * * *." The portions of section 3787 just quoted were construed by the Supreme Court in the case of Neary v. Peterson, 1 Cal.2d 703, 37 P.2d 82, and it was held that the phrase "lien for taxes" as there used included liens for special assessments, and that said section, whether taken as it read before or after the amendment thereto in 1927, was broad enough to apply to the special assessment lien of a bond issued under the Improvement Act of 1911 and acts amendatory thereof.

[2] The second primary question is this: Did the deed from the state to plaintiff as purchaser of tax deeded lands extinguish the street assessment liens covered by the improvement bonds? This question likewise should be answered in the negative. On July 15, 1940, on which date the lots were deeded by the state to plaintiff as purchaser of tax deeded lands, section 3836.1 declared as follows: "Except as against actual fraud, such deed, duly acknowledged or proved is conclusive evidence of the regularity of all proceedings, from the assessment of the assessor to the execution of such deed, both inclusive, and title to the property described therein will vest absolutely in the grantee free of all encumbrances of any kind existing before the sale, except; * * * (c) Any lien for direct assessments." Also, on July 15, 1940, section 3833.2 provided: "As used in this chapter, 'direct assessment' means an assessment levied by a district the bonds of which are secured by assessments levied on a particular parcel of land described in the bond." The foregoing were the only sections in force at the time of sale of the lots by the state to plaintiff which defined the nature and extent of title conveyed by a deed from the state to the purchaser of tax deeded lands, and, as will be seen, such a deed did not have the effect of extinguishing the street assessment liens covered by improvement bonds.

[3] It appears from the brief filed by plaintiff as respondent in the present appeal that his claim of absolute title to the lots is based upon the fact that in 1934, at which time the lots were deeded *to* the state for nonpayment of delinquent taxes, section 3897 of the Political Code provided that *a deed issued by the state to a purchaser of tax deeded lands* "shall convey title to the purchaser free and clear of all liens, taxes, assessments or encumbrances of any kind or character whatsoever levied or assessed or liened on the property which are due at the time of such sale so conveyed prior to the date of such sale * * *"; and he contends that the provisions of the above section are here controlling, citing Smith v. Addiego, 54 Cal.App.2d 230, 129 P.2d 953. There is no merit in the contention.

At the time the deed herein was issued by the state to plaintiff, section 3897 was no longer in effect. It was repealed in 1939, and in its place chapter VIIIa, title IX, part III, Political Code, entitled "Sale of Tax Deeded Lands," was enacted. The new chapter went into effect September 19, 1939, and it embodied certain amended Political Code sections relating to the sale of tax deeded lands. But the new chapter provided that if a Revenue and Taxation Code was adopted by the Legislature, the amendments to the Political Code set forth in the new chapter would be repealed at the time the Revenue and Taxation Code became effective. Stats.1939, sec. 27, p. 1922. The Revenue and Taxation Code was adopted and went into effect February 1, 1941, St. 1939, p. 1274; so that this particular chapter embodying the amended Political Code sections relating to the sale of tax deeded lands was in effect from September 19, 1939, until February 1, 1941. That chapter embodied Political Code sections 3836.1 and 3833.2, hereinabove quoted, which dealt with the effect of deeds *from* the state to a purchaser of tax deeded lands. Plaintiff purchased the lots from the state as tax deeded lands and received his deed from the state therefor within that period of time, to wit, on July 15, 1940. That being so, Political Code sections 3836.1 and 3833.2 as embodied in the new chapter were controlling as to the nature and extent of the title conveyed by the state to plaintiff; and by those sections it was declared that "title to the property described therein will vest absolutely in the grantee free of all encumbrances of any kind existing before the sale, except: * * * (c) Any lien for direct assessments"; and that the term "direct assessments" meant liens covered by street assessment bonds.

Plaintiff contends, however, that in Smith v. Addiego, supra, the court held that the code section in force at the time the property is deeded *to* the state for nonpayment of delinquent taxes is controlling as to the effect of the deed issued by the state at the time of the sale of the property as tax deeded lands; and that, therefore, in the present case the provisions of section 3897 and not those of sections 3836.1 and 3833.2 were controlling as to the nature of the title acquired by plaintiff under his deed from the state. An analysis of the decision in that case shows that the court did not so hold. As therein pointed out, in 1938, at the time the property involved in that case was deeded by the state to the purchaser as tax deeded lands, there was but one statute in force dealing with the effect of a deed from the state to the purchaser, to wit, Political Code, section 3897, which declared that such a deed conveyed title to the purchaser "free and clear of all liens, taxes, assessments or encumbrances of any kind or character whatsoever levied or assessed or liened on the property * * *." And the court further pointed out that the same section was in force in 1935, at the time the property was deeded to the state for nonpayment of delinquent taxes and continuously thereafter up to and including the sale of the property by the state in 1938. Therefore, the court went on to hold that the provisions of section 3897 were controlling, saying (54 Cal.App.2d at page 237, 129 P.2d at page 957): "Our conclusion is that the provisions of section 3897, Political Code, as they read when the appellants' tax deeds were issued, and as they read in 1935 when the deed was made *to* the state, operated to extinguish the lien of the street improvement bonds." In the present case, however, the situation is entirely different. Section 3897 was in force at the time the property was deeded *to* the state; but it was not in existence at the time the property was sold by the state to plaintiff. It had been repealed prior thereto, so that at the time the property was sold by the state the only statutes in force defining the nature and extent of title conveyed by a deed issued by the state at such a sale were Political Code, sections 3836.1 and 3833.2; and, as shown, those sections provided for the survival of liens for street assessments covered by improvement bonds.

In two recent cases involving the question of tax titles, the decision rendered in Smith v. Addiego, supra, was apparently construed as holding that the statute in force at the time the property is deeded *to* the state is controlling as to the nature and extent of the title conveyed to a purchaser at the sale by the state of the property as tax deeded lands, regardless of the provisions of the law in force at the time of such sale. Campbell v. Woolner, 57 Cal.App.2d 511, 134 P.2d 822; Rostain v. Guggenheim, 63 Cal.App.2d 127, 146 P.2d 247. The latter case is based on the decision rendered in the former, and was decided by the same court. Assuming that such was the construction placed on the decision in Smith v. Addiego, we are unable, for the reasons hereinabove given, to agree to it.

Moreover, we are not in accord with those portions of the decisions in the two later cases above mentioned interpreting section 3836.1 of the Political Code and a portion of the decision rendered in Bray v. Jones, 20 Cal.2d 858, 129 P.2d 357. With regard to section 3836.1 the court said in Campbell v. Woolner, supra, 57 Cal.App.2d at page 514, 134 P.2d at page 824: "Under the decisions last referred to [Smith v. Addiego and Bray v. Jones], the law in force at the time the property here in question was deeded to the state, on August 2, 1940, is controlling and governs the rights of the parties to this action. At that time, section 3897 of the Political Code had been repealed and, while the Revenue and Taxation Act was not yet in effect, sections 3833.2 and 3836.1 had been added to the Political Code, effective as of September 19, 1939. (Stats.1939, chap. 529, p. 1917)" The court then went on to say (57 Cal.App.2d at page 514, 134 P.2d at page 824): "Section 3836.1, thus added, provided *that the deed from the tax collector to the state* should convey a clear title free of all encumbrances except '(c) Any lien for direct assessments.'" (Italics added.)

An examination of chapter VIIIa of the Political Code, as enacted in 1939, Stats. 1939, p. 1917, and of Article V of that chapter which embodies section 3836.1, shows, however, that the deed referred to in that section is the deed required to be given by the tax collector on behalf of the state *to the purchaser* at the time of the sale by the state of the tax deeded lands, and is not the deed given by the tax collector *to the state* at the end of the five-year period of redemption.

And in reviewing the decision in Bray v. Jones, supra, the court in Campbell v. Woolner, supra, stated in substance that it had been there held that the Political Code section as it read on the date of the *deed to the state* governed the sale to the purchaser from the state; whereas, as shown by the decision in Bray v. Jones, the court held that a sale by the state was governed by the law as it stood at the time of such sale.

For the reasons above stated we do not deem the foregoing portions of the decision in Campbell v. Woolner, supra, as here controlling.

[4] The next major question presented by the appeal is whether, as Bernard contends, he acquired absolute title to the lots by virtue of the deeds issued to him as purchaser at the bond foreclosure sale, or whether, as the trial court held, plaintiff retained an interest in the property by virtue of the deeds issued to him as purchaser of tax deeded lands. We are of the opinion that the contention so made by Bernard should be sustained.

Section 75 of the Improvement Act of 1911, as in force from 1921 until 1937 (which covered the period of the levy of the assessment and the time the taxes became delinquent), provided as follows, Deering's General Laws, 1931, Act 8199: "The deed [to a purchaser at bond foreclosure sale], when duly acknowledged or proved, is primary evidence of the regularity of all proceedings theretofore had, and conveys to the grantee the *absolute title* to the lands described therein, as of the date of the expiration of the period for redemption, *free of all encumbrances, except the lien for state, county and municipal taxes.*" (Italics added.) In 1937 section 75 was amended, St.1937, p. 1674, but the paragraph above quoted remained the same. Such amendment covered the time Bernard demanded a sale of the property to satisfy the lien of the bonds, the sale to him, and the issuance of the certificate of sale to him. In 1941 the street improvement act was incorporated into the Streets and Highways Code (in effect September 13, 1941 St.1941, p. 751 et seq.) and section 6555 of that code, which covered the time the deed was issued to Bernard, provided: "The deed of the treasurer, when duly acknowledged or proved, is primary evidence of the regularity of all proceedings theretofore had, and conveys to the grantee the absolute title to the lands described therein, as of the date of the expiration of the period for redemption, free of all encumbrances, except *the lien* for State, county and municipal taxes." (Italics added.) Therefore, it would appear that under all of the foregoing provisions Bernard acquired "absolute title" to the land, free of all encumbrances, unless there was a continuation of the lien for state, county and municipal taxes after the property was deeded to the state, and this leads up to the final question as to when, if at all, the lien for state, county and municipal taxes was extinguished.

In this regard, it is said in 24 California Jurisprudence, at pages 219, 220: "The lien continues until the taxes are paid or the property sold for nonpayment thereof"; and "* * * a lien is extinguished by a valid sale to the state for delinquent taxes

* * *." Section 3716 of the Political Code provided, from 1872 until 1931: "Every tax has the effect of a judgment against the person, and every lien created by this title has the force and effect of an execution duly levied against all property of the delinquent; the judgment is not satisfied *nor the lien removed until* the taxes are paid or *the property sold for the payment thereof.*" (Italics added.) The foregoing section was in force at the time the property herein was sold to the state. In 1931 section 3716 was amended, St.1931, p. 144, by adding provisions to the effect that the lien shall cease at the end of 30 years and be conclusively presumed to have been discharged by payment, but the above-quoted provision remained the same. There was another amendment in 1933, but it has no bearing on the present case. Thus, at the time of the sale of the lots to the state, and the deed to the state, section 3716 read as above quoted. In 1939, St.1939, p. 2032, the section was recast and section 3716.1 was added. This amendment and the added section became effective the same as the other Political Code amendments hereinabove referred to—from September 19, 1939, until the Revenue and Taxation Code became effective in February, 1941. Consequently, they were in force at the time of the sale of the lots by the state to plaintiff. Section 3716 was amended to read: "Every tax has the effect of a judgment against the person, and every lien created by this title has the force and effect of an execution duly levied against the property subject to the lien." And the added section, 3716.1, provided: "Except as provided in section 3716.2 [cessation of lien after 30 years], the judgment is satisfied and the lien removed when, but not before, (a) the taxes are paid or legally canceled or, (b) for nonpayment of any taxes, *the property is sold to a private purchaser or deeded to the State.*" (Italics added.)

By applying the provisions of section 3716, as in force at the time the lots were sold to the state, the lien for the taxes terminated at that time; or by applying the provisions of section 3716.1, in force at the time the lots were sold and deeded by the state to plaintiff, the tax lien terminated, at the latest, on the date of such sale. The lots were sold and deeded by the state to plaintiff on July 15, 1940; and the bond foreclosure sale, at which Bernard became the purchaser, did not take place until three months after the tax sale. It follows that since, at the latest, the tax lien was extinguished three months prior to the foreclosure sale, Bernard, as purchaser at the foreclosure sale acquired title to the lots, free and clear of any tax liens.

In accordance with the views herein expressed, those portions of the judgment declaring that the plaintiff and the cross-complainant each owned an interest in the lots subject to the rights of the other are reversed, with directions to re-enter judgment in favor of Bernard on the cross-complaint, adjudging him to be the sole owner of the property.

PETERS, P. J., and WARD, J., concur.

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71 Cal.App.2d 82

PEOPLE v. GODSEY et al.

Cr. 3892.

District Court of Appeal, Second District,
Division 3, California.

Sept. 28, 1945.

1. Criminal law ⚷706

In prosecution for robbery while armed prosecutor was not guilty of misconduct in introducing evidence which referred to incident in which one jointly charged with defendant was shot, and which occurred within 20 hours after the robberies charged, especially where prosecutor was careful not to bring out circumstances under which shooting occurred.

2. Robbery ⚷24(1)

Evidence supported conviction on both counts of information charging robbery while armed with a gun.

3. Criminal law ⚷1169(11)
Witnesses ⚷350

Defendants could properly be asked on cross-examination if they had been convicted of a felony, and, upon both defendants answering in the affirmative and stating nature of those offenses, it was not reversible error to receive evidence which tended to show that such felonies were committed after crimes charged in present prosecution were committed.

4. Criminal law ⚷1154, 1156(1)

Discretion of trial court is to be considered in determining question as to whether prosecuting attorney overstepped the bounds of propriety, and trial court's conclusion that prejudice did not result from the disputed conduct will not be set aside unless contrary clearly is disclosed.

5. Criminal law ⚷1171(1)

Even if conduct of prosecutor, in introducing evidence as to incident in which one jointly charged with defendant was shot, was improper, conviction would not be reversed, where review of record failed to disclose a miscarriage of justice resulting from such conduct.

6. Criminal law ⚷706

In prosecution for robbery while armed with a gun, the calling as a witness of one who was victim of alleged attempted robbery not charged in present prosecution did not constitute misconduct on part of prosecutor on ground that it was so imflammatory to jurors' minds as to erase any reasonable doubt they might have had up to that time, where record did not show that witness was victim of alleged attempted robbery.

◆

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Larry William Glynn was convicted on both counts of an information charging robbery while armed with a gun, and he appeals.

Affirmed.

A. P. Coviello, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Everett W. Mattoon, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

It was charged in two counts of an information that appellant and one Godsey committed robbery, a felony, and that they were armed with a gun at the time of the commission of the alleged offenses. Trial was by jury and appellant was found guilty as to both counts as charged in the information. Godsey was found guilty as to count 1 as charged in the information, and not guilty as to count 2. Two previous trials resulted in mistrials—the juries having failed to agree. This is an appeal from the judgment and order denying appellant's motion for a new trial.

Appellant contends that it was prejudicial error to receive certain portions of the evidence. It is therefore necessary to set forth the evidence in detail.

The two robberies were committed December 31, 1943. The first robbery, alleged in count 1, occurred at a Thrifty Drug Store which is located at 4401 West Slauson in Los Angeles. A few minutes before 9 p. m., the closing time, two men entered the store, went directly to the lunch counter, which is in the rear of the store, sat down at a section of the counter which extends east and west, and ordered coffee. There were two waitresses behind the lunch counter, and they were preparing to "check out." They were counting the money they had received that day, and were placing it on a section of the counter which extends north and south. Some of the employees had placed money, received by them during the day, on the liquor counter; and other employees were counting money on the counter in the drug department. The two men remained at the lunch counter until the other customers had left the store, and the front door had been locked. They then stood up, each drew a gun, and announced that it was a "stick-up." The larger of the two men, identified by witnesses as Godsey, walked backward toward the front door to a place approximately in the middle of the store and, with one of the employees standing in front of him pursuant to his order, kept watch over the other employees while the smaller man proceeded to take the money from the counters and put it in his pocket. The manager of the store, who was standing by the "liquor register," went behind a partition, called the "liquor shelf," where there was a burglar alarm. The smaller man followed her. They later returned and the manager, who at the time had the key to the front door in her hand, screamed and fell upon the floor. After the smaller man had taken all the money from the counters, a total of approximately $320 in paper and silver money, and had taken a few packages of cigarettes, the larger man said, "Hurry up, Doc." They then demanded that someone unlock the front door and let them out. They questioned different employees as to the whereabouts of the key, and the employees stated they did not know where it was. A search was made for it, and one of the robbers stated in substance that someone would get "hurt" if the door was not unlocked. One of the employees saw the key in the hand of the manager, who was lying on the floor, removed it from her hand, unlocked the front door, and let the robbers out.

A "day or two" after the robbery the manager of the store, upon being shown approximately 15 photographs, identified the one of Godsey as that of one of the robbers. About three months after the robbery she identified both Glynn and Godsey at a police "showup" as the robbers, and she again identified them at the trial as the robbers. She testified that before the robbery she was standing by the liquor register where she had a view of the rest of the store; that she had been watching the robbers "all the while they were sitting there practically," and had just locked up approximately $2,000 in her cash box, and was going to tell the men to leave the store when they "pulled" their guns and said, "Take it easy, it is a stick up"; that Godsey had a "dark" gun, and Glynn a "silver" colored gun; that neither one appeared to be intoxicated; that Glynn followed her behind the liquor shelf and "reached there" just as she "reached for the alarm," and Glynn said, "'Oh, no you don't. Give me the money'"; that he walked toward her and put the gun against her stomach and said, "'Come on, give me the money'"; that she fell to the floor where Glynn was standing and he pushed her with his foot; that she arose from the floor just before the robbers reached the front door on their way out; that she saw "Miss Noce," an employee, unlock the door and let them out; and that the witnesses went immediately to the telephone and called the police. She testified further that at one time during the robbery she and Glynn were about one foot apart and at that time were facing each other.

The manager's husband, who was supervisor of the lunch counter, identified Glynn and Godsey as the robbers from a group of approximately 15 men at a "police show-up" about three months after the robbery. He also identified them at the trial as the robbers. He testified that on the night of the robbery he went to the drugstore about 9 p. m.; that when he entered he saw the supervisor of the drug department standing behind the lunch counter, in the corner, where two sections of the counter meet; that he went over and spoke to him and sat down at the section of the counter which extends north and south, in which position he faced the front of the store; that he saw Glynn and Godsey sitting by the side of the counter which extends east and west, and they were five or six feet from the corner of the counter; that Glynn wore a wedding ring on the little finger of his right hand; that the witness was still sitting there at the time of the robbery; that the robbery occurred about 9:20 p. m.; that Godsey had a black or blue black Colt automatic, and Glynn had a nickel plated gun; that on their way out of the store Glynn walked backward, and "Godsey kept turning backwards and kept looking back every few seconds until he got to the door"; and that in his opinion neither one of them was intoxicated.

The supervisor of the drug department identified Glynn and Godsey at the trial as the robbers. He testified that while he stood by the lunch counter he was "right in front" of Glynn and Godsey—"about three feet away from them"; that he observed them about two or three minutes; that he was facing the front doors and, as they "were being closed the two defendants got up and said, 'This is a hold up,' and pulled out guns"; that Godsey had a black automatic, and Glynn had a nickel plated revolver; that Glynn was in his presence 15 or 20 minutes and he was about four feet from him; and that both men appeared to be sober.

Lena Noce, another employee, identified Glynn and Godsey at the trial as the robbers. She testified that she saw them at the lunch counter, and saw them stand up and pull out their guns; that Godsey directed her to stand in front of him; that she stood with her back toward him, and could feel his gun against her back; that he said, "'If anyone moves somebody will get hurt'"; that she saw Glynn take the money from the lunch counter and go around the counter, but she was so "scared" she did not pay any attention to him; that she saw Glynn again when she let him out the front door; that Godsey was behind her with his gun against her back until they went to the front door; and that she unlocked the door and let them out.

The waitress, who served coffee to the robbers, testified that defendants were the men who committed the robbery.

Another employee who was present at the time of the robbery identified Glynn and

Godsey at the trial as the robbers, and testified that the first time she saw Glynn he was pointing a gun at her, and it was a "light-colored" gun; that he was "very close," and said he wanted the money; that "after that everybody handed out the money"; that when they were ready to leave, one of the girls was told to find the key to the front door; that Glynn looked "all over the desk" where the witness and another girl had their purses; that he opened both purses and looked inside, but he did not take anything out of the purses; that Glynn wore a wedding ring; and that in her opinion neither of the robbers was intoxicated.

At the time appellant was arrested he wore a wedding ring. During the trial Godsey wore a brown suit, and appellant wore a tan coat and trousers of a different color. Two of the above-mentioned witnesses testified that the robber, identified as Godsey, wore a brown suit, and the robber, identified as appellant, wore a tan coat on the night of the robbery.

The second robbery, alleged in count 2, occurred at a gasoline service station, located at 2431 East Florence Avenue in Huntington Park, which station is about seven miles from the drugstore above mentioned. The record does not show what time of day the robbery was committed, but the robbery was reported to the police department at 10:40 p. m. The station operator testified that two men drove into the station; that after he had filled the tank of their automobile with gasoline, one of the men, whom he identified at the trial as Glynn, followed him into the station and the other man remained in the automobile; that he (the witness) went behind the counter, and Glynn stopped in front of the "cash drawer"; that when the witness looked around Glynn had a gun "down the side of him," and said, "'Come on, give me that paper money'"; that Glynn pulled the witness' arm back and said he "wasn't fooling," and the witness "kicked the cash register open and gave him the money," approximately $65, which Glynn folded and put in his pocket, backed to the door, then turned around and went to the automobile. He further testified that Godsey "looks like" the man who drove the automobile, but that he was not sure it was he.

Police Officer Sund testified that when Glynn was arrested, April 29, 1944, he had a conversation with him at Central Station, at which conversation Officer Howsley was present; that the witness told Glynn that Officer Muchmore of Culver City had told him that Glynn wanted to tell him, Sund, "about the jobs that he had pulled"; that Glynn said that was right—he wanted to "clear" his mind; that Glynn told him he and Godsey committed the drugstore and service station robberies; that Glynn stated he and Godsey went into the drugstore to get a cup of coffee, and while they were in there they made up their minds "to pull a holdup"; that after they robbed the drugstore, they drove to the service station and Godsey remained in the automobile while Glynn committed the robbery; that they then went to the hotel where Glynn was staying and divided the money, and went from there to the Friendly Tavern Cafe where they spent the evening; "that they both had been drinking over the week end, the holidays, and that they were both pretty drunk"; that Glynn said they used a stolen Chevrolet automobile in the robberies; that "after the hold up in Culver City, in which Godsey was shot, they had taken Godsey to an industrial hospital on Avalon and Slauson Avenue"; that he left Godsey there and drove the "car to 87th Street, near Broadway, and parked the car there"; that one gun was left in the automobile and the other was thrown away. The witness testified that he and Howsley questioned Godsey in the county jail and he (Godsey) stated that he "might have" committed the drugstore and service station robberies, but he had been drunk for two or three days—"so drunk he couldn't remember what he did." He testified on cross-examination, in reply to a question as to when he first knew Godsey was in custody, that he knew Godsey was in custody "the next morning after he was shot in that hold-up." Before Glynn was arrested he saw Officer Sund in a cocktail bar and told him he had returned from Nevada because he had heard that he was accused of some robberies, and he wanted to give himself up. The officer told Glynn that he had been looking for him; however, the officer did not arrest him at that time.

Officer Howsley testified that on May 3, 1944, he told Glynn that Officer Muchmore had called him (the witness) from Culver City and stated that he had Glynn out the day before "for purposes of identification at Culver City," and that Officer Muchmore had told the witness that Glynn at the time had admitted the drugstore and service station robberies; that he asked Glynn if it was true, and Glynn said " 'Yes,' that he had admitted that to Officer Muchmore"; that Glynn said he was "hooked anyway," and had "just as well start serving" his time; that Glynn wanted to know if the police could "cop out on one count," and he (the witness) told him that was up to the district attorney's office; that Glynn stated he had a revolver and Godsey an automatic, that they got "around $300" at the drugstore, that he alone held up the service station and got around $60, and that they had thrown the guns away; that he (the witness) didn't take a statement from Glynn but he thought Sund made some notes of the conversation—he saw him write in his notebook at the Central jail; that he told Glynn that "after all Culver City had a job on him, and Huntington Park had a job on him, and we had one on him," and Glynn said he wanted to plead guilty to one count; that when they talked with Godsey in the county jail Officer Cox was present; that they then informed Godsey that Glynn had told them all about the drugstore robbery, and asked if it was true; that Godsey said, " 'I was so stuped up I don't know whether I did or not' "—that he was drunk and did not remember whether he went with Glynn to the service station or not—he could have; and that Godsey said he had been with Glynn on New Year's Eve.

Officer Muchmore of Culver City testified that he had a conversation with Glynn, relative to the drugstore robbery, in a police automobile on two occasions; that the first conversation occurred about May 2, 1944, when "Officer Johnson and myself picked up Glynn at the City jail, to take him out to Culver City for identification purposes," at which time he questioned Glynn regarding another matter, and then asked him what the "L. A. police department" had on him; that Glynn said they were accusing him of "some gas station" holdup he "didn't know anything about," but that he had held up another "gas station" and also the Thrifty Drug Store, and Godsey was with him on the drugstore robbery; that about May 6, 1944, they "picked him [Glynn] up at the County jail to take him out to our Justice Court for arraignment"; that the conversation was much the same; and that Glynn said he "had lost his gun or somebody stole it at some party, and he didn't know what happened to the one Godsey had."

The People called one Voyda as a rebuttal witness, and he testified that he saw Glynn and Godsey together on January 1, 1944, "a few minutes" after 4 p. m.; that Godsey had a gun; that Godsey was shot at that time; that Glynn was present at the time Godsey was shot; and that afterwards Glynn and Godsey left the place together.

Glynn testified that he had known Godsey "a little" over two years; that he (Glynn) belonged to a motorcycle club; that their usual costume consisted of boots, "levys," and a leather jacket; that on December 31, 1943, attired in boots, levys, and a leather jacket, he left his hotel about 7 p. m., "had something to eat and then went over to the Friendly Tavern cafe in Huntington Park," where members of the motorcycle club were gathered; that he remained there until about midnight; that he left there once during the evening and took a girl for a ride on a motorcycle "around the block a couple of times"; that during February, 1944, a girl gave him a wedding ring; that he was wearing the wedding ring on the little finger of his left hand at the time of his arrest; that he did not think it would have gone on the little finger of his right hand at that time as he weighed about 12 pounds more then than he did at the time of the trial, and he had to"force" it on the little finger of his right hand at the time of the trial; that the coat he was wearing at the trial was the first "tan or brown" coat he had had for several years, and he had purchased it "secondhand" from a tailor shop in Huntington Park in March, 1944; that he did not tell Sund, Howsley or Muchmore he was guilty of either of the offenses charged; and that he did not take part in either robbery. He testified on cross-examination that he had been convicted of a felony, and in answer to the question "And that was attempted robbery?" replied, "Yes." Glynn was later recalled for further cross-examination, and testified that he did not see Godsey on December 31, 1943; that he saw him on January 1, 1944, but he last saw him on that day "about 3:30 or 4:00 o'clock in the afternoon at the Yacht Club"; that he was not present at the time Godsey was shot; that the first time he saw Godsey after he was shot was in jail; and that he knew nothing about the shooting.

Glynn's brother testified that Glynn resided with him; that on December 31, 1943, he was at the Friendly Tavern Cafe; that he arrived there about 8:30 p. m., and Glynn was there when he "got there"; that he joined Glynn's group at the tavern; that so far as he knew Glynn was there "until" the witness left, which was about 9:30 p. m.; that Glynn had on "boots, levys and a leather jacket"; that he was with Glynn when he purchased the tan coat, and that was "along in March," 1944; and that on December 31, 1943, Glynn did not have a coat similar to the one he was wearing at the trial.

Godsey testified that he had known Glynn "a couple of years"; that he had worked at several places where Glynn was employed, but he was "more of a friend" of Glynn's brother; that he did not recall what happened on December 31, 1943, after 7:30, or 8 p. m.; that he went to his cousin's home that evening—he did not know what time but it was "getting dark"; that his cousin's wife was not home when he arrived, but she returned while he was there; that he had not been drinking when he arrived there, but he had "half a dozen or or more" drinks there, and did not recall leaving; that the next thing he remembered he was in the General Hospital and it was New Year's Day; that he did not tell Howsley he was with Glynn on December 31, 1943, and might have participated in the robberies—that he told him he had been drinking heavily, but he "was positive or at least quite sure" that he had nothing to do with the robberies—that he thought if he had participated in the robberies he would remember it; that he remembered having breakfast "or at least eating" with a girl friend the next day; that he did not own or have access to a gun at the time he was shot; that he did not know whether he had a gun when he was shot, and as far as he knew he was alone; that he remembered when the "impact of the bullet hit" him; that he recalled "being transported," after being shot, but he did not know "whether it was an automobile or an ambulance or what"; that he wore the same suit when he was shot that he was wearing at the trial; that he "must have" changed into the suit at his cousin's; that the suit was "in the cleaners out there," and his cousin's wife must have "got it out"; that he had on his "work clothes" when he arrived at his cousin's; that he had pleaded guilty to a felony "in this court a few weeks ago," and in reply to the deputy district attorney's question, "To what offense?" he answered, "Assault with a deadly weapon." He also testified that he was intoxicated when he arrived at his cousin's home; and on redirect examination by his counsel as to whether the plea of guilty to a felony pertained to the time he was shot, he replied that it did.

The cousin's wife testified that Godsey came to her home "about 10 minutes to 8:00 in the evening" on December 31, 1943; that she was there when he arrived; that he left about 8:45 p. m., at which time he wore a blue sweater and "dungarees"; that he was intoxicated when he arrived; and that while he was there he had "about four drinks" of whisky with her.

One Kennedy testified that he was an electrician at the ship yards; that he had known Glynn six or seven years; that Glynn was a truck driver during the time he knew him; that they belonged to the same motorcycle club; that the "official dress suit" of that club included boots and a leather jacket; that the witness was at the Friendly Tavern Cafe on December 31, 1943, from 7 p. m. until 10:30 p. m.; that Glynn was also there and the witness saw him "pretty near all evening"; that he and Glynn "were playing the marble machine together" that night; that on that occasion Glynn wore "blue dungaree pants," boots, and a leather jacket; that he didn't pay any more attention to Glynn that night than he did to the other members of the club; and that he "would say" Glynn was there all the time the witness was there.

[1-5] It is apparently appellant's contention that the introduction of any evidence which referred to the incident in which Godsey was shot constituted misconduct on the part of the district attorney, and that it was prejudicial error to permit its introduction. The claimed misconduct on the part of the district attorney occurred during his cross-examination of Glynn and during his direct examination of the witness Voyda. Appellant asserts that in the course of such cross-examination the deputy district attorney brought before the jury the alleged shooting of Godsey at a time subsequent to and removed from the offenses charged herein. The deputy district attorney, as indicated above, asked Glynn whether he was present on January 1, 1944, when Godsey was shot; whether he saw Godsey after Godsey was shot; whether he took Godsey to the hospital; and whether he knew anything about the shooting. No objection was made to these questions. Later

a motion to strike out this part of the cross-examination was made by defense counsel, and was denied by the court. After such ruling a motion for a mistrial made by defense counsel was also denied. In examining Voyda, the deputy district attorney asked him whether he had seen Glynn and Godsey on January 1, 1944; what time he had seen them; whether they were together when he saw them; whether Godsey had a gun at that time; whether Godsey was shot at that time; whether Glynn was present when Godsey was shot; and whether they left the place together after the shooting. Counsel for defendants objected to these questions, and made a motion for a mistrial. The objections were overruled, and the motion was denied. Appellant asserts that there was further misconduct on the part of the deputy district attorney in that at the trial he made a statement to the effect that the "only rebuttal" he had as to defendants' testimony was as to whether Glynn was with Godsey at the time Godsey was shot, and whether Godsey had a gun at the time. The district attorney was not guilty of misconduct in offering evidence to show that Glynn was with Godsey at the time Godsey was shot, since Glynn had denied being with Godsey at that time; and to show that Godsey had a gun on January 1st, since Godsey had denied having a gun. The time, referred to, was not remote but was within 20 hours after the robberies. The testimony of Voyda was offered for the purpose of impeaching Glynn, since Glynn had testified that he had not seen Godsey on January 1st execpt at the Yacht Club, and also because Godsey had testified that he had no gun on January 1st. The district attorney was careful not to bring out any testimony as to the circumstances under which Godsey was shot. In the case of People v. Cabaltero, 31 Cal.App.2d 52, at page 62, 87 P.2d 364, at page 369, wherein conduct of the deputy district attorney was assigned as prejudicial, the court said, "[W]here the evidence clearly supports the conviction and *it appears that the jury in all probability would have rendered a verdict of guilty even in the absence of any dereliction on the part of the district attorney,* a reversal is not justified." (Italics added.) It is clear that robberies were committed. The evidence was abundantly ample to prove that appellant was one of the persons who committed the robberies. He was identified a few days after the robbery by means of photographs, about three months after the robbery at a police show-up, and at the trial by six witnesses to the drugstore robbery, and at the trial by the witness to the service station robbery. Furthermore, as shown above, three police officers testified that appellant made admissions of his guilt as to the robberies charged herein. Although there were some inconsistencies in the testimony of the prosecution witnesses as to the time the drugstore closed on December 31, 1943, which employee locked the door, whether the burglar alarm was connected, what time the robbery occurred, how the robbers were dressed, who telephoned the police and when the police arrived, those witnesses were positive as to the identification of the defendants. It was proper cross-examination to ask the defendants if they had been convicted of a felony. Both defendants having answered that question in the affirmative and having stated the nature of those offenses, it was not reversible error to receive evidence which tended to show that said felonies were committed after the crimes charged herein were committed. "In order to be ground for reversal, the prosecuting attorney's conduct must have been such as to militate against justice * * * and the conduct must have occasioned injustice to the defendant. * * * The discretion of the trial court is to be considered in determining the question as to whether the prosecuting attorney overstepped the bounds of propriety; and the court's conclusion that prejudice did not result from the disputed conduct will not be set aside unless the contrary clearly is disclosed." 4 Cal.Jur.Supp., 1008, 1009. Even if it were to be assumed that the conduct of the deputy district attorney was improper, to justify a reversal of the judgment a review of the record must disclose a miscarriage of justice. There was no miscarriage of justice herein.

[6] Appellant further asserts that the calling of the witness Voyda, who was the "victim of the alleged attempted robbery in Culver City," was "so inflammatory to the jurors' minds" as to erase any reasonable doubt they may have had up to that time. The record does not show that Voyda was the victim of the alleged attempted robbery, nor does it show that the scene of said robbery was a liquor store. Counsel for appellant, in his brief, volunteers information to that effect. We find no basis for the

charge that the calling or interrogation of Voyda constituted misconduct on the part of the prosecuter.

The judgment and the order denying the motion for a new trial are affirmed.

DESMOND, P. J., and SHINN, J., concur.

70 Cal.App.2d 791

SPAHN v. SPAHN.

Civ. 14864.

District Court of Appeal, Second District, Division 1, California.

Sept. 19, 1945.

1. Divorce 🔑184(2)

Where a party to a divorce suit invokes the action of the trial court in the determination of property rights, as by submitting the matter in the pleadings and proof, such party cannot complain on appeal that the court had no authority to determine those rights. Civ.Code, §§ 137 et seq., 141, 146–148.

2. Divorce 🔑203

Where in various pleadings of both parties all property, whether community or separate, was set forth and made an issue for the court's disposition, and parties had by stipulation as well agreed that such disposition should be made, court had full jurisdiction to make an award of separate property. Civ.Code, §§ 137 et seq., 141, 146–148.

3. Appeal and error 🔑905

Stipulations made in open court when required for the regularity of an order are presumed in the absence of a contrary showing affirmatively presented on the record.

4. Evidence 🔑83(1), 89

A presumption is that official duty has been properly performed and in absence of proof to contrary the presumption controls. Code Civ.Proc. § 1963, subd. 15.

5. Judgment 🔑668(1), 681

The effect of a judgment or final order in an action before a court is conclusive upon the parties and their successors in interest and in absence of proof to contrary the presumption controls. Code Civ. Proc. § 1908.

6. Judgment 🔑346

A judgment should not be vacated, either in whole or in part, except for the most cogent reasons.

7. Judgment 🔑346

Whether the judgment is void on its face must be determined from an inspection of the judgment roll alone, and unless the record affirmatively shows that the court was without jurisdiction, the judgment is not subject to such summary action.

8. Judgment 🔑349

Unless the record shows affirmatively that something necessary to the jurisdiction of the court was not done or that something which was required was done in a manner so irregular as to make it void, the presumption is that the thing concerning which the record does not speak was properly done.

9. Divorce 🔑254

Action of court in divorce proceedings pursuant to stipulation of parties in ordering property to be placed in joint tenancy between the parties, directing that wife give lease to husband for wife's life to operate the property and requiring defendant to pay $100 per month for life for the lease, was not subject to the criticism that the order was a legal impossibility.

◆

Appeal from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Action for separate maintenance by Nellie Spahn against George L. Spahn who filed a cross-complaint for divorce wherein an interlocutory judgment of divorce was granted and a division of the property of the parties was made. From an order denying the defendant's motion to strike from interlocutory judgment of divorce a provision relative to disposition of certain real property located in Nebraska, the defendant appeals.

Affirmed.

Morris Lavine, of Los Angeles, for appellant.

Abner Warshaw, of Los Angeles (Miriam Shomstein, of Los Angeles, of counsel), for respondent.

DORAN, Justice.

This is an appeal from an order denying the appellant's motion to strike from an interlocutory judgment of divorce, provisions relative to the disposition of certain real property located in Nebraska. It is not contended that the court had no jurisdiction of the land because it was in Nebraska, but appellant maintains that there was no jurisdiction to make the disposition for the reason that the real estate was not community property.

The record discloses that on June 18, 1940, the plaintiff, Nellie Spahn, filed a complaint for separate maintenance, alleging certain Nebraska property to be community property; that thereafter, her husband filed an answer and cross-complaint for divorce which likewise alleged the Nebraska property as community property. Following these initial pleadings two amended complaints for separate maintenance were filed and a supplementary answer and cross complaint, the latter pleadings describing the Nebraska property but not denominating it as community property. On June 18, 1942 a trial was had which resulted in the granting of an interlocutory decree of divorce on the defendant-husband's cross-complaint, determining all property rights of the parties. No final judgment of divorce is shown by the record.

The following minute orders are particularly pertinent to the questions presented on this appeal:

June 18, 1942. Minute order, Dept. 16. "cause transferred from Department 1 is called for trial * * * The Court had a conference with counsel and each litigant in the chambers. * * * (Various witnesses testified.) Interlocutory decree of divorce is granted to defendant on the supplemental cross-complaint and ordered entered. Community property is awarded as follows: 1. Nebraska property to be in joint tenancy and trust, neither party to transfer or encumber same. 2. Plaintiff to give lease for her lifetime to operate this property. 3. Defendant to pay $100.00 per month for life of plaintiff for this lease. 4. Defendant to pay all taxes, etc. on property. 5. Plaintiff to have $8000.00 in Los Angeles, balance to defendant upon her death, but not to be given away by her. 6. Business in Los Angeles to defendant. 7. Maywood property to plaintiff, subject to encumbrance. 8. House in Nebraska to defendant. Furniture in Nebraska to plaintiff. 10. Insurance policy to defendant. 11. $500.00 attorney fees, $250.00 for plaintiff and $250.00 for defendant payable forthwith. 12. House in Nebraska that is sold on contract to defendant. 13. Each party to keep automobiles in their possession as separate property. *By stipulation of both parties as well as counsel, the above order is hereby made.* Attorney for plaintiff to prepare findings and judgment." (Italics added.) The above minute order has the following marginal notation: "In Case No. D193700 see Minute Order of Oct. 22, 1942, Bk. 408, Page 248, amending this order Nunc Pro Tunc."

Oct. 22, 1942. Minute order. "Cause called; plaintiff appearing with her attorneys * * * and defendant with his attorney, * * * (No reporter). After a lengthy conference in the judge's chambers, the court amends the minute order of June 18, 1942: 1.—Nebraska property to be in joint tenancy with the right of survival and defendant to give plaintiff a mortgage to protect payments of $100.00 per month to plaintiff for lease; also 3½, adding that in lease a 6 months forfeiture clause be added in the event defendant fails to make payments."

The findings of fact, filed Dec. 8, 1942 recite in Paragraph XII that the parties "have consented that this court may determine the rights and interests of each of them in or to all the property owned by them or in which they or either of them have any interest or marital rights, and have submitted to this Court the question of any disposition of all property owned by them or in which they or either of them have any interest or marital rights." In Paragraph XIII the court finds "that it is necessary to make some disposition" in reference to all of such property, and that "to protect the interest" of each party, it is necessary that such property "be owned or held by them jointly or in common."

On March 17, 1944 defendant's motion to amend the judgment was denied, and on August 17, 1944 the court denied defendant's motion to strike from the judgment the provisions relative to certain Nebraska real estate, on the ground that "said portion is in excess of the jurisdiction of the court and is void and of no effect." The present appeal is from the denial of this motion.

One of the principal contentions urged by the appellant is that "The Court has no jurisdiction to dispose of anything but the community property." Answering this argument, respondent maintains that "The court had jurisdiction to adjudicate and dispose of the property rights of the parties in the Nebraska real property, because an issue as to this property was raised by the pleadings of both parties."

Section 137 et seq. of the Civil Code empowers the court to make suitable provision by way of alimony, permanent and temporary support of wife and children, etc., and in Section 141 states that in so doing "the court must resort: 1. To the community property; then, 2. To the separate property of the husband." Sections 146 and 147 authorize the disposition of "the community property, and of the homestead," and Section 148 provides that such disposition "is subject to revision on appeal in all particulars, including those which are stated to be in the discretion of the court."

In support of the present contention appellant has cited Robinson v. Robinson, 65 Cal.App.2d 118, 150 P.2d 7, 8, where the court said, "And the power of the court in disposing of the property of the parties in a divorce action is limited to their community property. In such a proceeding the court has no power to dispose of the separate property of one of the parties, nor to carve out a life estate therein." However, as pointed out by respondent, the language of that case immediately following the portion quoted by appellant, places a different light on the situation and clearly distinguishes the case from the present litigation. In the Robinson case the court continues: "In the divorce action * * * no issue was made concerning the ownership of the real estate in question, for it was specifically alleged by the wife that the realty was the separate property of the husband. The court therefore was without jurisdiction to award to the wife a life estate therein." In the present action the record discloses that by pleadings and stipulation, both parties sought an adjudication and final disposition of all their property accumulated during a marriage of more than thirty years, regardless of its character as community or separate property. As said in the appellant's brief, "There were property interests involved and the pleadings are somewhat ambiguous concerning them." In fact, it would not be an unwarranted conclusion from the record that the parties themselves were uncertain as to the marital aspect of their property. It does appear certain, however, that they presented such property as an important issue and invited the trial court to make disposition thereof.

In the case of Callnon v. Callnon, 7 Cal.App.2d 676, 680, 46 P.2d 988, 990, cited by both parties, the court held: "Where the property rights are put in issue in a divorce proceeding, *either by specific allegations describing such property,* or by allegation that no community property existed, the decree is res judicata of such rights." In the same case, 7 Cal.App.2d at page 681, 46 P.2d at page 991, the rule is stated as follows: "It may be taken as settled that the jurisdiction of the court in a divorce proceeding over property rights is limited to the property which belongs to the community *or which is the separate property of the spouses.* This jurisdiction is found in Section 141 et seq. of the Civil Code, which authorize the division of the community property and a lien upon the separate property of the husband in aid of the enforcement of remedial orders made in the proceeding." (Italics added.)

[1] The rule which seems applicable in the present situation is explicitly stated in 27 Corpus Juris Secundum, Divorce, § 299, page 1141: "Where a party to a divorce suit invokes the action of the trial court in the determination of property rights, as by submitting the matter in the pleadings and proof, such party cannot complain on appeal that the court had no authority to determine those rights."

The above rule finds support in the California cases. In Allen v. Allen, 159 Cal. 197, 201, 113 P. 160, 162, it was said: "But the superior court in which the action for divorce must be brought is also invested with general jurisdiction to determine title to real property, whether based on legal or equitable claims, and if the parties in a divorce proceeding see fit to make the character of the property held by them—whether separate or community—an issue in the proceeding, as the Court is vested with jurisdiction to determine that question as fully as if the title were put in issue in a direct action brought for that purpose, the same effect must be given to its judgment as if such an action had in fact been brought. While it was not necessary that the question * * * should have been an issue in the divorce proceeding between these parties, they nevertheless did make it such. Neither party objected to doing so, but both invited it." Likewise in Marshall v. Marshall, 138 Cal.App. 706, 707, 33 P.2d 416, 417, the court said: "The issue as to the property having been fairly made and by both parties submitted to the court for determination, the court had jurisdiction to determine the question involved as to the character of the property, and to quiet the title of the rightful owner thereto." A like holding is found in Roy v. Roy, 29 Cal.App.2d 596, 603, 85 P.2d 223.

[2] It should be noted that, in plaintiff's original complaint the Nebraska land was alleged to be community property; that in appellant's original answer and cross complaint this real estate was likewise alleged to be community property; that in the first amended complaint both Nebraska and California properties were listed as community property; that in the second amended complaint the same property was listed but the phraseology was changed to allege "That plaintiff and defendant own the following property in the State of Nebraska". In the answer to this second amended complaint the appellant denies that the property was owned by the husband and wife, "but admits that he owns" such property; similar allegations are contained in the supplemental answer and cross complaint which also allege "That there is community property, the nature and extent of which the plaintiff is not informed." It will thus be seen that in the various pleadings of both parties, all property, whether community or separate, is set forth and made an issue for the court's disposition.

The appellant's opening brief contains the statement that the record showed "no stipulation with reference to the disposition of any property". There was, however, such a stipulation, as shown by the minute order of June 18, 1942 hereinbefore mentioned, which recites that on the day of the trial "The Court had a conference with counsel and each litigant in the chambers", and after ordering the Nebraska property to be put in joint tenancy, concluded with the following statement: *"By stipulation of both parties as well as counsel, the above order is hereby made."* (Italices added.) Confronted with this minute order, appellant's reply brief states that such order had been overlooked, and then takes the position "That the minute order of June 18, 1942 merely purports to make a tentative division of community property; it does not purport to dispose of separate property and may not be construed as showing a stipulation that separate property might be disposed of." This argument appears to be based upon the language of the minute order which said, "community property is awarded as follows"; thereafter, however, disposing of all of the property owned by the parties. In view of the entire record, a synopsis of which is set forth at the beginning of this opinion, appellant's contention is untenable. It entirely loses sight of the fact that, whatever the character of the property, whether community or separate, the parties had by their pleadings and stipulation, made its disposition an issue for the court to decide. Under the California cases to which attention has been directed, the trial court then had full jurisdiction to decide such issue.

Nor is there merit in appellant's further point that "The court prior to the entering of the interlocutory decree manifested its intention not to follow the stipulation referred to in the minute order of June 18, 1942, and its authority cannot be enlarged by such stipulation." In this connection attention is called to the marginal notation on said minute order, showing that on Oct. 22, 1942, and prior to the entry of findings and judgment, the court made a further minute order "amending this order (the minute order of June 18th) Nunc Pro Tunc". This amendment was also made, as was the original order, "After a lengthy conference in the judge's chambers"; it does not purport to alter the original minute order except as specifically set forth in the nunc pro tunc amendment; it does not state or suggest that the amendment was not made pursuant to the stipulation of the parties, and there is no evidence that the stipulation had been withdrawn.

[3] Moreover, as stated in the case of In re Estate of Kent, 6 Cal.2d 154, 163, 57 P.2d 901, 906, "Stipulations made in open court when required for the regularity of an order are presumed, in the absence of a contrary showing affirmatively presented on the record." The record here discloses no such contrary showing, and Paragraph XII of the trial court's findings specifically recites that the parties "have consented that this court may determine the rights and interests of each of them in or to all the property owned by them or in which they or either of them have any interest or marital rights, and have submitted to this Court the question of any disposition of all property * * *".

It may also be noted that at the time the aforesaid minute orders were made, no objection by the appellant appears of record. Likewise, the court's findings and the interlocutory judgment of divorce which disposed of the property pursuant to the terms of the amended minute order, entered December 8, 1942, appear to have called forth no protest by the appellant until March 16, 1944 when a motion to amend the judgment was made and denied. The appellant's motion to strike out the judgment provisions relative to the Nebraska property was not made until August 17, 1944. The present appeal is not from the judgment but from the order of September 20, 1944 denying this motion.

The respondent contends that the appellant's attack on the interlocutory judgment comes too late, having been made much more than six months after its entry. Bancroft v. Bancroft, 178 Cal. 367, 368, 173 P. 582, is cited in support thereof, where the court said: "It is well settled that an interlocutory decree of divorce is only subject to attack in the proceeding in which it is entered upon appeal, or by proceedings under section 473 of the Code of Civil Procedure, within six months after the entry of such decree, and that after the expiration of the period within which either of these forms of attack may be made, the trial court is without jurisdiction to alter or set aside its interlocutory decree." Neither of the indicated procedures were followed in the instant case. See also Abbott v. Superior Court, 69 Cal. App. 660, 232 P. 154; De Haven v. Superior Court, 114 Cal.App. 253, 300 P. 95.

It is the appellant's position, however, that "Where a judgment is void upon its face and requires only an inspection of the judgment roll to determine its invalidity, it may, upon motion of the parties or upon the court's own motion, be vacated or stricken from the files", and that where portions of a judgment are void, such portions may likewise be stricken. Appellant's contention in this regard appears to be founded on the argument previously considered herein, that the trial court was without jurisdiction to dispose of anything other than community property; further, that by ordering the Nebraska realty placed in joint tenancy with a life lease for which the defendant is to pay the plaintiff $100 per month, such portions of the judgment were rendered "void for the reason that the disposition the court attempted to make is a legal impossibility."

Assuming that appellant is correct in stating that portions of a judgment which are void on the face of the record may be vacated at any time, it does not follow that such a situation is here presented. A close scrutiny of the record does not disclose any invalidity on the face of the judgment, nor any want of jurisdiction to render such judgment. Indeed, as hereinbefore shown, quite a contrary situation is revealed, for the entire record indicates that both parties specifically listed all property in the pleadings, and that it must have been their intention that the court should make final disposition thereof. Appellant's contention in this regard, appears to be based, not upon any invalidity appearing on the record, but rather upon a partisan interpretation of the situation which is supported neither by California law nor by the facts of the instant case.

Clearly, appellant's unsupported statement that the court's disposition in the present case is void upon its face and therefore "a dead limb upon the judicial tree", quoted from the case of People v. Greene, 74 Cal. 400, 16 P. 197, 199, 5 Am. St.Rep. 448, does not make it so. As used in the Greene case, the quotation was doubtless pertinent, for a default judgment was there involved which was unsupported by either personal service of summons or by an affidavit and order for publication of summons. The Greene case therefore, bears not the slightest resemblance to the present litigation.

[4-7] As stated in appellant's closing brief, "The presumption is that official duty has been properly performed (C. C. P. Sec. 1963, subd. 15) and the effect of a judgment or final order in an action before a court of this state is conclusive upon the parties and their successors in interest. (C. C. P. Sec. 1908)." Likewise, C. C. P. Sec. 1963, subd. 16 provides that a presumption exists "That a court or judge, acting as such * * * was acting in the lawful exercise of his jurisdiction." These presumptions, not having been satisfactorily controverted, must govern the present situation. That a judgment should not be vacated, either in whole or in part, except for the most cogent reasons, cannot well be disputed. The following quotation from 14 Cal.Juris. page 1024, is here pertinent: "Whether the judgment is void on its face must be determined from an inspection of the judgment-roll alone, and unless this record affirmatively shows that the court was without jurisdiction, the judgment is not subject to such summary action."

[8] Certainly the record in this case is not an exemplar of perfection, but again quoting from California Jurisprudence, Vol. 15, page 69, it may be said that "Unless the record shows affirmatively that something necessary to the jurisdiction of the court was not done, or that something which was required was done in a manner so irregular as to make it void, the presumption is that the thing concerning which the record does not speak was properly done." No such vital irregularity is shown by the record here before the court.

[9] Appellant's argument that the judgment provisions concerning the Nebraska property are void "for the reason that the disposition the court attempted to make is a legal impossibility", cannot be sustained. The complaint here is that, after ordering the property to be placed in joint tenancy between husband and wife, the court could not legally direct that the plaintiff give a lease to defendant "for her (plaintiff's) lifetime to operate this property", and require "Defendant to pay $100.00 per month for life of plaintiff for this lease." This argument, according to appellant's brief, is based upon the proposition that the "Relation of landlord and tenant could not exist between the parties for the reason that there being a unity of title and of interest, one interest could not be subordinate to that of the other." The respondent's answer to this contention is first, that in making such disposition the court "merely acted pursuant to the agreement between appellant and respondent that it do so, so as to protect their respective interests." As heretofore indicated in this opinion, respondent's view appears to be correct.

In reference to the placing of a lease upon joint property, it is stated in 33 Corpus Juris, page 911: "Joint tenants may contract with each other concerning the use of the common property such as for the exclusive use of one of them." This is exactly what was done in the instant case for the respondent wife gave to the appellant husband the exclusive right "to operate this property", in consideration of the appellant paying respondent $100 per month for life. "Furthermore", as said in respondent's brief, "respondent in her consideration to accept the $100.00 monthly payments during her lifetime, waived her right to receive any additional income, rents, or profits from the property which consists of 240 acres of valuable farm land, to which she as a joint tenant was lawfully entitled thereto."

That there exists no legal inconsistency between joint tenancy and a contractual relation of landlord and tenant entered into by the joint tenants, seems clear. The appellant has at some length discussed the general rules concerning possession and enjoyment of jointly held property, and in particular, the rule of law that "one cotenant may not maintain an action against the other co-tenant who is in sole possession of the property to recover rent for the other's occupancy", etc. The case of McWhorter v. McWhorter, 99 Cal.App. 293, 278 P. 454, 456, is cited as authority. In the absence of any lease or agreement between the joint tenants this rule is correct, but neither the McWhorter case nor any other to which attention has been directed, has stated that it is improper for joint tenants to contract with each other as they will. In fact, the rule as heretofore quoted from 33 C. J., page 911, expressly recognizes that right. In the McWhorter case property had been deeded to the parties as husband and wife although the name of the grantee "wife" was assumed without warrant. The court there said: "In the present case the premises were not leased or rented, but, upon the contrary, were occupied by the defendant alone as his domicile. He was therefore not liable to the plaintiff for its rental value * * *." The case is not authority for the appellant's contention.

To do anything other than order an affirmance in the instant litigation would tend to impeach the legal sanctity of a judgment which was invited and apparently acquiesced in by both parties at the time it was entered; one which is valid on its face and which, under the law, must be presumed regular in all respects.

The order appealed from is therefore affirmed.

YORK, P. J., and WHITE, J., concur.

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PEOPLE v. BELTOWSKI.

Cr. 2322.

District Court of Appeal, First District, Division 2, California.

Sept. 28, 1945.

1. Criminal law ⚷26

The "corpus delicti" is the body, substance, essential elements of crime.

See Words and Phrases, Permanent Edition, for all other definitions of "Corpus Delicti".

2. Robbery ⚷24(1)

In prosecution for robbery, victim's testimony as to three defendants' entry into witness' store, pressing of pistol against his side by one of defendants, demands for money by two of them, and taking of specified sum from cash register, in witness' immediate presence, was sufficient to prove corpus delicti. Pen.Code, § 211.

3. Criminal law ⚷563

Proof of the "corpus delicti" is proof that a crime has been committed by someone.

4. Criminal law ⚷404(4)

In robbery prosecution, where victim testified that defendants wore caps of certain type at time of holdup, caps of such type, found by police officers at defendants' lodgings, were admissible as link in chain of defendants' identification as perpetrators of crime.

5. Criminal law ⚷404(4)

Accused's wearing apparel is admissible if some connection is shown between it and accused and between it and supposed crime.

6. Robbery ⚷26

In robbery prosecution, improbability of complaining witness' testimony that defendants remained in witness' store at least ten minutes to rifle cash register, as bearing on witness' identification of defendants as perpetrators of crime, was jury question.

7. Robbery ⚷24(3)

In robbery prosecution, evidence was sufficient to identify defendants as perpetrators of crime charged.

8. Criminal law ⚷404(3)

In prosecution for robbery, a pistol, found by police officers in defendant's room at time of his arrest, was admissible, though it did not meet specifications in prosecuting witness' testimony that weapon used was either black or brown.

9. Criminal law ⚷338(1)

The prosecution may lay before jury evidence of all circumstances surrounding accused's arrest.

10. Criminal law ⚷404(3)

The weapon used in commission of alleged robbery need not be positively identified.

11. Criminal law ⚷404(3)

Defendant's possession of means used to commit crime renders such means admissible, though not identified by eyewitness of offense charged.

12. Robbery ⚷26

In robbery prosecution, testimony of defendant, his wife, and others that defendant was in or near room, wherein he and such other witnesses were found by police officers after crime, during hour in which prosecuting witness testified that crime was committed, raised a conflict presenting question for jury.

13. Criminal law ⚷1169(3)

Where defendant, in entering plea of not guilty of robbery, admitted his previous conviction of another such crime, as alleged in information, and on cross-examination he admitted his previous convictions of four felonies, including one for robbery, admission of police officer's testimony that defendants were going to tell witness all about their crimes, including that charged, and other testimony as to other offenses of defendant, was not prejudicial.

14. Criminal law ⚷698(1)

In prosecution of three men for robbery, admission of typewritten statement of one of them, admitting his participation in crime and showing that codefendant had pistol used in holdup, without objection on such codefendant's behalf, was not error, though he did not sign statement, nor accede to anything contained therein, and flatly denied participation in robbery.

Appeal from Superior Court, City and County of San Francisco; Alfred J. Fritz, Judge.

John Beltowski was convicted of robbery, and he appeals.

Affirmed.

C. F. Eschwig, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

GOODELL, Justice.

The appellant John Beltowski and one Tony Castropil were jointly accused by information, of robbery. By a separate information one Earl Swanson was charged with the same offense. The three defendants were tried together before a jury and were convicted and sentenced to the state prison. Beltowski is the only defendant who has appealed.

On Saturday evening March 11, 1944, about 8:30, William F. Lazootin was sitting alone in his store on DeHaro Street in San Francisco. Three men entered, one of whom, later identified by Lazootin as Beltowski, pointed a pistol at him, twice pressed it against his body and demanded money. Another, later identified by Lazootin as Swanson, made the same demand, went to the cash register and emptied it of everything ($37) "including pennies" and turned it all over (less a $5 bill which fell to the floor) to one of the others. Lazootin testified that they were in the store not less than ten minutes.

The next day Beltowski and Castropil were arrested in a Market Street rooming house where they were found with Beltowski's wife and another woman. In the room were found several pistols, a dismantled shotgun, some shells, some money, three caps (headgear) and other miscellaneous things.

Before trial the police officers investigating the case took a typewritten, question-and-answer statement from Castropil in which he admitted his part in the robbery and stated that Swanson (whom he named therein as "Eddie") was a party to it, together with Beltowski. When Swanson was brought back from San Diego, whence he had gone on March 13, he added his signature to that of Castropil on the statement. Beltowski never signed it, and when it was read to him by the police before the trial he said "I have nothing to say." Castropil and Swanson at the trial admitted having signed the statement but Castropil testified that it had been forced from him by the police by physical violence and by threats of further beating. At the trial all three defendants denied any connection with the hold-up.

[1-3] It is claimed that "as to appellant Beltowski nowhere has the corpus delicti been proven." "The rightful meaning of this term is 'the body, the substance, the essential elements of the crime.'" People v. Watters, 202 Cal. 154, 157, 259 P. 442, 443. Lazootin, the victim, within the first few minutes of the trial testified to the entry of the three men, the pressing of the pistol against his side, the demand for money and the taking of $32. in his immediate presence. That testimony established prima facie the body of the offense and all the elements of it. Sec. 211, Penal Code. "Proof of the 'corpus delicti' is proof that a crime has been committed by someone." People v. Locurto, 97 Cal.App. 185, 191, 275 P. 462, 465; see also People v. Davis, 47 Cal.App. 2d 331, 335, 117 P.2d 917, and 8 Cal.Jur. p. 166, sec. 247.

It is next claimed that there is an insufficiency of the evidence as to the identification of the appellant. Counsel claims that "If the statements of Castropil and Swanson were thrown out there would not be a shred of evidence connecting appellant Beltowski with the crime." This is not true for the complaining witness, in his testimony that a robbery had been committed by someone, identified "the big fellow," Beltowski, as the man who had held the pistol against his side. While the identity of the perpetrator of a crime is no part of the corpus delicti (People v. Meyers, 7 Cal. App.2d 351, 354, 46 P.2d 282, and cases cited), still, as said in 8 Cal.Jur. p. 166, sec. 247, "* * * proof of the criminal agency frequently involves proof of the defendant's guilt". See also People v. Spencer, 58 Cal.App. 197, 221, 208 P. 380. Thus in this case, the same testimony that established "the body, the substance, the essential elements of the crime" connected the appellant with its commission.

[4-7] The testimony shows that the store was well lighted by electricity. Lazootin testified that "the big man came first" and he pointed, in the presence of the jury, to the appellant. He repeated "This guy first," and testified that he wore a Russian cap with a badge in front, and had the pistol. Swanson, he said, came in second and Castropil last. He told how each was dressed, and how each wore a Russian cap of the same type. None was masked, but Beltowski, according to Lazootin, held his hand over his mouth. When asked on cross-examination if he could tell the color of the hair of the three men, Lazootin answered,

"I saw their faces as they are now, but I didn't see the hair because they had the caps on their head."

The next morning when the officers went to the lodgings of Beltowski and Castropil they found there "some dark caps, something like a chauffeur's cap." At the trial one of the officers testified that the three caps then shown him were, "if not the exact caps, they are exact duplicates of the caps." In fact, he said, "one has a button on I wondered about at the time myself."

Two days after the robbery, Lazootin and his wife arrived at police headquarters while an inspector was interrogating Beltowski and Castropil. The inspector was about to ask Lazootin if he had ever seen the two men before, when Lazootin excitedly interrupted him and pointed two fingers at the two men. The inspector asked if he was sure and he answered "yes." "He says they had caps on, Russian caps, indicating they had caps on at the time of the hold up." The inspector then had them put on the caps, and Lazootin indicated Beltowski, and "went through the same gestures as he did this morning about holding the hand and the gun in his hand." The three caps were admitted in evidence over objection. They were of course admissible, for they formed one of the links in the chain of identification. "Wearing apparel of the accused is admissible in evidence, provided some connection between it and the accused, and between it and the supposed crime is shown." 8 Cal.Jur. p. 145, sec. 229. The complaining witness by direct testimony identified the appellant at the trial. Counsel for appellant says: "Complaining witness' story is improbable as to the men remaining in his store at least ten minutes to rifle a cash register. It does not take that length of time to clean the contents of a cash register. This point is made to show the improbability of his identifying the men who held him up. * * * Especially improbable as to the length of stay of the men who robbed him when he states no customers came in the store during the time they were there." In the first place these were purely jury questions. Secondly, the longer they were in the store, the better the opportunity for certainty of identification. It is argued that Lazootin has eye-sight in only one eye and he so testified, but the strength or weakness of the identification is a matter for the determination of the jury. People v. Farrington, 213 Cal. 459, 463, 2 P.2d 814; People v. Radovich, 122 Cal.App. 176, 179, 180, 9 P.2d 542 and cases cited. In People v. Braun, 14 Cal.2d 1, 5, 92 P.2d 402, 404, it is said: "To entitle a reviewing court to set aside a jury's finding of guilt, the evidence of identity must be so weak as to constitute practically no evidence at all. People v. Farrington, 213 Cal. 459, 2 P.2d 814; People v. Friday, 18 Cal.App.2d 197, 63 P.2d 303. In a case such as the present one, where there is positive direct testimony that the defendant was one of the perpetrators of the crime, it is incumbent upon him to show that the testimony is inherently unbelievable in order to prevail." The proof of identification was sufficient.

[8-11] The appellant urges that the pistol admitted in evidence was not identified by Lazootin, who testified that the weapon was either black or brown. Apparently none of the pistols found in the lodgings of Beltowski and Castropil met this specification and from this fact the appellant argues that the proof broke down, citing People v. Mullen, 69 Cal.App. 548, 231 P. 588. That case is distinguishable from this because there the weapon was not found in the defendant's possession. It was found in the possession of one Logue, who was not connected with the crime by any evidence, but who was in the company of the defendant at the time of the arrest. The admission of the gun in evidence was held erroneous for there was no evidence connecting the defendant with it in any way. See People v. Radovich, supra, and People v. Davis, 106 Cal.App. 179, 189, 289 P. 194, where the Mullen case is distinguished. Here, however, two or three pistols were found in Beltowski's room (together with other arms and ammunition) at the time of the arrest. See People v. Nakis, 184 Cal. 105, 113, 114, 193 P. 92. It was proper for the prosecution to lay before the jury all the circumstances surrounding the arrest. People v. Mar Gin Suie, 11 Cal.App. 42, 103 P. 951; People v. Stoerkel, 87 Cal.App. 336, 340, 262 P. 825. Nor need there be positive identification of a weapon. People v. Ferdinand, 194 Cal. 555, 563, 564, 229 P. 341. The possession by a defendant of means such as were used to commit the crime renders the same admissible even though not identified in any way by the eye-witness to the offense. People v. Radovich, supra, and cases cited. People v. Hale, 81 Cal.App. 734, 735, 254 P. 639; People v. Stoerkel, supra; People v. Mar Gin Suie, supra; People v. Hightower, 40 Cal.App.2d 102, 107,

104 P.2d 378. In People v. Abbey, 124 Cal. App. 412, 417, 12 P.2d 655, the victim did not even see the gun, which was concealed in the defendant's coat pocket. It was nevertheless held admissible.

[12] By way of alibi the appellant, his wife, the other woman and Castropil gave testimony to the effect that between 8 and 9 o'clock on the evening in question both the appellant and Castropil were in or near the room on Market Street. Had the jury believed this testimony an acquittal doubtless would have followed. Such testimony raised a conflict which the jury resolved against the appellant and its finding cannot be disturbed on appeal. People v. Spillard, 15 Cal.App.2d 649, 652, 59 P.2d 887.

[13] The information alleged that in 1942 Beltowski had been convicted of the crime of robbery in Alameda county, and in entering his plea of not guilty he admitted it. Under cross-examination he admitted having been convicted of four felonies, one of which was robbery. Objection was made to the testimony given by an officer that "They [the defendants] were going to tell me all about their crimes in San Francisco, this one and others that they committed." This and other testimony touching on other offenses was not prejudicial in view of the admissions of four prior convictions.

[14] It is claimed that the admission in evidence of Castropil's statement was prejudicial error. The statement incriminated both the appellant and Swanson. It showed that Beltowski had the pistol and that Swanson took the money out of the cash register while Castropil stood in front of Lazootin "so they wouldn't see the man was being held up from the street." This, of course, was damaging to the appellant. Counsel who represented all three defendants objected to the introduction of the statement as to Swanson but not as to this appellant. When it was being offered the defense started to make a general objection, whereupon the prosecution interrupted with the suggestion that the defense had the right to cross-examine the inspector (under whose examination it was being identified and offered). Counsel adopted this suggestion and carried on a rather extensive preliminary cross-examination as to the circumstances under which the statement was obtained from Castropil. It was after this that the statement was read and introduced, and it went into evidence without any objection on behalf of the appellant. The corpus delicti had been proved at the very outset of the trial. As already stated, the appellant had not signed the statement, nor acceded to anything it contained, and he flatly denied participation in the robbery. Nevertheless there was no objection and we see no error in its admission.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, Justice pro tem., concur.

71 Cal.App.2d 150

DAVIS v. DAVIS.

Civ. 12892.

District Court of Appeal, First District, Division 2, California.

Oct. 5, 1945.

1. **Divorce** ⚷326

A foreign divorce decree regular on its face is entitled to a presumption of validity and burden is upon party attacking it to overcome such presumption.

2. **Divorce** ⚷329

Evidence did not establish that Nevada decree was void on ground that hushand's Nevada residence was a sham.

3. **Divorce** ⚷329

Evidence was insufficient to overcome presumption of validity of Nevada divorce decree secured by husband on ground of fraud in procurement of decree in that husband gave his attorney a false address of wife so that she did not receive a copy of summons.

Appeal from Superior Court, City and County of San Francisco; Robert McWilliams, Judge.

Action by May Rich Davis against Edward Guy Davis for separate maintenance. From a judgment for defendant, plaintiff appeals.

Affirmed.

A. L. Crawford, of San Francisco, for appellant.

Henry Jacobsen, Jr., of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued for separate maintenance. Defendant set up as a defense a decree of divorce granted in the State of Nevada. The trial court found this decree valid and entered judgment for the defendant. On this appeal the only real question involved is whether the evidence supports this finding.

The evidence leading up to the entry of the Nevada decree is widely conflicting, both plaintiff and defendant frequently testifying to directly opposite versions of the same circumstances. Stating the facts in the light most favorable to respondent, and as they were found to be true by the trial court, it appears that for a number of years the defendant was employed as a yard master at the San Francisco terminal of the Southern Pacific Railroad, and the plaintiff in a hair dressing shop in the same city. The parties were married in 1922 and lived together as man and wife until sometime in 1933 when by mutual consent they separated and thereafter occupied separate residences.

In 1938 defendant was sent to a tuberculosis sanitarium in Arizona where he remained for about four months and was then returned to a San Francisco hospital. After he returned to his work he was found to have suffered a recurrence of his former ailment and in October, 1941, went to Reno, Nevada, for the purpose of seeking employment in a high, dry climate. He testified that he intended at that time to make Nevada his permanent residence and that he spent several weeks in interviewing employees of the Southern Pacific Railroad Company in that section in an endeavor to exchange his position in San Francisco with a like position in the Nevada section. After he had acquired a domicile within the State of Nevada in accordance with the laws of that state he filed a suit for divorce. A judgment and decree of divorce was entered therein on January 13, 1942, and immediately thereafter defendant remarried.

The appellant herein attacks the Nevada decree upon two grounds, first, that the domicile in Nevada was sham and taken solely for the purpose of securing a divorce, and, second, that there was fraud in the procurement of the decree in that a copy of the summons was addressed to her at 1735 Ellis St. in San Francisco whereas her correct address was 735 Ellis St.

[1, 2] As we said, the trial court found against appellant on both issues. As to the question of sufficient domicile the case is on a line with Windsor v. Windsor, 42 Cal.App.2d 464, 109 P.2d 363, and Plante v. Plante, 54 Cal.App.2d 318, 128 P.2d 787. In the latter case the court cited Delanoy v. Delanoy, 216 Cal. 27, 13 P.2d 719, 86 A.L.R. 1321, and Cardinale v. Cardinale, 8 Cal.2d 762, 68 P.2d 351, to the accepted rule that a foreign decree regular on its face is entitled to a presumption of validity and that the burden is upon the party attacking it. That principle controls here. The appellant merely casts some suspicion upon the testimony of the respondent but the trial court believed his testimony and found accordingly. Hence, the burden cast upon the appellant to overcome the presumption of validity of the decree was not sustained.

[3] The question of fraud in the procurement of the decree is based upon the claim that respondent gave his attorney a false address so that the copy of summons was not received by the appellant. She testified that she had lived at 735 Ellis St. in San Francisco since 1938 and that the respondent had lived there with her. This was denied by the respondent and the trial court found his testimony to be true. It appears that the appellant had moved her residence to different places in San Francisco on numerous occasions without notifying her husband; that she did the same as to her place of employment; there was thus some excuse for his not knowing her place of abode at that particular time. It may be that a more diligent inquiry would have enabled him to discover the correct address, but the assertion that the false address was given purposely to withhold from appellant kuowledge of the pending action was not supported by any competent evidence. Here again the suspicious circumstances are referred to as indicating fraud. But the trial court rejected the inferences and believed the testimony of the respondent and that ends the controversy.

The judgment is affirmed.

GOODELL, J., concurs.

71 Cal.App.2d 152

PEOPLE v. CRINOS.

Cr. 2356.

District Court of Appeal, First District,
Division 2, California.
Oct. 8, 1945.

Rehearing Denied Oct. 23, 1945.

Criminal law 🔑1182

Where no briefs were filed by either side, though extensions of time had been granted and counsel was notified that no further extensions would be granted prior to expiration of latest extension, and District Court of Appeal found that cause was fairly tried and without error, conviction was affirmed.

◆

Appeal from Superior Court, City and County of San Francisco; Herbert C. Kaufman, Judge.

Andrew Crinos was convicted of unlawfully having in his possession and under his control a certain firearm, to wit, a revolver, and he appeals.

Affirmed.

Alfred J. Hennessy, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

The defendant was convicted on an information charging a violation of section 2, Ch. 339, p. 696, Statutes 1923, as amended by Ch. 1098, p. 2316, Statutes 1931, as unlawfully having in his possession and under his control a certain firearm, to wit, a revolver. He has appealed from the judgment and from the order denying a motion for a new trial.

Respondent was tried to a jury and the two arresting officers testified that at the time of the arrest the defendant let drop from his possession to the floor a 32 Smith & Wesson revolver which was received in evidence. Proof was also made that the defendant had formerly been convicted of a felony and that at the time of judgment herein it appeared that he was a violator of his parole. The defendant and one other witness testified in his behalf but their testimony was completely discredited during their cross-examination.

A clerk's and a reporter's transcript were filed herein on May 10, 1945. Thereafter, upon affidavits of appellant's counsel that "he has worked diligently on the preparation" of appellant's opening brief, extensions of time for that purpose were granted to August 20, 1945, and on July 24, 1945, counsel was notified that no further extensions would be granted. No briefs have been filed by either side. However, we have read the entire transcript and find that the cause was fairly tried and without error.

The judgment and the order are affirmed.

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71 Cal.App.2d 170

PEOPLE v. RILEY.

Cr. 1898.

District Court of Appeal, Third District.
California.
Oct. 9, 1945.

1. Homicide 🔑332(2)

Conviction of manslaughter cannot be sustained unless the evidence affirmatively shows, or it can be reasonably inferred therefrom, that death resulted from an unlawful act of accused or an act committed without due caution. Pen.Code, § 192.

2. Homicide 🔑332(2)

Conviction of manslaughter could not be sustained where evidence was insufficient to warrant an inference that bruise over decedent's left ear, which resulted in subdural hematoma and subsequent death, was caused by deliberate act of accused or a lawful act performed in an unlawful manner or without due caution or circumspection. Pen.Code, § 192.

◆

Appeal from Superior Court, Sonoma County; W. D. L. Held, Judge.

William Ashton Riley was convicted of manslaughter, and he appeals.

Judgment reversed and cause remanded.

DeMeo & DeMeo, of Santa Rosa, and J. Oscar Goldstein, of Chico, for appellant.

Robt. W. Kenny, Atty. Gen., David K. Lener, and Jas. O. Reavis, Deputy Attys. Gen., and Chas. J. McGoldrick, Dist. Atty., and Bernard C. Plover, Deputy Dist. Atty., both of Santa Rosa, for respondent.

THOMPSON, Justice.

The defendant, William Ashton Riley, was indicted by the grand jury of Sonoma County for the crime of murdering Jessie L. Brassill, with whom he had been living for several years on her ranch in Rincon Valley as man and wife. He was convicted by a jury of manslaughter. It is contended, on appeal, that the corpus delicti was not proved and that there is no evidence of the deceased having died as the result of an injury sustained through any act or fault of the defendant.

Mrs. Jessie L. Brassill, a widow, who was about forty-five years of age, lived on a seven acre ranch which she owned near Santa Rosa, in Sonoma County. She also owned stocks and securities of the par value of about $15,000. Her husband had been dead for several years. She had no children. Her property was subject to a revocable declaration of trust in which the Wells Fargo Bank & Union Trust Company of San Francisco was named as trustee.

The defendant was commonly called "Slim." He was fifty-three years of age and had formerly been a farmer and stockman. He had a wife and four children from whom he had been separated for six years or more. He was not divorced. He owned no property. He became acquainted with Mrs. Brassill about 1940, after which he lived with her on her Rincon Valley ranch as man and wife. He assisted in the management of the farm, claiming that they were partners.

On November 10, 1943, Mrs. Brassill executed her will, giving all of her property to the defendant, designating him as her friend. She appointed him executor of that will, without bonds. On February 8, 1944, she executed a declaration of trust with relation to all of her property, including the seven acre Rincon Valley ranch, and the stocks and securities of the approximate par value of $15,000. The Wells Fargo Bank was made trustee. Most of the residue of her estate was given to the defendant, and in the event of his death it was to be equally divided between Miles Riley, a son of the defendant, and Mary Roberts, a friend of the trustor.

Both the deceased and the defendant were addicted to the use of intoxicating liquor. She sometimes drank to excess. It appears that they usually lived in harmony. There is, however, some evidence to the contrary. Lawrence Keck, a neighbor, who frequently visited the Brassill ranch, testified that he once saw the defendant slap the deceased. Mrs. Ida Walker, another neighbor, who visited the Brassill home on numerous occasions, testified that she went there on June 26, 1944, to sell a war bond, and that while she was making out the bond Mrs. Brassill and the defendant were arguing over some matter, and the witness heard the defendant say to Mrs. Brassill, "Yeah, I will see you six feet under first." No explanation was made regarding that remark except that Mrs. Brassill then said: "I'm sore at Slim." Mrs. Evelyn Elliott, who was a friend of the deceased, was visiting her home on and after June 25th. She was the only eye-witness to the incident which occurred on June 27th between the defendant and Mrs. Brassill in the back yard of the premises over the removal of some calves, during which, the prosecution claims, the defendant struck or knocked Mrs. Brassill down, causing the injury above her left ear which the physicians testified resulted in her death four days later. The chief issue on this appeal is whether there is any evidence that the defendant caused the traumatic injury over the deceased's left ear, which the doctors testified resulted in hemorrhage of the brain or subdural hematoma and subsequent death.

[1] Conceding that Mrs. Brassill died as a result of the injury over her left ear and that she sustained that injury during the episode over the removal of the calves, we are unable to find any evidence that it was inflicted by the defendant or that it was the result of an unlawful act of his or committed without due caution or circumspection. Unless the evidence affirmatively shows, or it may be reasonably inferred therefrom, that the acts of the defendant produced the death of Mrs. Brassill "in an unlawful manner, or without due caution or circumspection," it becomes necessary to reverse the judgment for lack of evidence. The evidence refutes the assumption that the defendant struck or kicked the deceased so as to cause the

injury from which her death ensued. In fact there is no evidence as to how the injury was sustained. She did not complain of that injury. When she arose and brushed the dirt from her clothing and walked to the house, Mrs. Elliott said that she passed her and that she was then "in normal condition." Evidently Mrs. Elliott saw no injury over the left ear. She did say "She had her left eye a little bit puffed up, I believe, but that was from a fall the night before." Her testimony clearly infers that the defendant pushed Mrs. Brassill away to protect her from being hurt by the calves, and not for the purpose of injuring her. Indeed she says the deceased was once knocked down by the rump of a fractious calf. The deceased had voluntarily gone out into the yard and attempted to take the calves away from the defendant. We have no way of determining whether she was injured as a result of being knocked down by the calf, or how she received the bruise over the left ear from which she died. It does not appear to be a reasonable inference which the jury was entitled to draw from the evidence that she received that injury as a result of the defendant's shoving her down, or that he did so without due caution or circumspection. Subdivision two of Section 192 of the Penal Code defines involuntary manslaughter as death resulting from "the commission of an unlawful act, not amounting to a felony;" or "the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection."

There is some evidence to the effect that on the afternoon of June 26th, while washing some milk cans in the basement, Mrs. Brassill stumbled and fell upon the concrete floor among the cans. We assume the inference intended to be drawn from that circumstance is that she may have then struck her head on the cans or on the concrete floor and thereby suffered the injury from which she subsequently died. But she then stated that she was not injured and asserted that she was absolutely all right. There was no evidence of an injury over the left ear or in the vicinity of the left temple prior to the affair with relation to the removal of the calves as above stated. Doctor Gertrude Van Steyn, the family physician of Mrs. Brassill, testified that on June 22nd she made a complete examination of Mrs. Brassill, who was her patient, and found her to be in first-class physical condition, with no apparent ailment or injury on her head or otherwise.

Mrs. Elliott appeared to be a favorable witness for the defendant. She saw the defendant go into the back yard about 10:30 in the forenoon of June 27th, toward the corral where two calves were then chained to a fence. The witness was standing opposite the open basement door. She heard Mrs. Brassill call to the defendant and tell him to leave the calves alone, that she would feed them. He replied that they were his calves because he had paid for them, and that he was going to take them down to the cows to feed them. He proceeded to unhitch the calves and started to lead them away by means of the chains which were fastened about their necks. They were frantic and wild, and jumped about as he led them away with a chain in either hand. Mrs. Elliott then left the basement and went upstairs where she looked out of the window and saw the completion of that incident over the removal of the calves. In effect, she stated that Mrs. Brassill went into the back yard to protest against the defendant's removal of the calves and that as she approached the defendant pushed her away several times to prevent her from being hurt by the calves. Mrs. Elliott says that the defendant did not strike the deceased but that she was hit on one occasion by a calf which was plunging about and knocked her down; that the defendant pushed her away with his foot to protect her from the calves; that on one other occasion he placed his hand on her jaw and pushed her away, and that she then again fell to the ground; that she arose and brushed off her clothing and returned to the house, passing the witness as she went up to her room, without saying anything; that the witness saw her plainly and saw no evidence of any injury upon her head or face; that she complained of no injury; that Mrs. Brassill went into her bedroom and closed and locked the door. Several hours later the defendant inquired for Mrs. Brassill and upon being told that she had gone to her room he went upstairs and knocked at the door, but receiving no reply he forced the door open and found her lying on the floor by the side of the bed, unconscious. She then had an apparent injury over her left ear, "two or three inches in diameter." She was placed on her bed. Her physician, Doctor Gertrude Van

Steyn, was immediately called to the house where she examined the patient. The doctor then found Mrs. Brassill suffering from an injury or bruise "on the left temple," together with several other bruises on her left ankle and right arm. The doctor testified that they appeared to be of recent occurrence because they were not of a yellow or green tinge. The patient was still unconscious and she was removed to the Sonoma County Hospital where she arrived at 5:30 P. M. She died four days later on July 1st. Doctor Harding Clegg performed an autopsy and testified that the patient died as a result of "subdural hematoma with the contributing cause of bronchial pneumonia"; that he found a clot of blood of considerable size at the base of the brain caused by the traumatic injury over the left ear which pool of blood might have been accumulating for a period of several hours or even days before death ensued. Other physicians testified similarly. There is adequate evidence to assume death ensued from hemorrhage affecting the brain caused by the traumatic injury which was found over her left ear and in the vicinity of the left temple. We may also assume that the accompanying pneumonia which subsequently developed was merely incidental to the traumatic injury from which she really died.

The real question is whether there is any evidence, or reasonable inferences to be drawn therefrom, to indicate that the defendant caused the injury from which Mrs. Brassill died, by striking her with his fist or with the chains which he held in his hands, or by kicking her when she was on the ground, or by unlawfully shoving her so that she fell and struck her head upon some object, or that she was stepped upon or kicked by one of the calves while she lay upon the ground. We may even assume, in support of the judgment, that a quarrel existed between them over the removal of the calves and that the defendant was angry or unduly violent; that he did not act with due caution or circumspection. But the only eye-witness to the affair was Evelyn Elliott, a summary of whose evidence reads as follows:

"He [the defendant] told her to go back to the house. * * * She said they were her calves and he said they were his calves because he paid for them. * * * They [the calves] were jumping all around. * * * He was hanging onto the calves.

"Q. What did Mrs. Brassill do? A. She was trying to hang on both of them. * * *

"Q. What did you see, if anything, when you looked out the window? A. I seen Mr. Riley still hanging onto his calves. * * *

"Q. Now you stated that Mr. Riley pushed her. Is that correct? That is what you saw from the window? A. Pushed her back. * * *

"Q. Now what if anything else happened there? A. Well, the calves knocked her down. * * * She kept trying to get him to bring them back and he was trying to go down to the barn with them and they were milling around, as you say, and he kept trying to push her back out of the way.

"Q. Yes, and will you go on? A. Well, not very much more to tell.

"Q. What is there, if anything? A. Well, the calves jumped into her and pushed her down. * * * Slim pushed her over out of the way a couple of times with his feet to keep her—out of the way of the calves. * * * She was [then] on her knees.

"Q. On her knees? A. On her side.

"Q. Flat on the ground? A. No. * * * Her shoulders and head were up off of the ground.

"Q. How many times did he push her with his foot? A. About twice. * * *

"Q. And in what portion of her body did he push her with his foot? A. The hip. * * * She went over a little bit, not all of the way over. * * *

"Q. How did she get into that position, if you know? A. The calves knocked her down.

"Q. Did Mr. Riley knock her down at any time? A. He didn't knock her down, he pushed her away and she stumbled, she didn't fall flat.

"Q. What part of her body did he push? A. I think he put his hand alongside of her jaw and just pushed her back and she stumbled. * * *

"Q. She stumbled once? A. Yes.

"Q. What caused her to go to the ground the other time? A. The calves. * * * Swishing their hind quarters around. * * *

"Q. Did you observe whether or not Mrs. Brassill struck her head at any time during any of these falls? A. You mean the falls in the yard?

"Q. Yes. A. No.

"Q. After Mrs. Brassill had been on the ground * * * among these calves, did you see her get up at all? A. Well, she got up after Slim pushed her out of the way and brushed her clothes off and started towards the house. * * *

"Q. Did you see her walking toward the house * * *? A. Yes.

"Q. And you met her upstairs, is that right? A. Yes.

"Q. Describe her condition as you saw it when she came upstairs, * * *. A. Normal.

"Q. She looked normal at the time? A. Just the same."

As we have previously stated, several hours later the defendant inquired for Mrs. Brassill, and upon being told she had gone to her room, he went upstairs and finding the door locked he forced it open and found her lying unconscious on the floor beside her bed. There was some discussion as to whether she had taken sleeping pellets. A bottle of such pellets, which was nearly empty, was found on the window sill. Doctor Van Steyn was promptly called and came to the house. The patient was examined and taken to the County Hospital in a comatose condition, where she was treated, but failed to regain consciousness, and died as a result of the injury over her left ear, four days later.

[2] We are driven to the conclusion there is no adequate evidence to sustain the verdict and judgment that she died as a result of either a deliberate act of the defendant, or from a lawful act performed in an unlawful manner, or without due caution or circumspection. The evidence leaves an uncertainty regarding the source of the injury from which Mrs. Brassill died. She may have died as the result of having been knocked down by the calf, or she may have received the injury which resulted in her death by falling from the bed, or she might have fainted and struck her head upon some object in her room as she fell. There is no evidence from which the jury could have inferred that she was injured as the result of the defendant's conduct.

The judgment is reversed and the cause is remanded.

ADAMS, P. J., and PEEK, J., concur.

COMBS v. LOS ANGELES RY. CORPORATION et al.*

Civ. 14841.

District Court of Appeal, Second District, Division 1, California.

Oct. 5, 1945.

Hearing Granted Nov. 29, 1945.

1. Appeal and error ⇒930(1)

On appeal from verdict and judgment for plaintiff, the court must view the evidence in the light most favorable to plaintiff.

2. Carriers ⇒331(5)

Where the conduct of a streetcar passenger in riding on streetcar steps can be said as a matter of law to constitute "unlawful riding on steps," in violation of ordinance, and his failure to comply with ordinance proximately contributes to his injuries, passenger is guilty of contributory negligence barring recovery.

3. Negligence ⇒136(14)

Whenever the violation of a statute or ordinance contributes proximately to plaintiff's injury, the issue ceases to be one of fact and becomes an issue of law, the consideration thereof being removed from the trier of facts.

4. Trial ⇒142

Only when it can be said as a matter of law that no reasonable conclusion is legally deducible from the evidence other than would sustain a verdict for defendant and that any other holding would be so lacking in evidentiary support that a reversal would be imperative, or a trial court would be required to set it aside, is a trial court justified in taking case from a jury.

5. Carriers ⇒320(8), 347(8)

Whether passenger, who boarded crowded streetcar and was standing on second step when injured in collision with automobile, was "unlawfully riding on steps" in violation of ordinance, so as to be guilty of contributory negligence barring recovery against streetcar company, or whether he was merely using steps as a means of ingress, was question for jury.

6. Appeal and error ⇒1064(1)
Carriers ⇒348(5)

In action against street railway company for injury sustained by passenger who had boarded a crowded streetcar and was standing on second step when collision with automobile occurred, an instruction that, if passenger's conduct violated ordinance prohibiting passengers from riding on steps, such conduct constituted negligence per se and that violation of the ordinance merely raised a presumption of negligence which was not conclusive, was prejudicially erroneous in that violation of ordinance is conclusive evidence of negligence.

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* Subsequent opinion 177 P.2d 293.

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Appeal from Superior Court, Los Angeles County; Harold B. Jeffery, Judge.

Action by Cecil Combs against Los Angeles Railway Corporation and Joseph Commodore for injuries sustained by plaintiff while a passenger on streetcar, as result of a collision between streetcar and automobile operated by defendant Commodore. Verdict for plaintiff as against defendant Railway Corporation and from the judgment entered upon the verdict and, from order denying its motion for judgment notwithstanding the verdict, defendant Railway Corporation appeals.

Reversed and remanded for new trial.

Gibson, Dunn & Crutcher, E. H. Chapman, and Philip C. Sterry, all of Los Angeles, for appellant.

Tripp, Callaway, Sampson & Dryden, Walter L. Gordon, Jr., and Lowell L. Dryden, all of Los Angeles, for respondent Cecil Combs.

WHITE, Justice.

This appeal is from a judgment in favor of plaintiff, entered upon the verdict of the jury in an action by plaintiff against defendants, Los Angeles Railway Corporation and Joseph Commodore, involving a collision between a street car operated by defendant Railway Corporation and an automobile operated by defendant Commodore, as a result of which plaintiff sustained personal injuries. By his complaint, plaintiff alleged that, on October 23, 1943, he was a passenger upon a street car owned and operated by defendant Railway Corporation; that, because of the negligent manner in which said street car and the automobile of defendant Commodore were operated, they came into collision with each other, thereby injuring plaintiff. By their respective answers, both defendants denied the negligence charged against them and, as a separate defense, pleaded contributory negligence upon the part of plaintiff.

The cause proceeded to trial before a jury and, at the conclusion of plaintiff's case, both defendants challenged the sufficiency of the evidence by motion for a nonsuit based on the claim that the evidence conclusively established that, as a matter of law, plaintiff was guilty of contributory negligence. This motion was denied. Upon the same grounds, at the close of the trial, each defendant moved the court for a directed verdict, which motions were likewise denied.

The jury returned its verdict in favor of plaintiff and defendant Commodore and against defendant Railway Corporation. The last named defendant thereupon moved the court for a judgment non obstante veredicto, basing such motion upon each and all of the grounds stated in the motion for nonsuit and directed verdict. This motion was also denied.

Thereafter, defendant Railway Corporation, being unsuccessful in its motion for a new trial, prosecutes this appeal from the judgment entered upon the verdict and from the order denying its motion for judgment notwithstanding the verdict.

[1] Viewing the evidence in the light most favorable to plaintiff, as we must following a verdict in his favor, the facts of the case may be thus epitomized: On the afternoon in question, at about five o'clock, plaintiff, together with several other prospective passengers, was waiting for a street car at 32nd Street and a private right-of-way maintained by defendant Railway Corporation. Upon arrival of the street car at the 32nd Street loading zone, the waiting pedestrians boarded the same with plaintiff getting on last. After the other people who were waiting had boarded the car, plaintiff being last in the waiting line proceeded up to the second step of the car when it started up. From this position, plaintiff paid his fare, received a transfer, and then endeavored to make his way up and into the car, but discovered that it was so crowded with passengers that it was impossible for him to do so. As to the crowded condition of the street car upon its arrival at 32nd Street, plaintiff, when testifying as a witness, was asked: "When the street car arrived at 32nd Street did you make any observation as to how many people were inside the street car?" to which he answered "I didn't." Upon another occasion plaintiff

was asked the following questions and gave the following answers thereto:

"Q. And you saw when you got on the car that the rear of the street car was heavily crowded, did you not? A. No, sir, I didn't notice until I got on there, until the car started off.

"Q. As a matter of fact, you noticed that other passengers were riding on the steps before you got on? A. Yes, sir."

With plaintiff standing on the second step, the street car proceeded a block to 33rd Street, at which point the automobile of the co-defendant Commodore collided with the steps upon which plaintiff and other passengers were riding, ripping the steps from the body of the street car and precipitating plaintiff on his head into the street to his injury.

Appellant does not challenge the jury's finding that it was guilty of negligence and concedes that, because the evidence upon that issue was in conflict, the jury's finding thereon is binding upon this court.

As a first ground for reversal, appellant earnestly contends that the evidence conclusively established that plaintiff was guilty of contributory negligence as a matter of law, by reason of which the trial court erred in denying the motions for nonsuit, directed verdict, and judgment non obstante veredicto.

[2, 3] At the trial there was introduced into evidence a traffic ordinance of the City of Los Angeles, numbered 77,000, section 80.47 of which reads as follows: "Unlawful Riding. No person shall ride upon the fender, steps, or running board of any street car or vehicle." That plaintiff was standing upon the steps of a street car at the time of the accident must be conceded. And, if his riding thereon can be said as a matter of law to constitute "unlawful riding" on the car steps in violation of the ordinance, then he was guilty of contributory negligence, if his failure to comply with the ordinance proximately contributed to his injury. Hurtel v. Albert Cohn, Inc., 5 Cal.2d 145, 147, 52 P.2d 922; Schultheiss v. Los Angeles Ry. Corp., 11 Cal.App.2d 525, 527, 54 P.2d 49. Whenever the violation of a statute or ordinance contributes proximately to the plaintiff's injury, the issue ceases to be one of fact and becomes an issue of law, the consideration thereof being removed from the trier of fact. The rule in this regard is thus set forth in Lorry v. Englander Drayage & Warehouse Co., 108 Cal.App. 116, 118, 291 P. 467, 468:

"In the absence of the ordinance, the question of whether appellants were negligent in riding on the running board would depend upon whether a person of ordinary prudence would have so ridden under the circumstances then existing, and this would have been a question properly to be left to the jury. Ivancich v. Davies, 186 Cal. 520, 199 P. 784; Strong v. Olsen, 74 Cal.App. 518, 241 P. 107. But the ordinance enacted an absolute standard of conduct, and removed from the jury the right to speculate as to what that ideal composite the man of ordinary prudence might or might not have done under similar circumstances. It thereby substituted certainty of conduct for uncertainty. If the violation of the ordinance proximately contributed to their injuries, appellants were guilty of negligence as a matter of law."

In the instant case, respondent contends that, while he was *using* the steps of the street car in an effort to board the same, he was not *riding* on the steps within the meaning of that term as used in the ordinance. In Connard v. Pacific Electric Railway Co., 14 Cal.2d 375, 377, 94 P.2d 567, 568, our Supreme Court says: "There is a clear distinction between the conduct of one who over a period of time deliberately stands or 'rides' on the steps of a moving car, and the conduct of one who merely undertakes, after the signal to stop has been given, to use the steps in the course of a continuous route from car seat to station platform." The case just cited involved the construction of the aforesaid section of the Los Angeles City Ordinance, with which we are here concerned. The evidence in that case showed that plaintiff, a passenger on the car, announced to the conductor his intention to alight at the next regular stop, whereupon the conductor gave the usual signal for the motorman to stop and the plaintiff proceeded rearward as the car began to slow down. It had slowed down to a speed of two or three miles per hour when plaintiff reached the back end and was continuing to decrease speed. Believing the car would come to a full stop, plaintiff started down the steps preparatory to alighting. He had reached the second or middle step, holding on to the hand rod, when, instead of coming to a full stop, the car suddenly "gave a jerk, or lurch, followed by a rapid forward movement."

Plaintiff was thrown off the steps and onto the station platform sustaining serious injuries. In reversing a judgment entered upon a directed verdict, the Supreme Court said, 14 Cal.2d at page 378, 94 P.2d at page 569: "In the present case, it was for the jury to say whether, under the evidence, plaintiff's position on the steps was so maintained over a period of time as to constitute 'riding' thereon, or whether he was attempting to alight from the car while in motion, or whether he was merely making a proper and necessary use of the steps as a means of exit, timing his descent to the station platform to occur simultaneously with the anticipated full stop of the car." Manifestly, one does not usually get on or off a street car without ascending or descending the steps thereof, and it is not unusual for a street car to start up while some passengers are on the steps waiting for those in front of them to pay their fares and proceed into the car, thereby making room for the passengers temporarily upon the steps to proceed onto the rear platform and into the car. From the very language of the ordinance here in question, it is apparent that the legislative body intended there should be some elasticity in the application of its provisions and they, therefore, did not use the word "stand" but used the word "ride" on the steps, thus signifying the legislative intent that not everyone who, under any and all circumstances, stands upon the steps while entering or leaving the car is guilty of a violation of the law. As was said by this court in Shannon v. Thomas, 57 Cal. App.2d 187, 197, 134 P.2d 522, 527: "In other words it must be held that the triers of fact, in applying the section to a given case, may have resort to the well established rule that what a person of ordinary prudence would have done under similar circumstances can be considered a practicable compliance with the law. Mauchle v. Panama-Pacific International Exposition Co., 37 Cal.App. 715, 174 P. 400; McLellan v. Cocola, 133 Cal.App. 9, 24 P.2d 200."

[4, 5] In view of the inviolable right of a litigant to a trial by jury as guaranteed by both the federal and state constitutions, it is an established rule that only when it can be said as a matter of law that no reasonable conclusion is legally deducible from the evidence other than would sustain a verdict for defendant and that any other holding would be so lacking in evidentiary support that a reversal on appeal would be imperative or a trial court would be required to set it aside, that justification exists for the court to take a case from a jury and render the decision itself. Therefore, upon this appeal the question to be determined by us is whether respondent was, as a matter of law, guilty of contributory negligence which proximately contributed to his injuries when he stood upon the steps of the street car in the manner and under the circumstances which characterized his conduct. Unless it can be said that reasonable minds can draw but one inference from the conduct of plaintiff and that inference points inevitably to the conclusion that the use of the steps by plaintiff in the instant action constituted a "riding" thereon in violation of the ordinance as distinguished from a proper, transitory, temporary or necessary use of the steps as a means of ingress to the street car, then we cannot disturb the ruling of the trial court in permitting the issue of contributory negligence to be submitted to the jury,

In that regard, it must be conceded, as contended by appellant, that respondent admitted that he "saw other passengers riding on the steps," but we cannot agree with appellant in its claim that the evidence shows that respondent saw "that it would be impossible for him to enter the interior of the car" before he got onto the step. Furthermore, after he had gotten onto the second step the car was in motion and continued uninterruptedly for only one short block, when the collision with the automobile occurred. In other words, from the time plaintiff ascended the steps until the happening of the accident, he could not have alighted with safety, because the street car was in motion. It is also true that after he got onto the steps of the car plaintiff paid his fare and received a transfer, but can it be said that the only reasonable inference to be drawn from the aforesaid conduct is that plaintiff *deliberately* stood or rode on the steps of the street car for such a period of time and in such a manner as to constitute a violation of the City Ordinance, rather than that when he got onto the step he did so with the intent and purpose of wending his way upward to the rear platform and the interior of the car? Even though plaintiff observed others riding on the steps of the car as it arrived at 32nd Street, can it be said as a matter of law that this fact should have deterred him from attempting to board the street car? Reasonable minds might conclude therefrom that such passengers standing on the steps as the car approached the loading zone were preparing to alight therefrom.

Under the facts of the instant case, the foregoing debatable questions were properly submitted to the jury, and if the jury, as evidently it did, credited the testimony of plaintiff and the evidence favorable to him, they would be justified, had they been properly instructed, in concluding that his occupancy of the steps of the street car was not in violation of the ordinance. The court, therefore, properly denied the motions for nonsuit, directed verdict, and judgment non obstante veredicto.

Finally, appellant contends that grave prejudicial error was committed by the trial court by giving a certain instruction. Appellant offered an instruction which it is not necessary to here set forth and which instruction was modified and by the court given on its own motion. The challenged instruction reads:

"I instruct you that Section 80.47 of the Municipal Code of the City of Los Angeles, in effect at the time of the happening of this accident, provided as follows: 'No person shall ride upon the fender, steps, or running board of any street car or vehicle'.

"Conduct which is in violation of the code sections just read to you constitutes negligence per se. This means that if the evidence supports a finding, and you do find, that any party to this action did so conduct himself it requires a *presumption* that he was negligent. *However, such presumption is not conclusive.* It may be *overcome* by other evidence showing that under all the circumstances surrounding the event, the conduct in question was excusable, justifiable, *and such as might reasonably have been expected from a person of ordinary prudence.* In this connection, you may assume that a person of ordinary prudence *will reasonably endeavor to obey the law* and will do so *until causes, not of his own intended making, induce him, without moral fault, to do otherwise.*" (Emphasis added.)

[6] In the light of what we have hereinbefore stated, it is manifest that the instruction as given was not a correct statement of the law, was conflicting, and might well intend to confuse the jury. By it the jury was first advised that conduct in violation of the pertinent ordinance constituted negligence per se, then they were told that conduct in violation of the ordinance merely raised a presumption of negligence and that such presumption was not conclusive. No rule is more firmly established in this state than that a violation of a statute or ordinance is conclusive evidence of negligence. Connard v. Pacific Electric Railway Co., supra, 14 Cal.2d at pages 376-379, 94 P.2d 567; Hurtel v. Albert Cohn, Inc., supra, 5 Cal.2d at page 147, 52 P.2d 922; Lorry v. Englander Drayage & Warehouse Co., supra, 108 Cal.App. at page 118, 291 P. 467; Atkins v. Barnum, 132 Cal.App. 506, 509, 23 P.2d 103; Scragg v. Sallee, 24 Cal.App. 133, 144, 140 P. 706. This erroneous instruction was not corrected in any other instruction and, in giving it, the court committed prejudicial error. Upon a retrial, the jury should be instructed regarding the "distinction between a proper, transitory, temporary, or necessary use of the * * * steps of a car, and the 'riding' on such * * * steps in violation of an ordinance * * *." Connard v. Pacific Electric Railway Co., supra, 14 Cal.2d at page 378, 94 P.2d at page 569. The jury should also be instructed that if they are convinced that the conduct of the plaintiff was in violation of the ordinance, then such violation is conclusive evidence of negligence and that, if the violation of the ordinance was a proximate cause of the accident plaintiff was guilty of contributory negligence and cannot recover.

In the interests of justice and to the end that the jury may be properly instructed in accordance with the views herein expressed, it is ordered for the foregoing reasons that the judgment be, and it is hereby, reversed and the cause remanded for a new trial.

YORK, P. J., and DORAN, J., concur.

71 Cal.App.2d Supp. 843

FARRAR v. FRY et al.

Civ. A. 5986.

Appellate Department, Superior Court,
Los Angeles County, California.
Sept. 25, 1945.

1. Landlord and tenant ⇨124(1)
War ⇨4

Under federal rent regulation, requiring landlord to provide same essential services, as those provided on date determining maximum rent and defining "services" as including the furnishing of telephone, apartment house landlords were obligated to continue to provide a tenant with such telephone service as they were furnishing occupant of such tenant's apartment on such date. Emergency Price Control Act of 1942, § 201, 50 U.S.C.A.Appendix § 921.

2. Landlord and tenant ⇨124(1), 149, 200(1½)
War ⇨4

The federal rent regulation, requiring landlord to provide same essential services as on date determining maximum rent, prevents apartment house landlords from passing on to tenant new federal excise tax on telephone service charged for at flat rate for each outgoing call on such date, but, where charge on such date was based on formula producing payments by tenant in varying amounts depending on telephone company's charge to landlord, regulation is not violated by adding tax to such charge. Emergency Price Control Act of 1942, § 201, 50 U.S.C.A.Appendix § 921.

3. War ⇨4

In tenant's action against apartment house landlords to recover penalty for violation of federal rent regulation by passing on to plaintiff federal excise tax on telephone service furnished him by defendants, plaintiff, relying on rent at another date than that determining maximum rent under regulation, if plaintiff's apartment was then rented, had burden of proving that premises were not then rented in order to establish overcharge. Emergency Price Control Act of 1942, § 205(e), as amended by Act June 30, 1944, 50 U.S.C.A. Appendix § 925(e).

4. Landlord and tenant ⇨124(1), 149, 200(1½)
War ⇨4

Apartment house landlords, charging tenant 5 cents for each outgoing telephone call, plus charge made therefor to landlords by telephone company, were justified in charging tenant 10 per cent. of such fixed charges after effective date of federal statute imposing 10 per cent. tax on amounts paid by subscribers for local telephone service, but could not pass on to tenant amount of federal tax on switchboard service maintained by landlords. Internal Revenue Code, § 3465, as amended in 1942, 26 U.S.C.A. Int.Rev.Code § 3465.

Appeal from Municipal Court of City of Los Angeles; Charles B. MacCoy, Judge.

Action by Robert C. Farrar, Jr., against Arthur Fry, individually and doing business as the Fry Operating Company, and another, to recover a penalty and attorney's fees for violation of a federal rent regulation for housing. Judgment for plaintiff, and defendants appeal.

Reversed and remanded.

Morris Lavine, of Los Angeles, for appellants.

Frederick H. Clapp, of Los Angeles, for respondent.

PER CURIAM.

The principal legal questions here presented for our determination are:

(1) Where telephone service is furnished a tenant of an apartment house through a centrally maintained switchboard, a charge being made the tenant for outgoing but none for incoming calls, is this one of "the same essential services" which the landlord must continue to provide after the effective maximum rent date, under the federal Rent Regulation for Housing (8 Federal Register 7322, issued pursuant to the Emergency Price Control Act of 1942, Pub. L. No. 421, 77th Cong. 2d Sess., c. 26, 56 Stat. 29, 50 U.S.C.A.Appendix § 921).

(2) Whether an increased federal excise tax on telephone service, chargeable to the landlord subsequent to the effective date of the Rent Regulation, may be passed on to the tenant without violating the maximum price regulation freezing rents.

The plaintiff brought this action under Section 205(e) of the Emergency Price Control Act of 1942 (56 Stat. 23, 50 U.S. C.A.Appendix § 901 et seq.; amended as to section 925 in 1944) to recover $50.00, plus reasonable attorney's fees, on the theory that, by passing on all of the new federal excise tax on telephone service to the plaintiff tenant, thus charging him 12 cents for an outgoing telephone call instead of the former rate of 10 cents, the maximum rental chargeable to him was increased and the Rent Regulation for Housing was thereby violated.

From the court's findings it appears that the plaintiff has been a tenant in the defendant's apartment house since about January 1, 1942, such building being located within the Los Angeles defense-rental area. During the period of plaintiff's tenancy the defendants have furnished him telephone service from a central switchboard, as one of the services provided with the accommodations secured to plaintiff by his tenancy. Prior to January, 1943, the defendants charged plaintiff 10 cents for each outgoing "local call" placed for him through the switchboard, but thereafter increased such charge to 12 cents per call, which plaintiff paid to defendants. Upon these facts the trial court entered a judgment awarding plaintiff $50.00, attorney's fees of $150.00, and costs. From such judgment this appeal follows.

[1] With reference to the first enumerated question, Section 3 of the Rent Regulation for Housing provides that the landlord "shall, as a minimum, provide with housing accommodations the same essential services, furniture, furnishings, and equipment as those provided on the date determining the maximum rent." Certain exceptions there noted are not material to the issues here presented. The "services" referred to in Section 3 are defined in Section 13(7) of the same Regulation, and include the furnishing of *telephone,* as well as light, heat, water, etc. It is, therefore, clear that the defendants herein are obligated, under the Rent Regulation, to continue to provide such telephone service to plaintiff as they were furnishing the occupant of plaintiff's apartment on the date determining the maximum rent.

[2] The answer to the second question is to be determined by the facts in each particular case. In the matter of local calls, it is a common practice for the hotel or apartment house operator to charge the tenant a flat rate of 5 cents or 10 cents per outgoing call without regard to the actual cost of such call to the operator. Such a system makes no effort to reflect any formula whereby the tenant is advised as to what portion of the sum he pays is represented by the telephone company's charge to the landlord, what part, if any, is tax and what part represents a service charge to be retained by the landlord. Where such a flat rate method was in use on the maximum rent date, the landlord is prevented by the Rent Regulation from passing on to the tenant the federal excise tax on telephone service in question, and any such additional charge constitutes an increase in the maximum rent for which redress could be sought and obtained as was done in this case.

Where, however, the system in effect on the maximum rent date as to telephone service was based on a formula which produced payments by the tenant in varying amounts, depending upon the telephone company's charge, any tax and the service charge added by the hotel or apartment house operator, and proof is presented of the communication to the tenants and a reasonable understanding by them of the existence and method of computation of such formula, no violation of the Regulation is committed by adding such excise tax to the charge made to the tenant.

[3] In order to prove that he had been overcharged, it was, of course, essential for plaintiff to establish the maximum charge that could legally be made. His complaint foreshadowed the method by which he intended to do this in its allegations, which the trial court found to be true, that he had lived in one of defendants' apartments since January 1, 1942, and that up until November of that year for the telephone service furnished him he was charged nothing for incoming calls, but for each outgoing call he was charged five cents plus whatever sum the telephone company charged the defendants, including an excise tax in the case of long distance calls amounting to more than fifty cents. The evidence, however, fails to support the finding of plaintiff's tenancy since January 1, 1942, but on the contrary clearly establishes the commencement thereof as of June, 1942. Plaintiff had, at separate times, occupied two apartments in the apartment house here in question, but no evidence was offered as to the rental schedule in effect therefor on any date prior to the commencement of his tenancy in June, 1942, nor as to what "essential services" were, prior to that time, furnished in return for such rental charge.

The date determining the maximum rent here, according to section 4 and Schedule A of the Regulation, is March 1, 1942, if the apartment in question was then rented; but if it was not then rented, the maximum rent is the last rent during the two months ending on that date, or if not rented in that period, the first rent received thereafter. No evidence was offered of any rental of this apartment at any time prior to the commencement of plaintiff's tenancy in June, 1942; but on the other hand no showing that it was not rented on or before March 1, 1942, appears, the evidence being silent on the subject. In view of the wording of the Regulation, which establishes as the maximum rent a rent received on any other date than March 1, 1942, only on condition that the premises in question were not rented on that date, it is a part of plaintiff's burden of proof to show that the premises were not then rented, if he relies on the rent at any other date as the maximum. This he has not done, nor has he shown what was the rent on March 1. His proof of the maximum rent therefore fails.

[4] On a new trial it may be that such evidence will be furnished together with evidence disclosing that the maximum legal charge for the telephone service for outgoing calls was made up as follows: 5 cents for each call plus the charge made by the telephone company to the defendants for each call. Up to November, 1942, the evidence revealed, the charge made by the telephone company for each call had included, in the case of long distance calls amounting to more than fifty cents, a federal tax of 10 cents or more, as required by section 3465 of the Internal Revenue Code as published in 26 U.S.C.A. Int.Rev. Code, § 3465. No tax was added to the local calls, for none was imposed, but it is apparent that had a tax been collected it would have been added, for the basis of the charges was 5 cents to the house plus the amount collected from the house by the telephone company, for each call. Whatever charge was made to the house for the use of the switchboard, if any, did not appear in the charge made to the plaintiff; it was doubtless covered in the general charge of 5 cents collected by the house.

Section 3465 of the Internal Revenue Code was amended, effective November 1, 1942, whereby a tax was levied of 10 per cent upon "the amount paid by subscribers for local telephone service and for any other telephone service" not taxed by other parts of the section. The incidence of such tax is upon the charge made to defendants by the telephone company for the use of a switchboard, as well as upon the charge for the telephone line and the calls made. Ten per cent of the telephone company's 5 cent charge for local calls was a tax directly imposed upon such calls which would amount to one-half cent for each call. Upon this basis defendants would be justified in charging plaintiff such extra one-half cent for each local outgoing call made by him after November 1, 1942.

The evidence shows that the additional one and one-half cents of the 2 cent added charge for each outgoing local call was the tax levied upon the switchboard service maintained by defendants. This tax cannot be passed on to the plaintiff tenant by the defendants herein, as the formula, by which the amount to be charged the plaintiff for any call was to be determined, did not include any added cost to defendants in maintaining or operating their switchboard. This would be true whether such increased cost to defendants was caused by a higher rate charge imposed by the telephone company for the use of such equipment, an excise tax thereon by the government, or a salary raise for the defendant's telephone operator.

The judgment is reversed and the cause is remanded for a new trial, appellants to recover their costs of appeal. The appeal from the order denying motion for a new trial is dismissed.

SHAW, P. J., and BISHOP and KINCAID, JJ., concur.

OLWELL et al. v. HOPKINS et al.*

Civ. 14922.

District Court of Appeal, Second District, Division 2, California.

Oct. 9, 1945.

Hearing Granted Dec. 6, 1945.

1. Judgment 🔑572(2)

A judgment upon the sustaining of general demurrer on ground that an absolute defense is disclosed by the allegations of the complaint constitutes a judgment on the merits and is a bar to a subsequent action based upon the same facts.

2. Judgment 🔑572(2)

Where complaint sought an accounting with respect to a joint enterprise allegedly entered into between a resident of the state and plaintiff's assignor, a foreign corporation not authorized to do business in the state, thereby disclosing that the contract was void as to the corporation and its assigns, a judgment entered upon sustaining general demurrer to the complaint constituted a judgment on the merits and was a bar to a subsequent action based upon the same facts.

3. Judgment 🔑584

A judgment rendered by a court of competent jurisdiction on the merits, which has become final, is conclusive as to the rights of the same parties in a subsequent action involving the identical subject matter and the same cause of action.

4. Judgment 🔑948(2)

Where complaint disclosed on its face that it involved the identical subject matter and same cause of action as a prior action, the bar of the prior judgment on the merits was properly raised by a general demurrer to the complaint.

◆

Appeal from Superior Court, Santa Barbara County; Ernest D. Wagner, Judge.

Action by Eugene E. Olwell and Murray M. Olwell, as copartners doing business under the firm name of Independent Distributing Company, against W. L. Hopkins and others to recover real property and for an accounting. From a judgment of dismissal, predicated upon the sustaining of defendants' demurrer without leave to amend, plaintiffs appeal.

Affirmed.

Norris Montgomery and Heaney, Price, Postel & Parma, all of Santa Barbara, for appellants.

Scheuer, Ryon & McMahon and Julien F. Goux, all of Santa Barbara, and Combs & Murphine, of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment of dismissal predicated upon the sustaining of defendants' demurrer without leave to amend to plaintiffs' amended complaint in an action to recover real property and to have an accounting, plaintiffs appeal.

The essential facts are these:

Prior to the filing of the present action plaintiffs filed against defendants an action in the Superior Court of Santa Barbara County, No. S. B. 32442. In such action plaintiffs alleged that they became owners of the cause of action alleged therein by virtue of an assignment to them of the assets of the Independent Distributing Company, a corporation of the State of Washington; that in 1929 that corporation entered into an agreement with one W. L. Hopkins for the conduct of a business enterprise for growing and dealing in food crops and farming; that upon the dissolution of the corporation in December, 1936, all of its interests in the joint venture were taken over by these plaintiffs. Action No. S. B. 32442 was brought to recover certain lands which the joint venture had leased for farming purposes and which had been managed for the partnership by defendant Hopkins. Plaintiffs also demanded an accounting and damages. Upon motion of defendants in such action a judgment of dismissal was entered. Thereafter an appeal was taken from the judgment by plaintiffs. This appeal was dismissed on March 31, 1943, and such judgment thereafter became final.

On January 25, 1943, the present action was instituted, being No. S. B. 34361. In the present action the facts pertaining to the filing, rulings, appeal and dismissal in action No. S. B. 32442 are fully pleaded in the complaint as amended. Defendants' general demurrer to the complaint as amended was sustained on the ground, among others, that the judgment in action No. S. B. 32442 constituted a bar to the present action under the doctrine of res judicata, whereupon the present judgment of dismissal was entered.

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* Subsequent opinion 168 P.2d 972.

There are two questions necessary for us to determine, which will be stated and answered hereunder seriatim:

[1] First: *Did the judgment of dismissal predicated upon the sustaining of defendants' demurrer in action No. S. B. 32442 constitute an adjudication upon the merits?*

This question must be answered in the affirmative and is governed by this rule of law: A judgment upon the sustaining of a general demurrer on the ground that an absolute defense is disclosed by the allegations of the complaint constitutes a judgment on the merits and is a bar to a subsequent action based upon the same facts. (See v. Joughin, 18 Cal.2d 603, 606, 116 P.2d 777; Goddard v. Security Title Insurance & Guarantee Co., 14 Cal.2d 47, 52, 92 P.2d 804.)

[2] Applying the foregoing rule to the facts of the present case, the record discloses that on December 28, 1942, the prior case, action No. S. B. 32442, duly and regularly came on for hearing upon defendants' motion to dismiss on the ground that the contract of partnership or joint venture which constituted the gravamen of plaintiffs' cause of action to enforce a constructive trust was void and illegal for the reason that it appeared from the face of the complaint to be a continuous contract made and entered into in 1927 and in continuing existence until 1936, which contract provided for the carrying on of intrastate business in California; that at no time during the period when performance was had thereunder was the foreign corporation which was alleged to be a partner or joint venturer qualified to do business under the laws of the State of California; which law in effect at the time made such contract illegal and void as to such foreign corporation and its assigns, the plaintiffs.

The motion was fully argued and submitted to the trial court. Thereafter defendants' motion was granted and a judgment of dismissal entered and an appeal taken by the plaintiffs from such judgment to the Supreme Court on January 7, 1943. This appeal was dismissed by plaintiffs March 31, 1943, and the judgment in the prior action has become final.

It thus clearly appears from the record that the ruling in the prior action was based upon a matter of substance,* in that the complaint as amended disclosed upon its face that plaintiffs did not have a cause of action against defendants. Hence such judgment was a judgment upon the merits of the cause of action attempted to be alleged in such prior case.

Second: *Was the judgment in action No. S. B. 32442 res judicata so far as the present suit is concerned?*

[3] This question must also be answered in the affirmative and is governed by this rule: A formal judgment rendered by a court of competent jurisdiction on the merits, which has become final, is conclusive as to the rights of the same parties in a subsequent action involving the (1) identical subject matter and (2) same cause of action. (Elliott v. Bertsch, 59 Cal.App.2d 543, 549, 139 P.2d 332. See 15 Cal.Jur. [1924] p. 146, sec. 195.)

[4] Plaintiffs in their opening brief at page 7 concede the applicability of the foregoing rule to the present case, when they say: "* * * it may be assumed that there are present the elements of notice and of identity of persons and subject matter in the two actions involved, so if the judgment in case No. 32442 is res adjudicata it would operate as a bar and not an estoppel (15 Cal.Jur. 136)". Since it is conceded that the parties and subject matter in the two actions are identical, it clearly follows that the prior judgment on the merits constitutes a bar to the subsequent action, and that this bar was properly raised by a general demurrer to the complaint as amended, which pleading discloses on its face the identity of the parties and subject matter of both actions.

In view of our conclusions it is unnecessary to discuss other questions argued by counsel.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., concurs.

Hearing granted; SCHAUER, J., not participating.

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* The ruling was not based upon a formal or technical defect in the complaint and thus did not fall within the third or fifth rule as stated by our Supreme Court in Goddard v. Security Title Ins. & Guarantee Co., supra, 14 Cal.2d at page 52 et seq., 92 P.2d at page 806 et seq.

71 Cal.App.2d 168

WETZEL v. WETZEL.

Civ. 14893.

District Court of Appeal, Second District, Division 1, California.

Oct. 9, 1945.

1. Judgment 🔑340

Doctrines limiting the functions of an action in equity to set aside a decree are not applicable to a motion made in the action itself and within the time prescribed by statute to set aside an interlocutory decree of divorce on ground of fraud and coercion. Code Civ.Proc. § 473.

2. Divorce 🔑165(1), 184(5)

The questions presented by timely motion to set aside interlocutory decree of divorce on ground of fraud and coercion were addressed to discretion of trial court and order granting such motion would not be disturbed in absence of showing of insufficient evidential support or abuse of discretion. Code Civ.Proc. § 473.

◆

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Action for divorce by Edwin L. Wetzel against Grace A. Wetzel, wherein defendant filed a cross-complaint. From an order granting defendant's motion to vacate an interlocutory decree of divorce, plaintiff appeals.

Order affirmed.

Nadia Williams, of Glendale, for appellant.

Lee Combs, of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from an order granting a motion to vacate an interlocutory decree of divorce.

Appellant's brief recites that, "The principal grounds upon which the motion was made were extrinsic fraud and coercion. Further grounds of mistake, inadvertence, excusable neglect and surprise were alleged, but an examination of the respondent's moving papers disclose that the only grounds relied upon were fraud and coercion".

The record reveals that the action for divorce was filed by the husband May 17, 1944; answer and cross-complaint were filed June 28, 1944; answer to the cross-complaint was filed on June 29, 1944 and the cause tried as a default on July 6, 1944. The wife was awarded judgment and, the decree, which included a property settlement agreement, was entered July 7, 1944. The notice of the motion to vacate and set aside the judgment under Section 473 of the Code of Civil Procedure was filed September 25, 1944. It was supported by an affidavit of the wife and met by counter-affidavits of the husband and others. Following a hearing, the court, on October 16, 1944, granted the motion and set aside the judgment.

It is contended by appellant that the affidavit of respondent in support of the motion failed to set forth facts amounting to extrinsic fraud or coercion; that the court will not interfere with a judgment obtained through collusion and that a judgment will not be set aside in such circumstances in the absence of a showing of damages by reason of such judgment or unless it appears that a retrial will result in a more advantageous judgment.

[1] Appellant relies in part on Bancroft v. Bancroft, 178 Cal. 359, 173 P. 579, 581, L.R.A.1918F, 1029, and Flood v. Templeton, 152 Cal. 148, 92 P. 78, 13 L.R.A.,N.S., 579; both are actions in equity. Doctrines limiting the functions of such actions are not applicable here. Indeed the Bancroft case points out that, "There is a distinction to be drawn, however, between cases where the application for relief from a decree collusively obtained is made in the action itself and within the time prescribed by section 473 of the Code of Civil Procedure, or before the period passes within which the interlocutory decree may be assailed upon appeal and cases where relief is sought in an independent action. For the period of six months the trial court has full control over the case, and may grant relief within the action to either party." Other cited cases are not helpful. It should be emphasized that the motion here considered was made under the provisions of Section 473 of the Code of Civil Procedure and met the requirements thereof in every respect.

[2] It is unnecessary to recite the contents of the affidavits relating to the motion. The procedure was appropriate in the circumstances; the questions presented were addressed to the judgment and discretion of the trial court and, in the ab-

sence of a showing of insufficient evidential support or an abuse of discretion, the judgment and order will be upheld. There is evidence in the record sufficient to support the judgment of the trial court and there is no showing of an abuse of discretion.

For the foregoing reasons the order is affirmed.

YORK, P. J., and WHITE, J., concur.

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71 Cal.App.2d 166

PEOPLE v. BROWN.

Cr. 2355.

District Court of Appeal, First District, Division 2, California.

Oct. 9, 1945.

1. Criminal law 🔑1144(13)

On appeal from judgment of conviction entered on a jury verdict, the evidence must be viewed in the light most favorable to respondent.

2. Criminal law 🔑478(1)

Arresting officer was qualified by five years' experience during which he made several hundred arrests in similar cases, to testify as an expert witness that premises occupied by accused had all the usual and customary arrangements and paraphernalia generally used by bookies for accepting and recording bets on horse races. Pen.Code, § 337a, subd. 2.

3. Criminal law 🔑317

Jury could consider fact that accused did not take the stand as a witness or offer any evidence in his own behalf.

4. Gaming 🔑98(5)

Evidence sustained conviction of occupying a room with paraphernalia for the purpose of recording bets on horse races. Pen.Code, § 337a, subd. 2.

◆

Appeal from Superior Court, San Francisco County; Herbert C. Kaufman, Judge.

Carlton L. Brown was convicted of the offense of occupying a room with paraphernalia for the purpose of recording bets on horse races, in violation of Pen. Code, § 337a, subd. 2, and he appeals.

Judgment affirmed.

J. W. Ehrlich, of San Francisco (Roy A. Sharff, of San Francisco, of counsel), for appellant.

Robert W. Kenny, Atty. Gen., David K. Lener, Deputy Atty. Gen., and Edmund G. Brown, Dist. Atty., and James F. Brennan, Chief Trial Deputy Dist. Atty., both of San Francisco, Cal., for respondent.

NOURSE, Presiding Justice.

The defendant was tried by a jury on an information charging a violation of subdivision 2 of section 337a of the Penal Code. The jury returned a verdict of guilty and the appeal is taken from the ensuing judgment.

The pertinent provisions of the code section under which defendant was tried declared every person guilty of felony "Who, whether for gain, hire, reward, or gratuitously, or otherwise, keeps or occupies for any period of time whatsoever, any room * * * with a book or books, paper or papers, apparatus, device or paraphernalia, for the purpose of recording or registering any bet or bets * * *" on the result of any contest of skill, speed or power of endurance.

[1] The sole attack upon the judgment and verdict is that the evidence herein is insufficient. Reciting the evidence in the light most favorable to the respondent, as we are required to do following the jury verdict, it appears that at the time of his arrest the appellant was keeping and occupying a room or place of business fitted in the manner customarily maintained by bookmaking establishments and containing all the usual paraphernalia for that purpose. The premises consisted of a cigar store at the rear of which was a room 32 feet long by 18 feet wide with a counter running along the side of the room for the full 18 feet with the usual pipe running on the top of the counter from which were suspended boards with the run-down sheets attached to them giving the entries and other racing information covering the races then being conducted at Bay Meadows, Narragansett and Belmont. Defendant also had in his possession at that time other papers known as "records of bets"

containing the number of the horse, the amount of money bet and whether the bet was to win, place or show. These betting records all checked with the run-down sheet on Bay Meadows and in some instances showed the prices paid on horses that had run. When he was placed under arrest the defendant was asked by the arresting officer "if that was all his betting records" and he answered yes that those were the betting records for that day. He also told the arresting officer, in answer to his question, that he was the only one working on the premises. While the officer was making the arrest the telephone on the premises rang and information was then given of the result and prices paid upon one of the races shown on one of the run-down sheets which the defendant had in his possession.

[2, 3] The arresting officer was qualified as an expert witness following five years' experience during which he made several hundred arrests in cases of this character and from this experience testified that the premises occupied by the appellant had all the usual and customary arrangements and paraphernalia generally used by "bookies" for recording and accepting bets on horse races. He then explained how the run-down sheets suspended from the pipe over the counter are used for giving information to the bettors and that the duty of the man behind the counter was to take and record these bets. Duplicates of all these records were contained in a recording machine which was found on the premises but when put under arrest the appellant stated that he did not have a key to this machine. This is the only evidence in the entire record which appears in any degree favorable to the appellant. He did not take the stand as a witness and offered no evidence in his behalf, a fact which the jury could take into consideration. People v. McCabe, 60 Cal.App.2d 492, 498, 141 P.2d 54.

[4] The question of the sufficiency of the evidence is scarcely a debatable one. He was charged with occupying a room with the paraphernalia used for the purpose of recording bets. He admitted that he was the only one employed on the premises. Twelve other men were in the large room presumably for the purpose of placing bets on the races or viewing the proceedings. That the room was prepared, furnished and maintained for the purpose of recording bets does not admit of argument. Since no other error is assigned we must affirm the judgment on the authority of People v. Hinkle, 64 Cal.App. 375, 221 P. 693; People v. Manning, 37 Cal.App.2d 41, 98 P.2d 748; People v. Steinfeld, 38 Cal.App.2d 280, 101 P.2d 89; People v. Roche, 68 Cal.App.2d 665, 157 P.2d 440; and People v. Partee, 70 Cal.App.2d 736, 161 P.2d 586.

The judgment is affirmed.

GOODELL, J., DOOLING, J. pro tem., concur.

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71 Cal.App.2d 108

In re VALENZUELA.

Cr. 1928.

District Court of Appeal, Third District, California.

Oct. 11, 1945.

1. Criminal law ⇨1202(3)

A defendant, admitting his prior convictions of felonies, charged in information specifically alleging that he served terms in state prison therefor, on inquiry after reading to him of information charging murder on arraignment in his attorney's presence, and admitting one of such convictions "as alleged," admitted, in effect, that he had been convicted and served term in state prison for each of such felonies, as charged in information, so as to constitute him an habitual criminal, though trial court failed to adjudge him specifically to be such a criminal. Pen.Code, § 644.

2. Criminal law ⇨1202(6)

A duly entered and certified judgment, sentencing defendant to imprisonment in state prison for term prescribed by law for manslaughter with three prior convictions of felonies, was valid, so that he was not entitled to discharge on habeas corpus after serving maximum term of ten years for manslaughter, as term fixed by statute under such circumstances was life imprisonment. Pen.Code, §§ 644, 1207.

3. Criminal law ⇨1208(9)

The state prison board has no judicial authority to determine crime of which prisoner has been convicted, but has authority to fix term of imprisonment based on judgment of commitment.

4. Criminal law ⚿=1202(1), 1208(9)

A defendant, shown by evidence to have been convicted of felonies before his conviction of crime charged, becomes an habitual criminal, in absence of affirmative contrary finding by court in exceptional case, and state prison board is authorized to fix term of imprisonment accordingly. Pen.Code, § 644.

5. Criminal law ⚿=1202(6), 1208(9)

Where defendant, adequately charged by information with commission of crime and prior convictions of felonies, for which he is alleged to have served terms in state prison or federal penitentiary, pleads guilty of such crime and admits prior convictions as alleged, judgment reciting that he was convicted or pleaded guilty of such offenses and pronouncing sentence of imprisonment in state prison therefor, mentioning crime and referring to prior convictions, is valid and authorizes state prison board to fix term of life imprisonment under statute. Pen.Code, § 644.

◆

Application by Philip Valenzuela for a writ of habeas corpus to obtain his discharge from the state prison.

Writ discharged, and applicant remanded.

Philip Valenzuela, in pro. per., and Thomas O'Hara, of Sacramento, for appellant.

Robert W. Kenny, Atty. Gen., Jess Hession, Asst. Atty. Gen., and Jas. O. Reavis, Deputy Atty. Gen., for respondent.

THOMPSON, Justice.

By means of habeas corpus the petitioner seeks to obtain his discharge from state prison on the ground that he has served a sentence in excess of the maximum term of ten years for the principal offense of manslaughter of which he was convicted, and that the trial court neglected to determine specifically that he is an habitual criminal under Section 644 of the Penal Code, although he pleaded guilty as charged in an information to three prior felonies included in that section, for each of which, it was alleged, he "served a term of imprisonment therefor" in a designated state prison in California. The information, judgment and proceedings are before this court.

The petitioner relies upon two points, either of which, he asserts, entitles him to his discharge. First, he claims there is no evidence that he admitted serving time for the former felonies in a state prison, and, second, that the court failed to specifically adjudge him to be an habitual criminal on account of the former convictions alleged. Both points have been decided adversely to the petitioner.

[1] The petitioner was charged in an information filed February 13, 1934, in Ventura County, with murder, together with three prior felonies, towit, grand larceny, robbery and burglary. Each charge of prior felony specifically alleged that he served a term of imprisonment therefor in a state prison of California. On February 19th of that year the defendant appeared in court with his attorney for arraignment. The information was then read to him. Upon inquiry, the defendant pleaded not guilty to the charge of murder. With particular reference to each separate charge of prior felonies, upon inquiry the defendant admitted that he suffered such previous conviction. The court asked him, "Did you suffer such previous conviction *as alleged*?" to which he replied, "Yes." It must be assumed he admitted the prior convictions *as charged*. On February 27th the defendant returned into court with his attorney and, by leave of court, he withdrew his former plea of not guilty to the charge of murder, and entered a plea of guilty of the crime of manslaughter. Time for sentence was then waived. The defendant once more admitted his prior convictions of felonies by particular reference to the dates charged in the information. The court then sentenced him to imprisonment in the State Prison at Folsom for the indeterminate term prescribed by law. Judgment of conviction was thereupon entered as required by Section 1207 of the Penal Code. That judgment recites the fact that the defendant was convicted of "manslaughter, *with three prior convictions.*" The judgment specifically provides that: "It is Therefore, Ordered, Adjudged and Decreed that the said Philip Valenzuela be imprisoned in the State Prison of the State of California at Folsom for indeterminate term as prescribed by the statutes

of the State of California for the crime of Manslaughter, *with three prior convictions of felony*."

In effect, the defendant admitted that he had been previously convicted and served imprisonment in a state prison in California for each alleged prior felony, *as charged in the information*. The defendant, on arraignment in the presence of his attorney, having had the information read to him, including the charges of prior convictions of felonies, each of which specifically alleged that "said defendant served a term of imprisonment therefor in the State Prison" which he admitted, in one instance "as alleged", it must be assumed he understood the charge and admitted that he had served imprisonment in a state prison on each alleged prior conviction. To otherwise determine would be quibbling with the facts. Those admissions of the defendant on arraignment furnish sufficient evidence that he was convicted and served imprisonment in the state prison for the prior felonies and in the manner constituting him an habitual criminal under the provisions of Section 644 of the Penal Code. In re Gilliam, 26 Cal.2d 860, 161 P.2d 793.

In the case of People v. Stone, 69 Cal. App.2d 536, 159 P.2d 701, 702, it is said in that regard: "The confession of a prisoner at the bar of his guilt as charged as well as of the truth of the allegation of prior convictions is, * * * most satisfactory evidence upon which to convict and will support a judgment that he is an habitual criminal." (Citing authorities.)

[2, 3] In effect the court determined that the defendant is an habitual criminal. The record discloses proof that he is an habitual criminal as defined in Section 644. The judgment recites the fact that he was so convicted. That section provides that upon proof of definite specified facts showing that the defendant has suffered prior convictions as therein stated he "shall be adjudged" an habitual criminal and shall thereupon be sentenced to imprisonment for life. That result follows as a necessary conclusion. No other adjudication could be rendered. The record shows that this was not an "exceptional case." Paragraph (c) of that section contains an apparently inconsistent provision authorizing the court "in exceptional cases, * * * in its discretion," to affirmatively determine within "60 days after the actual commencement of imprisonment" that "the defendant is *not* an habitual criminal." That exception to the rule is not involved on this appeal. It requires affirmative action of the court *in exceptional cases only*, within 60 days. No such action was taken. That limitation of time has expired and the court has no present discretion in that regard. It is apparent from the record in this case that the court assumed it was sentencing the defendant as an habitual criminal. The judgment of the court, which was duly entered in the minutes as required by Section 1207 of the Penal Code, and which was certified to by the clerk, so states. It recites that the defendant pleaded guilty to manslaughter and that he had "suffered the three prior convictions [as] alleged." The court then sentenced him to imprisonment in the State Prison at Folsom, for the term prescribed by law, "for the crime of Manslaughter, with three prior convictions of felony." The term fixed by Section 644 under such circumstances is life imprisonment. No appeal was taken from that judgment. Evidently the court contemplated sentencing the defendant for the crime of manslaughter, together with the three prior convictions of felonies as charged in the information. That judgment is valid and controlling and the petitioner is therefore not entitled to be discharged, notwithstanding the fact that he has already served the maximum term of ten years for the principal offense of manslaughter. The Prison Board has no judicial authority to determine the crime of which a prisoner has been convicted. But the board has the authority to fix the term of imprisonment based on the judgment of commitment. In re Bertrand, 61 Cal.App.2d 183, 187, 142 P.2d 351.

[4] Both the Supreme Court and the District Court of Appeal have held that when the evidence as disclosed by the record shows that the defendant is guilty of prior conviction as provided by Section 644 of the Penal Code, in the absence of affirmative finding to the contrary in an exceptional case as provided by subdivision (c) of that section, he becomes an habitual criminal and the Prison Board is then authorized to fix the term of imprisonment accordingly. People v. Vaile, 2 Cal. 2d 441, 42 P.2d 321; In re Basuino, 22 Cal. 2d 247, 138 P.2d 297; People v. Lyle, 21 Cal.App.2d 132, 68 P.2d 378.

In the Vaile case, supra, the defendant was convicted of two alleged crimes. He "plead guilty to the three prior convictions of a felony as alleged in the information." The court failed to specifically adjudge him to be an habitual criminal. The minutes of the court disclosed that the court merely pronounced sentence as follows: "Whereas the said Alton H. Vaile has been duly convicted in this court of the crimes of lewd and lascivious conduct, and infamous crime against nature, with three prior convictions of felony, it is therefore ordered * * * that he be punished by confinement in the State Prison." The Supreme Court said the court should include in its judgment a formal adjudication that the defendant is an habitual criminal. It, however, added: "But the omission of such formal adjudication in a final judgment would not vitiate said judgment nor in any way impair its effectiveness so long as the judgment contained an adjudication that the defendant had been found guilty of the several crimes *which, when committed* by a single person, *rendered him an habitual criminal.*" (Italics added.)

In the Basuino case, supra [22 Cal.2d 247, 138 P.2d 298], the defendant was charged with violation of the State Narcotic Act "with prior conviction of felony." He admitted the prior conviction of felony and pleaded guilty of the principal offense. Evidently the court failed to adjudge him guilty of the prior felony. The court said:

> "The petitioner * * * admitted the prior conviction of felony and pleaded guilty to the substantive offense as charged, thereby establishing irrefragably his liability to sentence for the offense as aggravated (for term of imprisonment) by the prior conviction. * * *
>
> "The foregoing recitals evidence an arraignment obviously sufficient to warrant the pronouncement of a judgment carrying the ten-year maximum; i. e., for *violation of the State Narcotic Act, with one prior conviction of a felony,* but the judgment itself as actually pronounced was silent as to the prior conviction of felony. * * *
>
> "The court was not required to adjudicate any fact not in issue. People v. Rhodes, 1934, 137 Cal.App. 385, 389, 30 P.2d 1026. The specific charges of the several informations, coupled with the defendant's admission of the prior conviction and pleas of guilty of the substantive offenses, definitely establish 'of what offense the defendant was finally convicted.' "

In the preceding case, although the information charged a prior conviction of felony, to which the defendant pleaded guilty, the court failed to adjudge him specifically to be guilty thereof. Section 11712 of the Health and Safety Code, St. 1941, p. 2264, provides that any person convicted of a violation of the Narcotic Act, who has been previously convicted of a felony which is *"found to be true"* by the court or a jury, "shall be imprisoned in the State prison for not more than 10 years." Although the petitioner in that case had fully served the maximum penalty for the principal offense, he has not served the maximum penalty of ten years prescribed by the Welfare Code for conviction of the crime charged, together with the prior conviction of another felony. The writ was discharged and the prisoner remanded. The principle determined in that case appears to fit the circumstances of this proceeding.

In the case of People v. Lyle, supra [21 Cal.App.2d 132, 68 P.2d 379], the defendant was charged with burglary and three prior convictions of other felonies. On arraignment he pleaded guilty to burglary and "admitted the prior convictions alleged in the information." The judgment, which was entered in the minutes, as it was in the present case, merely recited that the defendant pleaded guilty to burglary and "admitted the three prior convictions alleged therein." There was no specific adjudication that he was an habitual criminal. On the contrary, the reviewing court said it would assume, as the appellant alleged, that, at the time of sentence, the judge of the trial court said he "would *not* declare him an habitual criminal." The Appellate Court said in that regard: "It is apparently appellant's view that, because the trial court stated it would not declare him an habitual criminal, * * * the judgment should have been vacated by the court which rendered it, since it has now developed that its legal effect is different from what the trial court thought it would be. *It is obvious that the board of prison terms and paroles correctly determined that the legal effect of the judgment was an adjudication that appellant was an habitual criminal* and accordingly punishable by life imprisonment under the provisions of section 644 of the Penal Code. This is true because, although the judgment contains no formal adjudication of habitual criminality, it does nevertheless recite that appellant had admitted the three prior convictions alleged in the information and when the information is examined it appears that it is therein charged that each of such convictions was for a specified felony for which in each case appellant was punished by being confined in a specified penal institution. *The omission of a formal adjudication that appellant was an habitual criminal under these circumstances did not vitiate the judgment or impair its effectiveness and the only term of imprisonment permissible under the law was imprisonment for life without parole.* People v. Vaile, 2 Cal.2d 441, 42 P.2d 321." (Italics added.)

[5] The foregoing cases appear to be authorities in complete support of the rule that where a defendant who is adequately charged by information with the commission of a crime and of prior convictions of felonies, together with the allegations of service of imprisonment in a State prison or Federal penitentiary therefor, and the defendant pleads guilty to the charge and admits the prior convictions as alleged, the judgment which recites that he was convicted or pleaded guilty to those offenses and pronounces sentence of imprisonment in the State prison for the offenses, mentioning the crime and referring to the "three prior convictions of a felony" is valid and it authorizes the prison board to fix the term accordingly at life imprisonment as provided in Section 644 of the Penal Code.

The case of People v. Noland, 30 Cal. App.2d 386, 86 P.2d 363, relied upon by petitioner, is not in conflict with what we have previously said regarding the omission to specifically declare the defendant an habitual criminal. In that case the defendant was charged with a crime and a prior conviction of another felony. The information did not allege that he *served a term* therefor in a state prison, as section 644 requires. It merely alleged that he was "*received* at San Quentin Penitentiary." A jury found him guilty of the crime with which he was charged. The defendant pleaded guilty of the prior conviction as charged. Unlike the present proceeding, the judgment in that case made no reference to a prior conviction, or to the plea thereon. The court said in that regard: "The judgment pronounced by the trial court makes no reference whatever to the prior conviction." For that reason the court properly determined that, "being silent upon the matter of a prior conviction, the judgment must be construed as one imposing a sentence for a first offense only."

To the same effect is the case of People v. Schneider, 36 Cal.App.2d 292, 98 P.2d 215, 217. The court said in that case: "In pronouncing judgment the trial court ignored entirely the matter of prior convictions." In that case, unlike the present proceeding, the judgment did not contain statements indicating that the court contemplated the prior convictions in sentencing the defendant. In that case the court utterly ignored the conviction of the prior felonies. In this case the court specifically refers to the conviction of prior offenses in its judgment of commitment.

Following the affirmance of the judgment in the last-cited case, the defendant filed a petition for a writ of habeas corpus in the Supreme Court, In re Schneider, 23 Cal.2d 427, 144 P.2d 329, contending that he was merely sentenced as a first offender, since the trial judge ignored the prior convictions in pronouncing sentence. The Supreme Court discharged the writ and remanded the prisoner, stating that the determination of that question on the former appeal became the law of the case, and was therefore controlling. The intimation may be that the Supreme Court might have decided otherwise on the record except for the fact that the point had been determined on the appeal and it became the law of the case. But, it should be recalled that the record in that case, unlike the present record, disclosed the fact that the trial court ignored the prior convictions entirely and they were not mentioned in the judgment of commitment.

In People v. Nicholson, 34 Cal.App.2d 327, 93 P.2d 223, the judgment was reversed on the ground that the trial court had erroneously found the defendant to be an habitual criminal since the information failed to charge that he had served imprisonments in the state prison therefor. While the record showed that the defendant pleaded guilty to the former convictions *as alleged*, it was held those admissions could not be construed to mean that he admitted serving time in a state prison therefor since that fact was not alleged in the information. The foregoing case is not in point regarding the validity of the judgment in this case.

We conclude that the defendant's plea on arraignment of his guilt of the prior convictions of felonies as charged in the information constituted an admission that he actually served imprisonment therefor in the state prison since the information so states. We also conclude that the record in this proceeding adequately shows that the trial court determined the defendant's guilt of the three former felonies as alleged and took them into consideration in pronouncing sentence as the judgment of commitment specifically states. The Prison Board therefore had a right to fix the petitioner's term of imprisonment at life pursuant to the judgment, in accordance with Section 644 of the Penal Code.

The writ is discharged and the prisoner is remanded.

ADAMS, P. J., and PEEK, J., concur.

CITY OF LOS ANGELES v. COLE et al.

Appeal of DE ACOSTA et al. *

Civ. 14702.

District Court of Appeal, Second District, Division 1, California.

Oct. 3, 1945.

Rehearing Denied Oct. 24, 1945.

Hearing Granted Nov. 30, 1945.

1. New trial ⇨153

The "entry of judgment", as used in statute requiring notice of intention to move for new trial to be filed and served before entry of judgment or within 10 days afer receiving written notice thereof, presupposes a "trial", since no judgment can be entered until there has been a trial in the true sense, which means that all the issues necessary to authorize a judgment have been determined. Code Civ.Proc. § 659.

See Words and Phrases, Permanent Edition, for all other definitions of "Entry of Judgment" and "Trial".

2. New trial ⇨153

Where action embraces several issues, some of which are tried by the court and some by the jury, a notice of intention to move for new trial is premature when filed after jury verdict on issues submitted to jury, but before decision of issues tried by the court, and such notice confers upon court no power to act upon a motion subsequently made pursuant to the notice. Code Civ.Proc. § 659.

3. Eminent domain ⇨224

Court was not authorized to enter judgment of condemnation immediately upon return of jury's verdict assessing damages without first determining necessity for subjecting the property to the public use sought and, where findings of fact were not waived, notice of intention to move for new trial filed before findings of fact, conclusions of law, or final judgment had been filed or entered was premature. Code Civ. Proc. §§ 632, 657, 659, 1237, 1241, 1256, 1257.

4. Eminent domain ⇨240

In condemnation case, unless findings of fact are waived, trial court is required to make findings upon the issues of facts, except those relating to compensation, such as use and public necessity. Code Civ. Proc. §§ 632, 1237, 1241, 1256, 1257.

5. New trial ⇨3

Where findings of fact are required, until they are signed and filed, there is no decision and no one is aggrieved within the meaning of statute providing that application for new trial may be made by the "party aggrieved". Code Civ.Proc. §§ 632, 657, 1256, 1257.

See Words and Phrases, Permanent Edition, for all other definitions of "Party Aggrieved".

6. Appeal and error ⇨805

Defendants were not estopped from claiming lack of jurisdiction in second trial because they abandoned appeal from order granting such trial where order was void because based on notice prematurely filed. Code Civ.Proc. § 659.

7. Courts ⇨23, 37(1)
New trial ⇨138, 153

Jurisdiction to pass upon motion for new trial depended upon timely service of notice of intention to move for a new trial and, where such notice was prematurely filed, the litigants could not confer jurisdiction on the court in second trial by consent, waiver, agreement, or acquiescence. Code Civ.Proc. § 659.

8. Motions ⇨61

A void order remains without effect as completely as if never entered.

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* Subsequent opinion 170 P.2d 928.

9. Evidence ⚷142(1)

In eminent domain proceeding, evidence of sales of neighboring parcels is inadmissible unless such sales are voluntary on both sides. Code Civ.Proc. § 1237.

10. Evidence ⚷142(1)

In eminent domain proceeding, evidence of amount paid by a condemning party to owner of adjacent lands is incompetent whether payment was made as a result of a voluntary settlement, an award, or jury verdict, since price paid under such circumstances is not a fair test of true market value. Code Civ.Proc. § 1237.

11. Trial ⚷210(1)

Where expert market value witnesses called by city were cross-examined as to their knowledge of purchases by city and other government entities of neighboring land, thereby adducing evidence as to prices paid and other details concerning such transactions, jury should be instructed that purchases by condemning parties in affected area cannot be considered as a criterion of true market value, but that expert witness may state reasons for his opinion and may be cross-examined as to specific transactions had by condemning parties concerning acquisition of neighboring properties for the purpose of testing the fairness or honesty of his opinion given upon direct examination. Code Civ.Proc. §§ 1237, 1872.

12. Eminent domain ⚷134

The measure of damages in eminent domain proceeding is the present market value of the land and not its special value in use to owner or to the parties seeking to condemn. Code Civ.Proc. § 1237.

13. Eminent domain ⚷131

The "market value" of property injured or taken for public use is the price it will bring when offered for sale by one who desires, but is not required to sell, and is sought by one who desires, but is not required to buy, after due consideration of all the elements reasonably affecting value. Code Civ.Proc. § 1237.

See Words and Phrases, Permanent Edition, for all other definitions of "Market Value".

14. Eminent domain ⚷202(1)

In ascertaining market value of realty under condemnation, any evidence which tends to show the physical condition of the property, purpose for which it is employed or any reasonable use for which it may be adapted, is competent. Code Civ.Proc. 1237.

15. Evidence ⚷559

Expert testimony, offered by owners to prove physical characteristics of a certain hill and tunnel in connection with use to which land under condemnation on such hill could be put, was admissible as corroborative of testimony of other experts produced by owners concerning highest and best use of the property, though condemning parties had not questioned the adaptability of the property for such use. Code Civ.Proc. § 1237.

◆

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action in eminent domain by the City of Los Angeles against Henrietta Hawley Cole and others to acquire 12 parcels of land in the Los Angeles Civic Center for a new alignment of certain streets therein. From a judgment entered upon a verdict as to the market value of the respective parcels, and from an order denying their motion for new trial and motion to have trial in its entirety declared void and verdict and judgment set aside, Concepcion Calderon De Acosta and others appeal.

Appeal from order denying a new trial dismissed and judgment reversed and cause remanded with directions.

Burr & Smith and Philip Grey Smith, all of Los Angeles, for appellants.

J. H. O'Connor, Co. Counsel, and S. V. O. Prichard, Asst. Co. Counsel, both of Los Angeles, for respondent.

WHITE, Justice.

This is an action in eminent domain, C.C.P. § 1237, instituted to acquire 12 parcels of land in the Los Angeles Civic Center for a new alignment of certain streets therein. This appeal was taken by the defendants interested in Parcels 5, 9 and 11, located upon the top of what is known as Fort Moore Hill, which overlies the North Broadway Tunnel and is immediately adjacent to and northerly from the Hall of Justice in Downtown Los Angeles. Because this appeal, in the main, presents questions of law, we shall refer to the facts only in so far as and when such reference becomes necessary in connection with the legal question raised in regard thereto.

After the cause was at issue, a trial was had before a jury as to the market value of the real estate owned by appellants, or in which they had interests. At such first trial, the jury returned verdicts as to the market value of the respective parcels here in question. Thereafter and before any findings were signed or judgment rendered, respondent herein filed a motion for a new trial which was granted. A second trial was had, also before a jury, which returned verdicts as to the market value of the respective parcels hereinbefore referred to. The court thereafter signed findings which were filed and a judgment was rendered and entered. Appellants moved for a new trial. They also moved the court to have the second trial in its entirety declared void and to have the jury's verdict and the judgment set aside. Both of said motions were denied. From the judgment and order denying each of the aforesaid motions, appellants prosecute this appeal.

We shall first give consideration to appellants' claim that the entire second trial proceedings were void and should have been set aside because respondent's motion for a new trial in the original proceedings was premature and the court was therefore without power to grant the same. In that regard, the record reflects that the motion of respondent, City of Los Angeles, for a new trial was filed within ten days following the verdict of the jury on the single issue of the market value of Parcels 5, 9 and 11 in the proceedings for condemnation. No findings of fact, conclusions of law, or final judgment had been written, filed, or entered by the court, as to the proceedings had at such first trial.

[1, 2] Section 659 of the Code of Civil Procedure, which makes provision for filing a notice of motion for new trial, reads:

"The party intending to move for a new trial must, either before the entry of judgment or within ten (10) days after receiving written notice of the entry of the judgment, file with the clerk and serve upon the adverse party a notice of his intention to move for a new trial, designating the grounds upon which the motion will be made and whether the same will be made upon affidavits or the minutes of the court or both. Said notice shall be deemed to be a motion for a new trial on all the grounds stated in the notice. The time above specified shall not be extended by order or stipulation."

The words "either before the entry of judgment or" were added to the foregoing section in 1923. In using the words "before the entry of judgment," the Legislature must have realized and considered that the "entry of judgment" presupposes a "trial", and that no judgment can be entered until there has been a trial in the true sense, which obviously means that *all the issues* necessary to authorize a judgment have been determined. As was said in Bell v. Marsh, 80 Cal. 411, 414, 22 P. 170, "A case has not been *tried* until all the issues have been disposed of * * *." A "trial" contemplates that all the issues raised by the pleadings must be disposed of. Where only a part of the issues are disposed of, how can it be said that there has been a trial so far determinative of the issues that the appropriate judicial conclusion thereof by judgment is authorized?

"Where an action embraces several issues, some of which are tried by the court and some by a jury, a notice of intention to move made after return of the verdict but before the decision of the remaining issues tried by the court, is premature." 20 Cal.Jur. 172, and cases there cited.

[3] We are convinced that the provisions of section 1241 of the Code of Civil Procedure require the court to determine the fact that the necessity for subjecting the property to the public use sought existed, and that a judgment of condemnation is not authorized immediately upon return of a verdict by the jury which assessed the damages to the defendants. Hinshaw v. Superior Court, 45 Cal.App. 105, 107, 187 P. 41. In other words, the verdict of the jury upon the single issue of damages does not constitute a decision of the action. Where several issues are embraced within an action, some of which are tried by the court and some by the jury, a notice of intention to move for a new trial is premature when filed after the jury verdict on the issues submitted to the jury but prior to the decision on the issues tried by the court, and such notice confers upon the court no power to act upon a motion subsequently made pursuant to the notice. Barnes v. Foley, 189 Cal. 226, 227, 207 P. 885; In re Estate of McKenna, 138 Cal. 439, 440, 71 P. 501.

[4, 5] That, in condemnation cases, the court is required to make findings upon the issues of fact (except those relating to compensation) such as use and public nec-

essity, was the holding in Vallejo & Northern R. Co. v. Reed Orchard Co., 169 Cal. 545, 556, 147 P. 238; and in Hinshaw v. Superior Court, supra. Sections 1256 and 1257 of the Code of Civil Procedure make the rules of practice of Part II of the same code applicable to condemnation actions and, as findings of fact were not waived in the proceedings in the first trial, they were required. Sec. 632, C.C.P. Under section 657 of the Code of Civil Procedure, an application for a new trial may be made by "the party aggrieved" and "until the findings are signed and filed there is no decision, and nobody is 'aggrieved,' within the meaning of section 657 of the Code of Civil Procedure." Root v. Daugherty, 201 Cal. 12, 14, 255 P. 181, 182; Dominguez v. Mascotti, 74 Cal. 269, 270, 15 P. 773. Furthermore, the case of Root v. Daugherty, just cited, as well as Estate of Barker, 207 Cal. 112, 276 P. 992; Middleton v. Finney, 214 Cal. 523, 527, 6 P.2d 938, 78 A.L.R. 1104; Reeve v. Jahn, 9 Cal.2d 244, 250, 70 P.2d 610; Cloud v. State Terminal Co., 22 Cal.App.2d 568, 570, 71 P.2d 600, all decided since the 1923 amendment to section 659 of the Code of Civil Procedure, decisively hold that, in cases where, as in the instant one, findings of fact are required, a motion for a new trial instituted by the filing of a notice of intention prior to the signing and filing of findings of fact and conclusions of law is "premature and ineffectual for any purpose."

Respondent contends that, under the provisions of section 659 of the Code of Civil Procedure prior to the 1923 amendment, although patent error existed in the jury trial of the issue of market value in condemnation proceedings, the court was "under the grim necessity of wasting its time in trying the remaining issues to the point of entering judgment before the error could be corrected", and that it was "to avoid this stupid waste of precious court time that section 659 of the Code of Civil Procedure was amended by adding the words 'either before the entry of judgment or' ". However, as heretofore pointed out, in the cited cases, the appellate tribunals of this state disagree with respondent's reasoning and uniformly hold that where, after the return of the verdict of the jury, there remains something more for the court to do, then the "trial" is not completed upon the coming in of the verdict; no valid judgment can be entered by the court pursuant to the jury's verdict; and, consequently, there having been no decision of the cause, the proceedings for a new trial are prematurely taken. In re Estate of Green, 25 Cal.2d 535, 154 P.2d 692, relied upon by respondent, in our opinion supports appellants' position, because, in that case, all of the issues involved were submitted to and decided by the jury and nothing remained for the court to do but to enter judgment upon the verdict. In the case just cited, the court speaks approvingly of the holding in the cases cited herein, where, as in the case at bar, all of the issues were not submitted to the jury. Had the Legislature intended the construction contended for by respondent of the 1923 amendment to section 659 of the Code of Civil Procedure, it could very easily have provided therefor by appropriate language. It must be assumed that the Legislature was cognizant of the case of Root v. Daugherty, supra, decided in 1927, and of cases subsequently decided interpreting the 1923 amendment to section 659 of the Code of Civil Procedure, and yet the Legislature has taken no steps to alter or change the pertinent code section.

[6-8] Finally, respondent contends that appellants are estopped to make any claim that jurisdiction was lacking in the second trial, for the reasons that: (1) Appellants abandoned their appeal from the order granting a new trial in the first proceedings; (2) appellants expressly requested the court to engage in the second trial; (3) appellants freely participated in such trial without any objection; and (4) appellants thereby caused respondent considerable expense. If the order granting a new trial was void, appellants had a right to rely upon that contention and to forego the expense of an appeal. If, as decided in Root v. Daugherty, supra, and numerous other cases therein cited, proceedings for a new trial taken prematurely are a nullity and ineffectual for any purpose, it was not within the power of any of the litigants to invest the court with jurisdiction by consent, waiver, agreement or acquiescence. Jurisdiction to pass upon a motion for a new trial depended upon timely service of the notice of intention to move for a new trial. Such jurisdiction could not otherwise be conferred. A void order remains without effect as completely as if never entered. Title Insurance Co. v. California Development Co., 171 Cal. 173, 152 P. 542; Peters v. Anderson, 113 Cal.App. 158, 297 P. 76; Abelleira v. District Court of Ap-

peal, 17 Cal.2d 280, 289, 109 P.2d 942, 132 A.L.R. 715; Middleton v. Finney, supra, 214 Cal. at page 528, 6 P.2d 938, 78 A.L.R. 1104. Because of what we have herein stated, it must be held that the trial court erred in denying appellants' motion to declare void the entire proceedings had at the second trial; the judgment entered therein must be reversed with directions to the court below to proceed from the point at which the jury returned verdicts in said first trial of the action. Because the purported order granting a new trial in the original trial was made without jurisdiction, is void and without effect as completely as if it were never entered, it becomes unnecessary in remanding the cause to make any order in connection therewith.

By reason of the orders we must make herein, it is possible that, at the conclusion of the proceedings yet to be had in the first trial, a new trial may eventually properly be granted; and we are therefore impelled to give consideration to the remaining two questions raised on this appeal to the end that the court may be guided thereby should a new trial finally ensue.

The first of these claimed errors is that the court erred in giving to the jury at the request of plaintiff two instructions: The challenged instructions read:

"You are instructed that the price paid by plaintiff condemnor for other property is not a proper basis for determining the market value of the property here in question. Such sales are not a fair criterion of value for the reason that they are in the nature of a compromise. The fear of the one party or the other to take the risk of legal proceedings ordinarily results in the one party's paying more or the other party's taking less than is considered to be fair market value of the property. For these reasons such sales are not proper evidence of value in any case, whether in a proceeding by the same condemning party, or otherwise."

"You are instructed that the price fixed by an agreement between the owner of property and a public corporation seeking to condemn his land by virtue of eminent domain cannot be taken as a criterion of the market value of other land in the vicinity. The price so fixed by compromise, when there can be no other purchaser and the seller has no option to refuse to sell and can only elect between the acceptance of the price offered and the delay, uncertainty and trouble for legal proceedings of an assessment, is not a reasonable or fair test of just compensation for the defendant's property. It is in no sense a sale in the market."

In this regard, the record reflects that plaintiff produced three, and the defendants here involved, two market value witnesses. The difference in the appraisals of these witnesses was largely a difference in the matters which they took into consideration in arriving at their opinions. We think it may fairly be said that the expert witnesses produced by these defendants based their opinions as to market value mainly upon the transactions (as far as sales were concerned) by which one or the other of the interested governmental agencies had acquired property within the Civic Center area either by purchase or condemnation. Indeed, appellants very frankly state in their briefs that "These purchases by the City of Los Angeles and other governmental entities formed a large part of the basis for the opinions of the experts called by the appellants. * * *" On the other hand, the expert witnesses called by plaintiff City and who gave their opinions as to the market value of the parcels involved, expressly excluded these purchases by governmental agencies within the Civic Center area from their consideration as a basis for their expressed opinions, although they had familiarized themselves with the nature and details of these transactions. Appellants were allowed to cross-examine respondent's witnesses at length as to the latters' knowledge of such transactions and thereby adduced from the witnesses on cross-examination the price paid and other details concerning such transactions.

[9, 10] Appellants contend that the aforesaid instructions given to the jury were both erroneous and prejudicial, but, as stated by respondent, the first of these instructions "is a paraphrase of a quotation made by our Supreme Court in the case of City of San Luis Obispo v. Brizzolara, 100 Cal. 434, at page 436 [34 P. 1083], from Mr. Lewis in his treatise on Eminent Domain. The first sentence of the instruction is merely a rephrasing of the first sentence of the quotation made, and the final three sentences are a precise reproduction of this statement approved by our Supreme Court"; while "the second instruction to which objection is made is likewise in part a paraphrase and in part a precise quotation from the statements

of our Supreme Court in the same Brizzolara case [100 Cal.] on page 436 [34 P. 1083]". Whatever may be the holding in some other states, we are persuaded that, upon the authority of the case of San Luis Obispo v. Brizzolara, 100 Cal. 434, 34 P. 1083, it must be held as the rule in this state that evidence of sales of neighboring parcels is not admissible unless such sales were voluntary on both sides, and that it is not competent for either party in a condemnation proceeding to put in evidence the amount paid by a condemning party to the owners of adjacent lands, however similar they may be to that in controversy, whether the payment was made as a result of a voluntary settlement, an award, or verdict of a jury, because, for the reasons stated in the Brizzolara case, supra, that the price paid under such circumstances is not a fair test of true market value. This rule is also followed in some other jurisdictions. Pittsburgh, C., C. & St. L. R. Co. v. Gage et al., 286 Ill. 213, 121 N.E. 582, 586; Metropolitan St. R. Co. v. Walsh, 197 Mo. 392, 94 S.W. 860, 863; Cleveland, etc., R. Co. v. Smith, 177 Ind. 524, 97 N.E. 164, 173; Sawyer v. Boston, 144 Mass. 470, 11 N.E. 711; MacNaughton v. Commonwealth, 220 Mass. 550, 108 N.E. 357.

[11] The instructions, however, as given are open to criticism in that they did not advise the jury of the further rule announced in the Brizzolara case, supra, that, while evidence of the character to which we have here adverted is not admissible as evidence in chief, such evidence is admissible by way of cross-examination "for the purpose of testing the fairness or honesty of an opinion which the witness may have given upon his direct examination in relation to the value of the property involved in the action" [100 Cal. 434, 34 P. 1084]. As heretofore noted, in the instant action, such testimony was permitted on cross-examination of respondent's witnesses and the jury should have been advised that they were entitled to take the same into consideration for the aforesaid limited purpose. Reclamation District No. 730 v. M. Inglin, 31 Cal.App. 495, 500, 160 P. 1098, and cases therein cited.

[12, 13] Furthermore, section 1872 of the Code of Civil Procedure, as amended by Statutes of 1937, pages 1605, 1606, provides that an expert witness may, upon his direct examination, state the reasons for the opinions given by him. It is the present market value of the land that constitutes the measure of damages, and not its special value in use to the owner or to the parties seeking to condemn. "Market value" is the highest price in terms of money which the land will bring if exposed for sale in the open market with a reasonable time allowed to find a purchaser buying with knowledge of all the uses and purpose to which it is adapted and for which it is capable of being used. The true test is not value for a special purpose, but value in view of all the purposes to which the property is naturally adapted. 10 Cal.Jur. 338, 339. As is said in 29 Corpus Juris Secundum, Eminent Domain, § 137, at page 974: "The market value of property injured or taken for public use is commonly defined as the price it will bring when offered for sale by one who desires, but is not required, to sell, and is sought by one who desires, but is not required, to buy, after due consideration of all the elements reasonably affecting value."

The instructions as framed might well have been considered by the jury as prohibiting them from considering such testimony, even that elicited upon cross-examination, for any purpose whatsoever. Should a new trial eventually be had, the instructions in question should be reframed to comply with the views herein expressed. That is to say, the jury should be advised that, under section 1872 of the Code of Civil Procedure, an expert witness may state the reasons for his opinion, and also of the rule with reference to cross-examination concerning specific transactions had by the condemning parties concerning acquisition of neighboring properties and the limited purpose for which such testimony is received. However, the jury should also be instructed as to the foregoing rule announced in the Brizzolara case, supra, that purchases by the condemning parties in the affected area cannot be considered by them as a criterion of true market value.

Finally, appellants insist that the court erred in refusing to permit them to prove the physical characteristics of a certain hill and tunnel in connection with the use to which the pertinent parcels of land could be put on said hill. It appears from the record that appellants called as a witness Albert C. Martin and, while engaged in qualifying him as an expert construction engineer, respondent's counsel interrupted to inquire "for what purpose counsel is attempting to qualify" Mr. Martin. Outside the presence of the jury and in answer to the aforesaid inquiry, appellants' counsel stated:

"I propose to show that this man is thoroughly familiar with the geology and the character of the underlying structure under these subject parcels for the purpose of bringing out first the physical structure of Fort Moore Hill; secondly, the location of the tunnel in that physical structure; and thirdly, the amount of support offered by that structure for anything that may be put upon the hill in the way of an apartment house or other building in connection with the highest and best use already testified to and what effect, if any, that may have on the tunnel structure. In other words, the sum and substance of it is to bring before the jury the physical facts and some information concerning the effect of the tunnel in the situation."

After further discussion, it was stipulated that the foregoing statement made by appellants' counsel be considered as an offer of proof, to which offer of proof respondent's counsel objected upon the ground that any testimony "relative to the nature and character of structure of the hill, its possibility of supporting a six story building, or any other kind of a building, is absolutely beyond the point in this case and is incompetent and not a proper part of defendants' affirmative case, but is anticipatory and in the nature of rebuttal when there is nothing to rebut, and on that basis we object to any examination of the witness along those lines." The objection was sustained.

Appellants contend that the evidence was admissible because "the jury might well question whether the subject properties would be capable of sustaining the type of apartment houses or other buildings for the highest and best use since the tunnel under the hill at North Broadway was within approximately 50 feet of all of them and comparatively close to the surface. The jury was entitled to this information and without it they would have no way of knowing whether such construction on the subject property was possible, or whether it would be too costly." In other words, appellants argue that they were entitled to prove the geology and similar physical characteristics of the hill to support the opinion given by their expert witnesses as to the possible use to which the land could reasonably be put.

Respondent, on the other hand, urges that appellants' expert witnesses were permitted to freely testify concerning their opinions as to the highest and best use of the property under condemnation and that no questions were asked on cross-examination which "even remotely suggest that the present properties were not adaptable for the highest and best use thus indicated by defendants' witnesses, either by reason of any geological or structural defects in the land which would render it either dangerous or unsuitable for such a purpose." Therefore, urges respondent, until there was interjected into the case some suggestion that the things which appellants' witnesses had testified constituted the highest and best use for the property could not be built upon the hill, "what this witness is doing is merely to anticipate a possible defense and this is an attempt to offer rebuttal before there is anything to rebut".

[14, 15] We are not in accord with respondent's reasoning. The proffered testimony of Mr. Martin was not rebuttal in character but was simply coroborative of testimony given by other expert witnesses produced by appellants. The testimony with reference to the geology and similar characteristics of the property sought to be condemned tended to show conditions actually affecting the use of such property. Regarding the rule with respect to the consideration of all circumstances and conditions which may reasonably affect the market value of real property, the court said in City of Beverly Hills v. Anger, 127 Cal.App. 223, 228, 15 P.2d 867, 868: "In ascertaining the market value of real property, any evidence which tends to show the physical condition of the property, the purpose for which it is employed, or any reasonable use for which it may be adapted, is competent." It was error to exclude the evidence contained in the foregoing offer of proof.

The attempted appeal from the order denying defendants' motion for a new trial is dismissed. For the reasons herein stated, the judgment appealed from is reversed, and the cause remanded with directions to the court below to grant defendants' motion to declare void the entire proceedings had upon the second trial herein, and to proceed to an orderly conclusion of the first trial in conformity with the views herein expressed, from that stage of the proceedings whereat, in such first trial, the jury returned verdicts on the issues submitted to them.

YORK, P. J., and DORAN, J., concur.

71 Cal.App.2d 144

Ex parte LONCARIC.

Cr. 1909.

District Court of Appeal, Third District, California.

Oct. 3, 1945.

1. Criminal law ⚷1202(1)

The character of the institution and its inmates, together with the nature of proceedings leading to confinement therein, determine the status of the institution as respects question whether it is a "state prison" within meaning of habitual criminal statute, irrespective whether institution is called a reformatory. Pen.Code, § 644.

See Words and Phrases, Permanent Edition, for all other definitions of "State Prison".

2. Criminal law ⚷1202(1)

The serving of a term in the State Reformatory of Kansas upon conviction in Kansas for burglary constituted service of a sentence in a "state prison" within the habitual criminal statute. Pen.Code, § 644.

Proceeding in the matter of the application of Joseph Daniel Loncaric against Robert A. Heinze, Warden of the California State Prison at Folsom, for a writ of habeas corpus to obtain release from imprisonment.

Writ discharged and petitioner remanded.

Joseph Daniel Loncaric, in pro. per.

Robt. W. Kenny, Atty. Gen., Jess Hession, Asst. Atty. Gen., and Jas. O. Reavis, Deputy Atty. Gen., for respondent.

THOMPSON, Justice.

By means of habeas corpus the petitioner seeks release from imprisonment in Folsom State Prison on the ground that he was erroneously determined to be an habitual criminal under section 644 of the Penal Code since he served imprisonment for one of the prior felonies, of which conviction he pleaded guilty, in the state reformatory of Kansas, as distinguished from a state prison, as that section requires.

The petitioner was charged by an information filed in Los Angeles County of the crime of burglary and of three prior convictions of felonies. The first alleged prior conviction was apparently abandoned. The defendant pleaded guilty to the charge of burglary. He also admitted that he was guilty of the two other charges of prior convictions of burglaries, as alleged in the information. The court determined him to be an habitual criminal under section 644 of the Penal Code and sentenced him to state prison for the term prescribed by law.

Upon this proceeding the petitioner concedes that he suffered conviction of the last alleged prior felony, and that he served time therefor in the Missouri State Prison, as alleged in the information. The petitioner, however, challenges the second prior conviction of felony, to wit, burglary committed by him in the state of Kansas, June 17, 1929, for which it was alleged he was convicted and "served a term of imprisonment therefor in a penal institution." The petition alleges, and the answer concedes, that the "penal institution" in which the petitioner served imprisonment for the last mentioned prior felony, was the "State Reformatory of Kansas."

The only point raised on this petition, upon which it is claimed the court erroneously determined the defendant to be an habitual criminal, is the assertion that a state reformatory may not be held to be a "State prison and/or Federal penitentiary," which are the only penal institutions in which service of imprisonment for former felonies may be considered in determining that the accused is an habitual criminal as provided by section 644 of the Penal Code.

[1] That identical question has been determined adversely to the petitioner in the recent case of In re Gilliam, 26 Cal.2d 860, 161 P.2d 793. In that case the Supreme Court says:

"It is the character of the institution and its inmates together with the nature of the proceedings leading to confinement therein which determine its status in relation to the language of the code section [Pen. Code, sec. 644] under consideration. The word 'penitentiary' may be used in a sense sufficiently broad to include a 'reformatory' (50 C.J., § 3, Penitentiary, p. 330; State v. Vaughn, 15 Okl.Cr. 157, 175 P. 731), and so it would appear here with reference to the federal reformatory wherein petitioner was imprisoned."

[2] We assume the preceding language applies likewise to a state reformatory, such as the institution in which the petitioner in

this case was imprisoned in the state of Kansas. The opinion in the Gilliam case, supra, discusses that very question and so applies the ruling.

On the authority of In re Gilliam, the writ is discharged and the prisoner is remanded.

ADAMS, P. J., and PEEK, J., concur.

71 Cal.App.2d 206

BRACEY et ux. v. GRAY et ux.

Civ. 7171; Sac. 5717.

District Court of Appeal, Third District, California.

Oct. 13, 1945.

Hearing Denied Dec. 6, 1945.

1. Appeal and error ⇨1200

A trial court from which appeal has been perfected cannot determine on motion that decision of District Court of Appeal is erroneous or void, that being the province of the Supreme Court.

2. Appeal and error ⇨439

An appeal taken, unless dismissed, must be deemed to be pending in reviewing court until appeal is determined, and trial court is without jurisdiction to annul its judgment until appeal has been disposed of.

3. Appeal and error ⇨76(1)

An appeal from judgment which disposes of all matters in litigation is a "final judgment". Code Civ.Proc. § 946.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Judgment".

4. Appeal and error ⇨436

After appeal from judgment has been perfected, trial court no longer has control over action with respect to matters embraced therein, and cannot proceed further until appeal has been heard and determined and jurisdiction of trial court restored.

5. Judgment ⇨9

A decision of District Court of Appeal was not void because the judge who tried the case appealed from was a member of appellate tribunal pro tempore and sat on the bench when case was argued, where such judge did not participate in decision and specifically disqualified himself. Code Civ.Proc. § 170a.

6. Judges ⇨47(2)

Under statute providing that no judge before whom cause may have been tried or heard shall "sit or act" in appellate tribunal on trial or hearing of such cause, quoted term means that such disqualified judge shall not preside or participate in hearing, trial, or determination of the appeal or exercise duties of a member of the court in particular case. Code Civ. Proc. § 170a.

See Words and Phrases, Permanent Edition, for all other definitions of "Sit or Act".

7. Courts ⇨101

District Court of Appeal is not illegally constituted as a court merely because one of its members is disqualified from participating in particular case, since two legally qualified justices may render a valid decision. Code Civ.Proc. § 170a, Const. art. 6, § 4a.

8. Constitutional law ⇨305

Appellants were not deprived of due process of law because one of justices of District Court of Appeal was disqualified, since court was still legally constituted and decision was concurred in by two qualified justices. Code Civ.Proc. § 170a; Const. art. 6, § 4a; U.S.C.A. Const.Amend. 14.

◆

Appeal from Superior Court, Butte County; Harry Deirup, Judge.

Action by Arthur Bracey and wife against John Gray and wife to recover possession of realty and damages for its detention. From an order of the superior court denying defendants' motion to vacate judgments entered against them which judgments had been affirmed on appeal by the District Court of Appeal, defendants appeal.

Affirmed.

John Gray and Dora Stuart Gray, both of Chico, in pro. per.

Coyle E. Bybee, of Chico, for respondents.

THOMPSON, Justice.

The defendants have appealed from an order of the Superior Court of Butte

County denying their motion to vacate and annul judgments entered against them in the above entitled action on January 17, 1939, and on May 1, 1939, in a suit for possession of real property. The judgments were affirmed on appeal by this court. Bracey v. Gray, 49 Cal.App.2d 274, 121 P.2d 770. It is contended the decision of the Appellate Court is void because one of the members thereof was disqualified, under Section 170a of the Code of Civil Procedure, from sitting as a member of that tribunal in reviewing the case on appeal. The appellants appeared in proper person to represent the defendants and appellants.

In 1928 the land in question was conveyed by the owner, Alice Anderson, to the defendant Dora Stuart, then unmarried, subject to a deed of trust executed to secure a debt of $2,250. Dora Stuart subsequently married the defendant John Gray, and thereafter filed a homestead on the property. The land was sold to the State Mutual Building and Loan Association, under the provisions of the trust deed, for default of payments. July 5, 1935, the State Mutual Building and Loan Association sold and conveyed the land to the plaintiffs Arthur and Adelaide Bracey. The plaintiffs then brought suit against Mr. and Mrs. Gray, in Butte County, for possession of the property. Judge Warren Steel of Yuba County tried that case and rendered judgment against the defendants. During the trial in the Superior Court, John Gray executed a quitclaim deed to the plaintiffs, and, with his consent, the cause was dismissed as to him. Judgment was erroneously entered January 17, 1939, against both defendants. On motion, a new trial was granted as to the defendant Dora Stuart Gray. On retrial, judgment was rendered against her May 1, 1939. From that judgment both defendants appealed. This court affirmed that judgment January 23, 1942. Judge Steel was then sitting in this court for the hearing of the calendar during which the said appeal was argued and submitted, but he did not participate therein. The minutes of this court show that "Mr. Justice Steel deeming himself disqualified in this cause did not participate." That appeal was determined by the two other qualified justices.

[1-4] We know of no authority of a trial court from which an appeal has been perfected to determine on motion that the decision of the District Court of Appeal is erroneous or void. That is the province of the Supreme Court. But the motion in this case was to have the judgments of the trial court from which the appeal was taken declared void. Even if the decision of the appellate court were void for any reason, that fact would furnish no reason for cancelling the judgment of the trial court. We assume that after an appeal has been taken, unless it is subsequently dismissed, it must be deemed to be pending in the reviewing court until the appeal is determined. Under such circumstances the trial court is without jurisdiction to annul its judgment until the appeal has been disposed of. It is true that in a proper proceeding for certain purposes the appeal may not be deemed to oust the trial court of jurisdiction. 2 Cal.Jur. 415, sec. 178. An appeal from a judgment which disposes of all matters in litigation is a final judgment. Potvin v. Pacific Greyhound Lines, Inc., 130 Cal.App. 510, 20 P.2d 129; Code of Civ. Proc. sec. 946. After an appeal from a judgment has been perfected, the trial court no longer has control over the action with respect to the matters embraced therein, Bailey v. Superior Court, 125 Cal. App. 748, 14 P.2d 151, and cannot proceed further until the appeal has been heard and determined and the jurisdiction of the trial court restored. Kaufman v. Superior Court, 108 Cal. 446, 41 P. 476, 477; 2 Cal. Jur. 415, sec. 178. In the Kaufman case, supra, it is said:

> "'Until such appeal is heard this court will not inquire whether the court or clerk had or had not jurisdiction to enter the judgment. The case being in this court by appeal, the court below cannot proceed in it *until the appeal is heard and determined.*'" (Italics added.)

It follows that if the appeal was not determined by the Appellate Court because its decision was void, or otherwise, the appeal is still pending in that court. Certainly the trial court is without jurisdiction on a mere motion to set it aside to hold that the decision of the Appellate Court is void. If for any reason the judgment of the District Court of Appeal is deemed to be void, it is the province of the Supreme Court to so determine. Both this court and the Supreme Court denied appellants' petitions for writs of certiorari to review the alleged invalidity of the decision of this court on the grounds which are urged on this appeal.

[5] There is no merit in appellants' contention that the decision of the Appel-

late Court was void for the reason that Judge Steel was a member of that tribunal pro tempore, or that he participated in the decision of that court. It is true that since he tried and determined the case in the Superior Court, he was disqualified from participating in the decision of the Appellate Court. Section 170a of the Code of Civil Procedure provides that:

"No justice, judge, or justice of the peace, before whom a cause or question may have been tried or heard, shall sit or act, in an appellate tribunal, on the trial or hearing of such cause or question."

Judge Steel did not sit, act or participate in the decision of the case in this court. He specifically disqualified himself as the uncontradicted minutes of this court clearly show. Even though he may have remained seated on the bench while the cause was argued and submitted to the Appellate Court, he did not participate therein, nor did he take part in the decision which that court rendered. There is no law prohibiting a disqualified justice of an appellate court from remaining on the bench during the time that such case is being argued if the record shows that he disqualifies himself and that he does not participate in the decision of the case. Certainly such disqualified justice would not be excluded from the courtroom during the argument. If he is entitled to remain in the courtroom it would seem to make little difference where he sat during that procedure.

[6, 7] The term "sit or act" as it is used in Section 170a, supra, has been uniformly construed to mean that such disqualified justice shall not preside or participate in the hearing, trial or determination of the appeal, or exercise the duties of a member of the court in the particular case. Allen v. State, 102 Ga. 619, 29 S.E. 470; Faulkner v. Walker, 36 Ga.App. 636, 137 S.E. 909; Russell v. Crook County Court, 75 Or. 168, 145 P. 653, 146 P. 806; Black's Law Dictionary. The tribunal is not illegally constituted as a court merely because one of its members is disqualified from participating in a particular case. Two legally qualified justices of a district court of appeal may render a valid decision. Article VI, sec. 4a, Const. of Calif. The Constitution provides in that regard:

"The presence of two justices shall be necessary for the transaction of any business by such court except such as may be done at chambers, *and the concurrence of two Justices shall be necessary to pronounce a judgment.*" (Italics added.)

The case of William Cramp & Sons Ship & Engine Bldg. Co. v. International Curtis Marine Turbine Co., 228 U.S. 645, 33 S.Ct. 722, 57 L.Ed. 1003, upon which the appellants rely, is not in conflict with what we have previously said regarding the disqualification of one of the justices of an appellate bench to hear and determine a particular case. It is in exact accordance therewith. In the last cited case a United States District Judge rendered a judgment dismissing a petition in his court in an infringement proceeding. He subsequently sat with two other Justices of the Circuit Court, and *"participated"* in the determination of the same case on appeal. The United States Supreme Court, in construing Section 120 of the Federal Judicial Code, 28 U.S.C.A. § 216, which provides that "No judge before whom a cause or question may have been tried or heard in a district court, * * * shall sit on the trial or hearing of such cause or question in the circuit court of appeals," said that the controlling application of that statute to the facts of that particular case was not open to controversy. But that statement was made on the record which disclosed the fact that the disqualified justice actually *participated in the hearing and determination of the appeal* in the circuit court. That case is therefore not authority in support of the appellants' contention that the decision of this appellate court is void because one of the three members of the court was disqualified since he did not participate in the decision.

[8] Nor is there merit in appellants' assertion that they were deprived of due process contrary to the Fourteenth Amendment to the Federal Constitution, by the disqualification of one of the Justices of the District Court of Appeal in this particular case. The court was still legally constituted and the decision was concurred in by two qualified justices as provided by Article VI, section 4a, of the California Constitution.

The order is affirmed.

ADAMS, P. J., and PEEK, J., concur.

71 Cal.App.2d 195

PEOPLE v. MOULTON.

Cr. 3911.

District Court of Appeal, Second District, Division 2, California.

Oct. 11, 1945.

1. Robbery ⟹24(1)

Evidence was sufficient to support conviction of robbery in the second degree.

2. Robbery ⟹26

In robbery prosecution, whether defendant took from complaining witness only amount owed defendant for transporting such witness and two girl companions in defendant's automobile and no animus furandi was shown were fact questions for jury.

3. Criminal law ⟹1159(2)

Implied finding of jury adverse to defendant will not be disturbed on appeal from conviction, where supported by substantial evidence.

4. Criminal law ⟹742(1), 747

Conflicts in evidence and conflicts and inconsistencies in individual witness' testimony must be resolved by jury.

◆

Appeal from Superior Court, Los Angeles County; Harold B. Landreth, Judge.

Kenneth W. Moulton was convicted of robbery in the second degree, and he appeals.

Affirmed.

Crispus A. Wright, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Carl S. Kegley, Deputy Atty. Gen., for respondent.

FOX, Justice pro tem.

From a judgment of conviction of robbery in the second degree and from the order denying his motion for a new trial defendant appeals.

From the implied findings, supported by the testimony of the complaining witness, one Harlan Smith, it appears that the latter who was a sailor in company with a soldier and two girls met defendant on May 31, 1944, at about one o'clock in the morning on Central Avenue between 42nd and 43rd Streets in the City of Los Angeles. The party of four had just emerged from a night club. Standing nearby, defendant inquired of Smith whether he "wanted to buy a quart." Following the latter's affirmative reply all five crossed the street to defendant's automobile which stood in a parking lot behind a filling station, and procured the liquor which Smith paid for.

In quest of a place to drink they repaired to a hotel in defendant's car and rented a room. Smith paid for the transportation. After a brief visit, defendant departed and was not invited by Smith to return. He came back, however, at about the time the quart had been consumed. The soldier having succumbed to the narcotic influence of the beverage remained, but Smith, his female companions and defendant drove away in the latter's automobile. After the girls had disembarked at 42nd Street, defendant drove to the dead end of the street where, after Smith had alighted, a conversation ensued. Defendant demanded payment of $2. When Smith countered with the inquiry why he owed that sum defendant knocked him down, kicked him and searched his empty pockets. He then turned Smith on his side, removed his billfold which was suspended at the top of his pants, took from it $9 and threw the billfold to the ground. Smith arose and without attempting to retrieve his wallet grabbed a stick, drove away his assailant and pursued him across a vacant lot and down the street. On returning to defendant's automobile Smith removed its keys. Defendant thereupon returned and attempted to engage Smith in conversation, whereupon the police arrived and took defendant into custody.

[1] The insufficiency of the evidence to support the judgment of conviction is the only point raised on this appeal. There is no merit in the point. The recited facts, together with the inferences which the jury could reasonably draw therefrom, are the substance of Smith's testimony and furnish ample support for the judgment.

[2, 3] The defendant takes the position that Smith owed him $2 for bringing him and the two girls back to 42nd Street from the hotel and that he took no more than that amount from Smith, and that no animus furandi was shown. These were questions of fact for the determination of the jury

and its implied finding adverse to defendant will not be disturbed on appeal since there is substantial evidentiary support therefor. People v. Newland, 15 Cal.2d 678, 104 P.2d 778.

[4] Defendant draws attention to certain alleged conflicts in the testimony of Smith. Conflicts in the evidence are, of course, to be resolved by the jury. This rule also applies to conflicts and inconsistencies in the testimony of an individual witness. Firth v. Southern Pac. Co., 44 Cal.App. 511, 514, 186 P. 815; Weintraub v. Soronow, 115 Cal.App. 145, 150, 1 P.2d 28; Showalter v. Western Pac. R. Co., 16 Cal.2d 460, 479, 106 P.2d 895.

The judgment and order are affirmed.

MOORE, P. J., and WILSON, J., concur.

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71 Cal.App.2d 160

PEOPLE v. ONE 1940 BUICK SEDAN, ENGINE NO. 53795291 (HARRISON et al., Interveners).

Civ. 12864.

District Court of Appeal, First District, Division 1, California.

Oct. 9, 1945.

1. Forfeitures 🔑5

Where notice of seizure of and intended proceedings to forfeit automobile charges only that it was used to conceal or transport narcotics unlawfully and contains no reference to possession thereof by occupant of automobile, provision of statute for forfeiture of vehicle in which any narcotic is unlawfully possessed by occupant thereof should not be considered in determination of issues, as word "occupant" in such provision does not impliedly modify provisions for forfeiture of vehicle used to transport narcotics unlawfully or in which any narcotic is unlawfully kept, deposited or concealed. St. 1940, 1st Ex. Sess., p. 23, § 11610.

2. Trial 🔑165

On motion for nonsuit, court must assume that plaintiff's evidence is true, disregard conflicting evidence, and draw reasonable inferences to support plaintiff's position, and if there is then no substantial evidence to support plaintiff's case, motion may be granted, but otherwise it must be denied.

3. Forfeitures 🔑4

The word "any", as used in statute providing for forfeiture of vehicle in which any narcotic is kept, deposited or concealed, means that if some narcotic is deposited or concealed in vehicle, kind and quantity thereof are immaterial. St. 1940, 1st Ex. Sess., pp. 17, 23, §§ 11001, 11610; St. 1939, p. 755, § 11002.

See Words and Phrases, Permanent Edition, for all other definitions of "Any".

4. Courts 🔑92

Where District Court of Appeal affirmed judgment for finance company as claimant of automobile, sought to be forfeited for narcotic violation, on finding that company made reasonable investigation as to moral responsibility of purchaser, holding that it must clearly appear that legal or equitable owner of automobile seeking to protect his interest therein, was aider and abettor in such unlawful conduct, was dicta. St. 1939, p. 768, § 11620; St. 1940, 1st Ex.Sess., p. 23, § 11610.

5. Forfeitures 🔑3

There are no constitutional impediments to forfeiture of vehicle intrusted by owner thereof to one using it illegally, though owner does not know of or acquiesce in such use. St. 1940, 1st Ex.Sess., p. 23, § 11610.

6. Forfeitures 🔑3

To forfeit automobile, registered in name of purchaser thereof under sale contract assigned to finance company, for narcotic violation, company, as legal or equitable owner of vehicle, need not have been aider or abettor in commission of the offense. St. 1940, 1st Ex.Sess., p. 23, § 11610.

7. Forfeitures 🔑5

In state's proceeding to forfeit automobile for narcotic violation by purchaser of vehicle under conditional sale contract assigned to finance company, evidence was sufficient to take to jury question of purchaser's unlawful use of automobile. St. 1940, 1st Ex.Sess., p. 23, § 11610.

Appeal from Superior Court, San Francisco County; John J. Van Nostrand, Judge.

Proceeding by the People to forfeit One 1940 Buick Sedan, Engine No. 53795291, on ground of its use to conceal, convey, carry or transport narcotics unlawfully, in which Samuel W. Harrison, Jr., and the Fidelity Acceptance & Thrift Company, a corporation, filed answers as claimants and interveners. From a judgment of nonsuit, plaintiff appeals.

Reversed.

Robert W. Kenny, Atty. Gen., and Ralph W. Scott, Deputy Atty. Gen., for appellant.

Clark, Nichols & Morton, of Berkeley, for respondent Fidelity Acceptance & Thrift Co.

WARD, Justice.

The State appeals from an order and judgment of nonsuit in a proceeding instituted by the State to forfeit an automobile pursuant to Health and Safety Code, section 11610, St. 1940, 1st Ex.Sess., p. 23.

Both the registered owner, Samuel W. Harrison, Jr., and the legal owner, Fidelity Acceptance & Thrift Company, filed answers as claimants and interveners which denied that the automobile was used unlawfully, and as a separate defense the finance company alleged that it had made a "reasonable investigation * * * as to the moral responsibility, character and reputation" of Harrison, the purchaser, as provided for by Health and Safety Code section 11620, St. 1939, p. 768. At the close of the presentation of the State's evidence regarding the unlawful use of the car, motion for nonsuit on behalf of claimants and interveners was granted. Therefore the only issue presented concerns the sufficiency of the evidence to sustain a forfeiture under the statute.

[1] Section 11610 provides: "A vehicle used to unlawfully transport any narcotic, or in which any narcotic is unlawfully kept, deposited or concealed, or in which any narcotic is unlawfully possessed by an occupant thereof, shall be forfeited to the State." In brief, the statute may become operative on (1) transportation of any narcotic, (2) keeping, depositing or concealing any narcotic, (3) possession of any narcotic if the possessor is an occupant of the vehicle. The notice of seizure and intended forfeiture proceedings, used under the statute in lieu of the ordinary complaint, charges that the vehicle herein "was used to unlawfully conceal, convey, carry or transport Narcotics, to-wit: Marihuana" etc. The last provision, which for convenience may be designated (3)—possession by an occupant—should, in view of this notice of seizure play no part in the determination of the issues in this case. The notice of seizure contains no reference to possession by an occupant. If there was transportation, with or without concealment, the section may become operative and the automobile forfeited to the state. The word "occupant" does not modify each of the three clauses. A reasonable construction forbids the implied use of the word as a modification of the previous designated uses of the vehicle.

The evidence shows that an inspector for the Division of Narcotic Enforcement testified that he had seized the car, located in front of a hotel or apartment on Post Street near Buchanan in San Francisco on the date alleged in the notice of seizure, from Samuel W. Harrison, Jr. Prior thereto the inspector, in company with another inspector and a police officer had visited the sleeping quarters of Harrison and interviewed him and one Jim McCaw, and searched the premises. In a suit case "minor traces of marihuana" were found, and in a suit of clothes, admittedly the property of Harrison, a bunch of keys, which Harrison said also belonged to him. One of the keys opened the door of Harrison's automobile, locked and with the windows tightly closed, then parked in front of the hotel. Without objection the inspector testified that Harrison said he had locked and parked the automobile. The inspector searched the car. In an ash tray which he pulled out from the dashboard were found a number of ordinary cigarette "butts" beneath which was a marihuana cigarette which had not been smoked. The inspector testified that Harrison stated "that the night before he and this Jim McCaw—he is also known as James McCoy—had been riding around. He met McCoy, and during the course of the evening they picked up two girls who he believed were prostitutes; that they had driven around, and had gone on Washington Street to a restaurant and that he had got out of the car and went into the restaurant, and when he came out he observed McCaw and these two girls smoking a cigarette which looked like the one that we had, which we had found. Q. Did he say where they were smoking the cigarette? A. In the automobile. We said that—we asked him if he didn't know that it was wrong for them to be smoking marihuana, and he stated that he did, but that he didn't say anything about it because he had been playing, as he called it, 'the big shot' that night, and he didn't want to create the impression that he wasn't such, and he said that he had seen other brown cigarettes like that in the possession of the girls or of McCaw during the evening. * * * Well, he then stated that they let the girls out, and that he and McCaw had then driven up to the hotel and that he had parked the car and locked it up and they had gone up and gone to bed." The inspector further testified that at the conclusion of the trial "Mr. Harrison approached me and asked me how come I had not arrested James McCaw yet, or alias Jim McCoy; that he was still peddling this marihuana, as he had been at that time, and I informed him that McCaw would be arrested when we had sufficient evidence to arrest him. He was subsequently arrested on the 15th of this month—last month." A chemist inspector for the Division of Narcotic Enforcement testified: "I analyzed the contents of it [an envelope containing the evidence] and found it to be one cigarette containing three grains of the leaves and flowering tops of cannabis sativa, or marihuana." Thereupon the plaintiff rested. The claimants and interveners presented a motion for a nonsuit which was subsequently granted.

[2] On motion for a nonsuit it must be assumed that plaintiff's evidence is true. Conflicting evidence must be disregarded and reasonable inferences must be drawn to support the plaintiff's position. If there is then no substantial evidence to support plaintiff's case the motion may be granted; otherwise it must be denied. In re Estate of Flood, 217 Cal. 763, 21 P.2d 579; Martin v. Tully, 44 Cal.App.2d 226, 112 P.2d 282; In re Estate of Lances, 216 Cal. 397, 14 P.2d 768; Burlingham v. Gray, 22 Cal. 2d 87, 137 P.2d 9. The evidence presented by the state, together with the reasonable inferences that may be drawn therefrom, show that the State proved that on the night previous to the arrest of Harrison, a marihuana cigarette had been transported in the automobile from one part of San Francisco to another and that on the day of the seizure there was kept and concealed in the automobile the same narcotic.

The claimant and intervener, Fidelity Acceptance & Thrift Company, is the only respondent who has filed a brief on appeal, and the court, pursuant to rule 17(b) of the Rules on Appeal, has submitted the cause as to respondent Harrison solely on the appellant's briefs. Respondent attempts to read the section so that the transportation, keeping, depositing or concealing, or unlawful possession in each instance must be by an "occupant." As indicated above the section may not be so interpreted. Respondent's arguments on the definition of "occupant" are therefore of no assistance to the court in this case.

[3] Respondent also relies upon People v. One 1941 Cadillac Club Coupe, 63 Cal. App.2d 418, 147 P.2d 49. That case was considered by this court in the recent case of People v. One 1940 Buick 8 Sedan, 70 Cal.App.2d 542, 161 P.2d 264. The quantity of narcotics to be transported, kept, deposited or concealed, or to be possessed by an occupant, is not designated in the statute. People v. One Ford Coupe, etc., 10 Cal.App.2d 321, 51 P.2d 882; People v. One 1940 Buick 8 Sedan, supra. On the contrary, the statute specifically used the words "any narcotic." The word "any" may mean "some," "one out of many," or may be construed to mean "all." Ordinarily it is used synonymously with "a" or "an," referring to "one." Bates v. McHenry, 123 Cal.App. 81, 10 P.2d 1038; 3 C.J.S., p. 1398. Here, it is a general word not limited or restricted by the context. As used in sec. 11610 it means if there is some narcotic, as defined by sec. 11001, St. 1940, 1st Ex.Sess., p. 17 and sec. 11002, St. 1939, p. 755, deposited or concealed, the kind and quantity are immaterial.

[4-6] Respondent, purchaser of the conditional contract of sale, contends that neither by omission nor commission was it an aider and abettor in the unlawful use of the Harrison automobile. It was held in March, 1944, People v. One 1941 Cadillac Club Coupe, supra, 63 Cal.App.2d at pages 421, 422, 147 P.2d at page 51 that if the attempted forfeiture is based on the provision, viz., " 'or in which any narcotic is unlawfully kept, deposited or concealed, or in which any narcotic is unlawfully possessed by an occupant thereof', then it must clearly appear that either the legal or equitable owner of the vehicle, as the case

may be, who is seeking to protect his interest therein, was an aider and abettor in such unlawful conduct, or in other words, particeps criminis." (Petition for hearing by Supreme Court denied in May, 1944. Three justices voted for a hearing.) That case affirmed a judgment by the trial court in favor of a finance company based upon the finding that the finance company had made a reasonable investigation as to the moral responsibility of the purchaser. Consequently, all that was said with respect to the forfeiting of purchaser's interest and with respect to what was necessary for the State to prove in order to forfeit the finance company's or the registered owner's interest in the absence of a defense by the legal or registered owner, was dicta. In June, 1945 the Supreme Court said in People v. One 1941 Ford 8 Stake Truck, 26 Cal.2d 507, 159 P.2d 641, 642: "But there are no constitutional impediments to a forfeiture where the owner entrusts his vehicle to another who uses it illegally, even though the owner does not know of or acquiesce in such use. * * * An owner who entrusts the possession of his vehicle to another thereby accepts the risk that it will be used contrary to law." The legal owner, the claimant and intervener herein, had entrusted the possession of the car to Harrison, the registered owner. In view of the holding in the last cited case, which received the direct approval of six justices and a special concurring opinion by one justice, it is incumbent upon the court to hold that in the forfeiture of a vehicle under the statutes in question it is not necessary that the legal or equitable owner should have been an aider or abettor in the commission of the offense. People v. One 1940 Buick 8 Sedan, supra.

No proof was offered that the finance company had made a "reasonable investigation of the moral responsibility, character, and reputation of the purchaser" of the car, Harrison. Health and Safety Code, sec. 11620. No opportunity for the introduction of evidence under this defense as pleaded in the answer was presented inasmuch as the court granted the motion for nonsuit at the close of the presentation of the state's evidence. This evidence may be presented at a future hearing.

[7] By reason of the views heretofore expressed concerning the facts necessary to be proved by the state in order to forfeit a car under section 11610 of the Health and Safety Code, the court erred in granting the motion for a nonsuit and in entering the judgment in favor of defendants.

The judgment is reversed.

PETERS, P. J., and SCHOTTKY, J. pro tem, concur.

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71 Cal.App.2d 177

MARLENEE v. WARKENTIN.

Civ. 14848.

District Court of Appeal, Second District, Division 1, California.

Oct. 11, 1945.

1. Bankruptcy 🔑425

Where bankruptcy schedules filed by judgment debtor failed to show judgment creditor's residence or that creditor's residence was unknown, and creditor had no notice or actual knowledge of the proceedings, discharge in bankruptcy did not release bankrupt from the judgment debt. Bankr.Act §§ 7(8), 17(2, 3), 11 U.S.C.A. §§ 25(8), 35(2, 3).

2. Bankruptcy 🔑424

Judgment against bankrupt based on finding that bankrupt had wrongfully and fraudulently appropriated and converted to his own personal use his partner's interest in partnership property was based upon a "willful and malicious injury" to property, and was not a debt which was discharged in bankruptcy. Bankr.Act § 17(2, 3), 11 U.S.C.A. § 35(2, 3).

See Words and Phrases, Permanent Edition, for all other definitions of "Willful and Malicious Injury".

◆

Appeal from Superior Court, Los Angeles County; Kurtz Kauffman, Judge.

Action by Phoebe Armstrong Marlenee, as executrix of the will and estate of Charles Lee Marlenee, deceased, against J. H. Warkentin, also known as Jack Warkentin and as Dr. J. H. Warkentin, to renew a judgment recovered against defendant, wherein defendant pleaded a discharge in bankruptcy. From a judgment for plaintiff, defendant appeals.

Affirmed.

Henry M. Lee, of Los Angeles, for appellant.

Vere Radir Norton and W. H. Gregory, both of Los Angeles, for respondent.

YORK, Presiding Justice.

This is an action to renew a judgment recovered by respondent on December 28, 1936 against appellant in the sum of $14,476. The only defense pleaded is a discharge in bankruptcy.

From a judgment decreeing that "the liability of the defendant to the plaintiff, as evidenced by the said judgment, duly made and entered on December 28, 1936, as aforesaid, is a liability for a willful and malicious injury to the property of plaintiff, and further said liability has not been discharged, in whole or in part through the operation of a discharge in bankruptcy, or otherwise, and the same now remains an existing liability of the defendant to the plaintiff in the sum of $14,552.20," this appeal has been perfected, it being urged by appellant that the trial court erred in its findings of fact numbered fifth and sixth, and in denying his offer to produce certain documents in evidence.

The court admitted in evidence the pleadings, findings and judgment in the original action, as well as a certified copy of the discharge in bankruptcy and a portion of the schedule, and found, among other things, as follows:

"Fourth: It is true that the defendant was adjudicated a bankrupt on February 13, 1937, by the District Court of the United States at Los Angeles, California, and that on September 7, 1937 he was discharged from all provable debts and claims against his estate which existed on February 13, 1937, which were duly scheduled and not excepted by law from the operation of a discharge in bankruptcy.

"Fifth: It is true that defendant filed a schedule of his liabilities with his petition for adjudication as a bankrupt, and it is true that his liability to plaintiff as indicated by said judgment of December 28, 1936 was included in said schedule of liabilities, but notwithstanding the plaintiff's place of residence was well known to the defendant at the date of the filing of said schedule the same was not included therein, nor was there included therein a statement that such place of residence was unknown to the defendant. And the court further finds that said liability was not duly scheduled and that the plaintiff had no notice or actual knowledge of the proceedings in bankruptcy in time for proof and allowance of her said claim;

"Sixth: It is not true that the defendant's liability to the plaintiff as evidenced by said judgment, made and entered as aforesaid on December 28, 1936, was discharged by the defendant's discharge in bankruptcy made and entered on September 7, 1937, as aforesaid, nor at any time or at all, by said or any decree of discharge in bankruptcy or otherwise, and that said liability is excepted from the operation of the bankruptcy act."

[1] In support of his specifications of error relating to the trial court's findings of fact numbered fifth and sixth, hereinbefore recited, appellant argues that respondent had actual notice of the bankruptcy proceedings, because certain documents referring to such proceedings were filed in the original action in which the judgment here sued upon was rendered. The evidence adduced at the trial of the instant action does not establish that such documents were ever called to the attention of respondent or that she had either actual notice or actual knowledge of the bankruptcy proceedings. The portion of the schedule received in evidence (Defendant's Exhibit A) fails to show the respondent's place of residence, and also fails to show that her place of residence is unknown. She testified that her place of residence had been the same since 1926, that she always had a telephone in her residence during the period in question, and that appellant had visited her at said residence prior to her husband's death.

Section 7(8) of the Bankruptcy Act, 11 U.S.C.A. § 25(8), requires a voluntary bankrupt to file with his petition "a list of his creditors, showing their residences, if known; if unknown, that fact to be stated." The penalty for failure to schedule a debt properly is stated in section 17(3) of the Act, 11 U.S.C.A. § 35(3): "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * (third) have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy * * *."

In Van Denburgh v. Goodfellow, 19 Cal. 2d 217, 222–224, 120 P.2d 20, 23, in which the bankrupt listed an incorrect address for one of his creditors, it was held: "It is well settled that a debt is not duly scheduled if the bankrupt has listed the creditor's address incorrectly. See cases cited under 11 U.S.C.A. § 25, note 23; Brown v. Tropp, 106 Cal.App. 605, 289 P. 648; Parker v. Murphy, 215 Mass. 72, 102 N.E. 85, 87; In re D'Alessio, D.C., 24 F.Supp. 563. 'The bankrupt is under duty to use reasonable diligence to ascertain the residence of the creditor, and if thereby he acquires knowledge of such residence he must state it correctly, and if he fails to ascertain such residence, to state that the residence is unknown. * * *' McGehee v. Brookins, Tex.Civ.App., 140 S.W.2d 963, 964. * * * The provisions requiring either a correct statement of the creditor's address or actual notice to him are intended to insure the creditor an opportunity to participate in the administration of the bankrupt's estate and to share in the assets. A creditor who refrains from making a claim against the bankrupt when these provisions are violated does not share in the assets of the estate but retains his debt unimpaired." See, also, Smith v. Hill, 232 Mass. 188, 122 N.E. 310, 2 A.L.R. 1667; Brown v. Tropp, 106 Cal.App. 605, 289 P. 648.

[2] Appellant also urges that the original action was not based on any alleged tort but was purely one of partnership accounting and therefore could not support a judgment "for conversion or wilful and malicious injuries to the person or property of another."

However, finding numbered ten made by the trial court in said original action and quoted in appellant's opening brief, provides, among other things, "that defendant's conduct regarding said partnership and the property thereof has been marked by deceit, dishonesty, falsehood and fraud * * * and the Court finds that said defendant has wrongfully, maliciously, fraudulently and unlawfully appropriated and converted to his own personal use said decedent's nine-tenths interest in said partnership and the property thereof * * *."

The findings in the instant cause recite certain provisions contained in the judgment rendered in the original action, among which is the following:

"4. That said defendant has wrongfully, fraudulently, and unlawfully appropriated and converted to his own personal use the whole of said decedent's interest in said partnership and the property thereof, together with the aforesaid sum of Five Thousand Four Hundred Seventy-six Dollars ($5,476.00) and has thereby injured, damaged and defrauded said estate and the persons entitled thereto in the sum of Fourteen Thousand Four Hundred and Seventy-six Dollars ($14,476.00); and that the plaintiff is entitled to recover said sum from said defendant."

It must be assumed that the evidence presented at the trial of the original action was sufficient to support said findings of fact and the judgment based thereon which was rendered on December 26, 1936, and which "remains due, owing and unpaid from the defendant to the plaintiff"; and that the trial court in the instant case properly adjudged that the liability of appellant herein, as evidenced by said judgment, "is a liability for a wilful and malicious injury to the property of plaintiff."

Section 17(2) of the Bankruptcy Act, 11 U.S.C.A. § 35(2), specifically excepts "willful and malicious injuries" to the property of another from the operation of a discharge in bankruptcy.

For the reasons stated, the judgment appealed from is affirmed.

DORAN and WHITE, JJ., concur.

27 Cal.2d 61

RAND v. BOSSEN, County Treasurer, et al.

S. F. 17062.

Supreme Court of California.

Oct. 9, 1945.

1. Constitutional law ⚷144
Limitation of actions ⚷4(2)

The statute providing that action to contest validity of credit on or payment of assessment levied by reclamation district must be commenced within six months from effective date of statute or date of such credit or payment, whichever is the later date, is not unconstitutional as impairing a bondholder's contract. Pol.Code, § 3480g, as added by St.1941, p. 1187.

2. Constitutional law ⚷92

The Legislature may place reasonable limitations upon a constitutionally protected right.

3. Limitation of Actions ⚷170

Mandamus proceeding may be barred by statute of limitation where action is sought to compel officials to perform duties in connection with collection of taxes or assessments to pay bonds.

4. Limitation of actions ⚷4(2)

The statute providing that action to contest validity of credit on or payment of assessment levied by reclamation district must be commenced within six months from effective date of statute or date of credit or payment whichever is the later date fixes by implication the time when action accrues to contest validity of credit on or payment of assessment as well as time within which action must be commenced, and, so viewed, issue is solely one of reasonableness of time limit, as against contention that under the statute a bondholder's action might be barred before it accrues. Pol.Code, § 3480g, as added by St.1941, p. 1187.

5. Constitutional law ⚷191

Where a statute operates immediately to cut off an existing remedy, or within so short a time as to give the party more reasonable opportunity to exercise his remedy, retroactive application of the statute is unconstitutional as to such party.

6. Constitutional law ⚷70(3)

What constitutes a reasonable time for a party to exercise his remedy is primarily a question for the Legislature and a court will not overrule its decision except where probable error has been committed.

7. Limitation of actions ⚷4(2)

Under statute providing that action to contest validity of credit on payment of assessment levied by reclamation district must be commenced within six months from effective date of statute or date of credit or payment, whichever is the later date, the six-month period is not unreasonable, since collection of assessment as required by statute is part of bondholder's contract of which bondholder is presumed to be aware. Pol. Code, § 3480g, as added by St.1941, p. 1187.

8. Limitation of actions ⚷4(2)

Where statute authorizing payment of assessments with reclamation district bonds was adopted in 1923, but it was not until 1933 that Supreme Court laid down rule that statute did not apply to bonds issued prior to that time and custodian of bond fund had accepted bonds in payment of assessments although bonds were issued prior to 1923 amendment, such factors not only justified six-month period of time fixed by Legislature within which to commence an action to contest validity of credit on or payment of assessments levied by district, but also the adoption of a limitation period. Pol.Code, § 3480g, as added by St.1941, p. 1187.

9. Constitutional law ⚷143, 144
Waters and water courses ⚷216, 230

The statute is part of contract of holder of reclamation district bonds, but not every alteration in his remedies or rights is an unconstitutional impairment of his contract. Pol.Code § 3480g, as added by St.1941, p. 1187.

◆

In Bank.

Proceeding in mandamus by O. B. Rand against William C. Bossen, as Treasurer of the County and bond fund custodian of Reclamation District, and others to compel sale of land in reclamation district acquired by the treasurer after acceptance of matured bonds of district and payment of assessments levied on land by the district.

Writ denied.

Hewitt & McBride and Loyd E. Hewitt, all of Yuba City, for petitioner.

Rich & Weis, W. P. Rich, and Richard H. Fuidge, all of Marysville, and W. Coburn Cook, of Turlock, for respondents.

CARTER, Justice.

Petitioner is the holder of a bond of respondent Reclamation District No. 784, which was one of an issue of 1921 secured by assessments levied upon lands in the district. A call for payment of assessments to meet bonds was made in 1937. In response thereto Farm Land Investment Company, an owner of land in the district against which assessments were a lien, paid them with matured bonds of the district and the lien was cancelled by respondent Bossen, County Treasurer, bond fund custodian of the district. Respondent Bossen acquired the land involved from the company. Petitioner prays for a writ of mandate compelling the sale of the above-mentioned lands upon the theory that the assessments are delinquent because there was no lawful authority to accept the bonds in payment of them. Intervener holds bonds of the same issue.

At the time of the issuance of the bonds, section 3480 of the Political Code, the statute under which the bonds were issued, contemplated payment of assessments in cash. However, purchasers at a sale after delinquency or by the treasurer after deed to him, were authorized to pay the purchase price in bonds. Stats.1917, p. 1181. In 1923 a paragraph was added to section 3480 reading:

"Any land owner of the district who shall desire at any time to lessen or remove the lien upon his land of any assessment on which bonds have been or hereafter may be issued may deliver to the county treasurer for cancellation any bonds payable out of said assessment, and the treasurer shall credit against the assessment on his land the principal and accrued interest of said bonds." Stats.1923, p. 598. It was pursuant to that paragraph that Farm Land Investment Company paid the 1937 assessment call with bonds.

It has been held that to apply that paragraph to bonds issued before its enactment would be a violation of the impairment of contracts clause of the Constitution (Hershey v. Cole, 130 Cal.App. 683, 20 P.2d 972; see In re Cranberry Creek Drainage Dist., 202 Wis. 64, 231 N.W. 588, 85 A.L.R. 242; 97 A.L.R. 911) on the principle that the terms of the statute under which the bonds are issued become a part of the contract with the bondholder which cannot be impaired by subsequent amendment. See Re Cranberry Creek Drainage Dist., 202 Wis. 64, 231 N.W. 588, 85 A.L.R. 242; 97 A.L.R. 911. Assuming the soundness of that proposition, and its applicability here, inasmuch as the bonds were issued prior to 1923, when the paragraph was added to section 3480, we come to the statute adopted in 1941, reading:

"No action or proceeding to contest the validity of any credit on or payment of all or any portion of an assessment levied by a reclamation district which has heretofore been made pursuant to the provisions contained in Section 3480 of this code at the date of such credit or payment, may be commenced unless commenced within six months from the effective date of this section or the date of such credit or payment, whichever is the later date." Pol.Code, § 3480g, added by Stats.1941, ch. 145, p. 1187. It is urged that to hold that the instant proceeding is barred thereunder would be an impairment of the bondholder's contract; that the period of time is unreasonably and arbitrarily short; and that an unreasonable burden is placed on the bondholders if they must keep, at their peril, constant watch upon the proceedings for collection of assessments although there is no default in the principal or interest on their bonds.

[1-4] We find no impairment of the bondholder's contract by section 3480g. Assuming his contract embraces the right to have the assessments paid in cash and that *all* remedies for the enforcement of that contract cannot be taken away, section 3480g does not purport to achieve that result. It merely fixes a *time limit* during which he may assert the right. True, it may be that he must be more vigilant in keeping a watch on whether the district officials are performing the terms of the contract such as levying the assessments to pay the bonds and collecting them in the proper medium, but it is his contract and he has an obligation to ascertain whether or not it is being performed. It has heretofore been held that an action on the bond must be commenced within four years from its maturity date. Irvine v. Bossen, 25 Cal. 2d 652, 155 P.2d 9. Holders of nonmatured bonds upon which the interest has been paid may not have the same reason to suspect that collections are not being made in cash that would tend to motivate holders of matured bonds or those with interest in default. But they presumably are familiar

with the statute—the terms of their contract and must be guardians of their own interests. In Coombes v. Getz, 217 Cal. 320, 18 P.2d 939, 943, this court was considering the statute of limitation on a constitutionally given right of action against the officers of a corporation for embezzlement. It was contended that the statute of limitation was invalid because it impaired the constitutional right when it was applied where plaintiff did not know of the embezzlement. To this the court replied that:

"This restriction upon legislative action does not, however, extend to reasonable statutory limitations within which this constitutional right may be enforced." Likewise, in the instant case the Legislature is authorized to place reasonable limitations upon a constitutionally protected right. It is not new that a mandamus proceeding may be barred by a statute of limitation where action is sought to compel officials to perform duties in connection with the collection of taxes or assessments to pay bonds. See Barnes v. Glide, 117 Cal. 1, 48 P. 804, 59 Am.St.Rep. 153. We cannot agree that under section 3480g a bondholder's action might be barred before it accrues. That assumes that he could not bring an action to compel the collection of assessments in cash rather than bonds before there was a default in payment of his bonds. It would probably rarely happen that the acceptance of bonds instead of cash would not be immediately followed by a default in either principal or interest. But in any event the section may be interpreted to fix by implication the time when an action accrues to contest the validity of a credit on or payment of an assessment as well as the time within which the action must be commenced. So viewed the issue is solely one of the reasonableness of the time limit.

[5-9] The general rule with regard to retroactive operation of statutes of limitation is stated in Rosefield Packing Co. v. Superior Court, 4 Cal.2d 120, 122, 47 P.2d 716, 717:

"In accordance with this principle it has been specifically held that the Legislature may shorten or extend the period of the statute of limitations, or similar time statutes relating to procedure, and that the changed period may be made applicable to pending proceedings. * * There is, of course, one important qualification to the rule; where the change in remedy, as, for example, the shortening of a time limit provision, is made retroactive, there must be a reasonable time permitted for the party affected to avail himself of his remedy before the statute takes effect. If the statute operates immediately to cut off the existing remedy, or within so short a time as to give the party no reasonable opportunity to exercise his remedy, then the retroactive application of it is unconstitutional as to such party." See also: 5 Cal.Jur. 755, 788; 34 Am.Jur., Limitations of Actions, §§ 18–26; Kozisek v. Brigham, 169 Minn. 57, 210 N.W. 622, 49 A.L.R. 1263; Steele v. Gann, 197 Ark. 480, 123 S.W.2d 520, 120 A.L.R. 758. In Tuttle v. Block, 104 Cal. 443, 38 P. 109, the court was concerned with a statute requiring that a deed be made by the tax collector within a year after the passage of the act or the purchaser at the tax sale would be deemed to have abandoned his rights. An action in mandamus by a purchaser at a tax sale ten years before the act was passed, to compel the execution of a deed, was held barred because not commenced within the year after the statute became effective. The court stated, 104 Cal. at page 448, 38 P. at page 110:

"The amendment in question is clearly a prospective statute of limitation of the time within which the tax deed must have been made, and consequently a like limitation of the time within which an action must have been commenced to enforce the making of such deed, and, as such, does not impair nor purport to impair the obligation to make the deed, but merely prescribes a reasonable period of time, *after the passage thereof,* within which an action for a breach of such obligation must have been commenced. * * *

"This argument, though often made heretofore, has been answered and almost uniformly overruled by the highest authorities. It is well settled that a reasonable limitation of the time within which a matured contractual obligation may be enforced by suit does not impair the obligation of the contract in the sense of the constitutional prohibition cited; and it has been often held that a limitation to one year, and even to six months, is not unreasonable, and does not impair the obligation of the contract, nor deprive the obligee of an adequate remedy." What constitutes a reasonable time is primarily a question for the Legislature and a court will not overrule its decision except where palpable error has been committed. Terry v. Anderson, 95 U.S. 628, 24 L.Ed. 365; Wilson v. Iseminger, 185 U.S. 55, 22 S.Ct. 573, 46 L. Ed. 804; Mills v. Scott, 99 U.S. 25, 25 L. Ed. 294. Tested by that rule we cannot say the period of six months here specified is unreasonable. Consideration must be given to the circumstances that the collection of the assessments as required by the statute is a part of the bondholder's contract of which he is presumed to be aware. He also should know that the establishment of statutes of limitation are always a legislative prerogative. The mode of payment or crediting assessments is merely one of the things required to be done under his contract. There is always the power to levy supplemental assessments. Irvine v. Reclamation Dist. No. 108, 24 Cal.2d 468, 150 P. 2d 428. Any delay in questioning the validity of an assessment payment or credit tends to disturb the orderly procedure of assessment collection, the performance of the duties by the officials, the orderly payment of bonds and the stability of the titles of landowners. The statute authorizing the payment of assessments with bonds was adopted in 1923 but it was not until in 1933 that Hershey v. Cole, supra, laid down the rule that it did not apply to bonds issued prior to that time. There probably have been many instances throughout the state in which the custodian of bond funds has accepted bonds in payment of assessments although the bonds were issued prior to the 1923 amendment. These factors not only justified the length of the period of time fixed by the Legislature but also the adoption of a limitation period. True the statute is part of the bondholder's contract but not every alteration in his remedies or rights is an unconstitutional impairment of his contract. Thus, in Keefe v. Clark, 322 U.S. 393, 64 S.Ct. 1072, 88 L.Ed. 1346, the statute under which bonds secured by assessments were issued provided for supplemental assessments if the original assessment proved inadequate to pay the bonds. A subsequent statute declared all land which was sold for taxes would be relieved from all assessment charges, thus making it not subject to a supplemental assessment. The court held the statute valid, stressing the fact that the contract obligation to levy a supplemental assessment was not on the face of the bond itself. Likewise, in the instant case there is nothing on the face of the bonds requiring that assessments must be paid in cash, specifying the remedy of a bondholder or the time within which he may pursue it. The court went on to state in 322 U.S. at page 397, 64 S.Ct. at page 1074, 88 L.Ed. 1346:

"We do not find in the provision of the drain statute relied upon by appellants a clear and unequivocal purpose of Michigan to permit drain districts to bargain away the State's power to sell tax-delinquent lands free of encumbrances. Long before the date when appellants' bonds were issued, the Michigan Supreme Court had held that, 'The general rule is that a sale and a conveyance (by the State) in due form for taxes extinguishes all prior liens, whether for taxes or otherwise. This rule is one of necessity, growing out of the imperative nature of the demand of the government for its revenues.' * * * The provision of the drain statute upon which appellants rest their case does not expressly purport to alter this 'rule of necessity'. On its face it deals only with the levy of an additional assessment in the event that drain bonds are not paid in full at maturity, and does not assume to deal with the manner of selling tax-delinquent properties in drain districts or the kind of title that can be conveyed at such sales. 'The language falls far short of subjecting lots which have been sold to pay tax or assessment liens to an additional assessment for the deficit. Such a construction would defeat the remedy of tax sales as a means of realizing the assessment lien.'" Also in the case at bar, as has heretofore been pointed out, the remedies of the bondholder have always been subject to statutes of limitation and there is nothing in the statute under which the bonds were issued that compels the conclusion that the Legislature bargained away its power to alter the limitation period.

Reliance is placed upon the series of cases including McGahey v. Com. of Virginia and In re Brown, 135 U.S. 662, 685, 701, 10 S.Ct. 972, 34 L.Ed. 304. In those cases the State of Virginia had issued interest coupons which were made receivable in the payment of taxes and other debts due the state. By various methods the state Legislature sought to impair that right. In the Brown case the statute placed a limit of a year in which to test the validity of a coupon. Otherwise, it could not be used in the payment of taxes. The court held the period unreasonable but conceded that each case must rest upon its own circumstances. It pointed out factors that do not exist in the instant case. It said, 135 U.S. at page 707, 10 S.Ct. at page 986, 34 L.Ed. 304:

"* * * But, if they were not paid at maturity, the alternative right was given to the holder of them to use them in the payment of taxes, debts, dues, and demands due to the state. The very nature of the case shows that such an application of the coupons could not be made immediately, or in any very short period of time. If all the bonds were of the denomination of $1,000 each, *it would require 20,000 of them to make up the funded debt of $20,000,000.* These 20,000 bonds would be likely to be scattered and dispersed through many states and countries, and it would be impracticable for the holders of them to use the coupons which the state should fail to pay in cash in the alternative manner stipulated for in the contract, *unless they had a* reasonable time to dispose of them to taxpayers." (Emphasis added.) And, 135 U. S. at page 708, 10 S.Ct. at page 986, 34 L. Ed. 304:

"The only way in which they (non-resident bondholders) could, within the year prescribed, utilize their coupons—the accumulation, perhaps, of years—would be to sell and dispose of them to the tax-payers. How this could be done, especially in view of the onerous laws which were passed with regard to the sale of coupons in the state, it is difficult to see. Under all the circumstances of the case, and the peculiar condition of the securities in question, we are compelled to say that in our opinion the law is an unreasonable law, and that it does materially impair the obligation of the contract." Moreover, the court pointed out that (135 U.S. at page 708, 10 S.Ct. at page 986, 34 L.Ed. 304):

"No limitation of time was fixed by the act within which the coupons should be presented or tendered in payment of taxes or other demands. The presumption would naturally be that they could be used within an indefinite period, like bank bills."

In the instant case the statute of limitation was a bar to an action on the bonds. Irvine v. Bossen, supra. Other cases are cited but suffice it to say each case depends upon the particular factors involved.

Intervener advances other arguments why the petition should not be granted, such as that petitioner's bonds are barred by the statute of limitation under the rule announced in Irvine v. Bossen, supra, and pendency of another action but inasmuch as we have determined that this proceeding is barred by section 3480g of the Political Code it is unnecessary to discuss them.

The alternative writ is discharged and the petition for a peremptory writ is denied.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, and SCHAUER, JJ., concurred.

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27 Cal.2d 70

In re ROBERTS' ESTATE.

STIEBEL et al. v. ROBERTS et al.

L. A. 19036.

Supreme Court of California.

Oct. 16, 1945.

1. Descent and distribution 🔑71(7)

Where widow's right to probate homestead out of community property was established by judgment which had become final in proceeding to determine heirship, such determination was res judicata in subsequent accounting proceedings decreeing distribution of estate. Probate Code, §§ 1080, 1082.

2. Descent and distribution 🔑71(7)

In proceeding to determine heirship, any person entitled to distribution of estate or part thereof, and praying that court determine who are entitled to distribution, may obtain decision binding on any other person interested in estate as to how estate shall be distributed, and a final decree in such proceeding is conclusive during remainder of administration of estate under subsequent proceeding for distribution. Probate Code, §§ 1080, 1082.

3. Descent and distribution 🔑71(1)

Probate court's jurisdiction in proceeding to determine heirship includes power to adjudicate community property rights. Probate Code, §§ 1080, 1082.

4. Wills 🔑790

Whether surviving spouse is put to an election whether to take under the will is not required to be left open until time of distribution, under rule that if widow is put to an election she need not decide until estate is to be distributed whether she wishes to claim her share in community property or benefits provided for in will.

5. Descent and distribution ⚷71(7)

Right of testator's widow to share in remainder interest after life estate if life tenant should die without issue entitled to remainder interest was conclusively determined by final decree determining heirship. Probate Code, §§ 1080, 1082.

6. Executors and administrators ⚷194(6)

Where probate court's order granting testator's widow a family allowance of $100 monthly, in addition to the bequest of $200 monthly made by will, was not appealed from within time prescribed, and no petition for modification of order after filing of inventory was made, such order could not be collaterally attacked in subsequent proceeding involving distribution of estate. Probate Code, §§ 681, 1240, 1080, 1082.

7. Executors and administrators ⚷500

An executor does not lose his right to statutory compensation because of his mismanagement of estate, but he should be charged with losses resulting from his default or neglect and allowed his commissions.

8. Executors and administrators ⚷501

Probate court's exercise of discretion respecting division of statutory compensation between executrices according to services actually rendered by each could not be disturbed on appeal, in absence of showing of abuse of discretion. Probate Code, § 901.

9. Trusts ⚷274(1)

Payments of interest and installments on loan secured by deed of trust on apartment house belonging to testator's estate were properly charged against corpus of estate rather than to income.

10. Wills ⚷732(3)

Under will bequeathing to testator's widow $200 monthly for life out of rents and receipts of estate, bequest, being one of income, was to be paid out of net income of estate, and widow was entitled to payments specified only in so far as there was income to meet them.

11. Wills ⚷733(8)

The amount of net income available to pay periodical bequests directed to be paid out of income depends on what period serves as basis for computing the gross income and expenses, and testator may himself provide in will for basis of such computation.

12. Wills ⚷684(6)

In absence of provision in testamentary trust prescribing period to be used as basis of computing gross income out of which periodical bequests are to be paid, the income is to be computed according to annual accounting periods, and the deficiencies of one period cannot be made up out of earnings of another.

13. Wills ⚷684(6)

Where will provided that $200 per month should be paid to testator's widow for life out of rents and receipts of estate, but did not prescribe any accounting period, the net income was required to be computed on basis of an annual accounting period, and any deficiency in any accounting period could not be made up out of net income of any other period.

14. Wills ⚷684(6)

Where will provided that $200 per month should be paid to testator's widow for life out of rents and receipts of estate, without prescribing any accounting period, if, upon computation, annual net income exceeded amount required by widow's bequest, the excess would be distributable to other beneficiaries interested in income, hence, if total expenditures exceeded total receipts or sums available therefor, income applied to expenditures chargeable to corpus would not necessarily be distributable to widow.

15. Executors and administrators ⚷513(9)

An order settling an account binds those interested in estate to the propriety as well as to the occurrence of the receipts and disbursements listed therein.

16. Executors and administrators ⚷309

An executor or administrator in making payments in anticipation of decree of distribution acts at his peril, and, if it turns out on distribution that payee is not entitled to receive any part of estate, executor or administrator must look for reimbursement to such payee.

17. Executors and administrators ⚷484

Advances by executor on a bequest not properly being a part of an account in absence of decree of distribution, probate court may exclude such items from the account and reserve them for consideration on distribution of estate.

18. Executors and administrators ⚷309

The probate court's approval of advancements on bequest made by executrix in anticipation of decree of distribution as part of account settled may relieve executrix of personal liability to other beneficiaries of estate for amount advanced, but interests of beneficiaries in estate can be determined only by decree determining heirship or by decree of distribution.

19. Executors and administrators ⚷514

In absence of determination of probate court by decree of heirship or of distribution, such court's previous settling of an account of executrix, in which payment of bequest in anticipation of decree of partial or final distribution was listed, did not foreclose a decision in subsequent proceeding involving distribution as to amount of net income available in accounting period involved to meet such bequest of $200 monthly payable out of receipts and revenues of estate.

20. Trusts ⚷274(2)

Whether expenditures for renovating apartment house belonging to estate and which did not represent additions to building or furnishings, but merely repairs and replacements, were chargeable to corpus or income of estate, depended largely on condition of property when received by executrices and, if such repairs and replacements were urgent when estate was established, such expenditures would be chargeable to corpus, but, if property was in tenantable condition when executrices took office, the expenditures would be chargeable to income.

21. Trusts ⚷274(2)

The cost of putting into tenantable repair premises not in such repair when received by trustee, whether originally acquired by trustee as part of trust property at time of creation of trust, or subsequently, is payable out of corpus of trust estate, but cost of thereafter keeping premises in repair is payable out of income, and same rule is applicable to estates.

22. Trusts ⚷274(2)

Extraordinary expenses or replacements ultimately chargeable to income of estate for more than one accounting period, where practicable, should be apportioned equitably to specific periods deriving the benefit, so that, if trust does not terminate before probable life of improvements, all costs of improvements will be paid out of income, but, if trust terminates before end of probable life of improvements, payments from income will cease at termination of trust and any amount unpaid to corpus is repayable out of income of accounting periods of any succeeding testamentary trust.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Proceeding in the matter of the estate of Charles H. Roberts, deceased. From a judgment decreeing distribution of the estate and settling the accounts of Ethel E. Stiebel and Elizabeth Clare Roberts, executrices, Ethel E. Stiebel and others, opposed by Elizabeth Clare Roberts and others, appeal.

Reversed.

Prior opinion 154 P.2d 411.

Potter & Potter, Frank Rouse, and Julius Patrosso, all of Los Angeles, for appellants.

Chase, Barnes & Chase and Ransom W. Chase, all of Los Angeles, for respondents.

TRAYNOR, Justice.

Charles H. Roberts died on August 11, 1933, leaving a holographic will containing the following bequest to his wife Elizabeth Clare Roberts: "After the payment of my just and lawful debts, I give, devise and bequeath to my wife, Elizabeth Clare Roberts, Two Hundred Dollars ($200.00) per month for her natural life out of the rents and receipts of my estate. This Two Hundred Dollars ($200.00) must be paid first, then the children get theirs." The will also gave a life interest in 5/12 of the estate to Oliver James Roberts and a life interest in 3/12 to Ethel E. Stiebel, children of a former marriage of the testator, with remainder in each case to the children of the life tenant. The remaining 4/12 of the estate was given to the children of two predeceased daughters of the testator. Elizabeth Clare Roberts, the testator's widow, and Ethel E. Stiebel, his daughter, were appointed executrices under the will. On October 10, 1934, the probate court set aside out of community property, as a probate homestead for the widow, a lot on which were located seven bungalows, six of them rented. The validity of this order was contested in a proceeding between the parties under sections 1080–1082 of the Probate Code to determine heirship. The judgment in that proceeding, which became final, held that the order setting aside the homestead was valid; that 1/5 of the other property acquired by the testator was community property and that an undivided 1/10 interest in the property under administration was therefore the widow's share; that the remaining 4/5 of the property acquired by the testator was his separate property; that "Elizabeth Clare Roberts is entitled under the terms of the Last Will and Testament of * * * Charles H. Roberts, Deceased, to payment of the sum of Two Hundred Dollars ($200.00) a month for the rest of her natural life from the date of the death of said decedent, to wit, August 11, 1933, to be paid out of the net income received from nine-tenths (9/10) of the remaining estate or property of said decedent; that said payments of Two Hundred Dollars ($200.00) a month are a charge upon said net income and are to be paid prior and ahead of the payment of any income to any of the persons entitled to the corpus or principal of said estate, or to any interest therein; that said bequest of Two Hundred Dollars is a bequest of income."

The executrices filed a first account in 1934, which was settled. The amended second account and the third and final account were consolidated. In the same proceedings objections were raised to both accounts and the distribution of the estate was litigated. The probate court entered its decree of distribution and settlement of the accounts. Contestants appeal from this decree.

[1-3] Appellants contend that the will reveals the testator's intention to dispose of all the property in which he had any interest, including the community property; that the widow was therefore put to an election to take her interest in the community property under the statute or to take under the will; and that by claiming a probate homestead in the community property, she elected to take her share in the community property under the statute and cannot take under the will. This question is not open on this appeal, however, for it was rendered res judicata by the final judgment in the proceeding between the parties to determine heirship. That judgment established the right of the widow to the probate homestead set aside for her as part of the community property and her right upon the distribution of the estate to receive her share in the community property in addition to her bequest under the will, and determined conclusively the issue now raised whether or not it was then expressly raised. Panos v. Great Western Packing Co., 21 Cal.2d 636, 638, 134 P.2d 242; Bernhard v. Bank of America, 19 Cal.2d 807, 810, 122 P.2d 892; Hamilton v. Carpenter, 15 Cal.2d 130, 133, 98 P.2d 1027; Seidell v. Anglo-California Trust Co., 55 Cal.App.2d 913, 918, 132 P.2d 12; see 2 Freeman, Judgments (5th ed.) § 627. The issue was within the probate court's jurisdiction in that proceeding, for in a proceeding to determine heirship "any person * * * entitled to distribution of the estate or any part thereof" and "praying that the court determine who are entitled to distribution of the estate" (Prob.Code, § 1080) may obtain a decision binding on any other person interested in the estate as to how the estate shall be distributed. Section 1082 of the Probate Code provides that a decree in such a proceeding, if final, "shall be conclusive * * * during the remainder of the administration of the estate and upon any subsequent proceeding for distribution." See Estate of Horman, 167 Cal. 473, 475, 140 P. 11; Colden v. Costello, 50 Cal.App.2d 363, 371, 122 P.2d 959. The court's jurisdiction in a proceeding to determine heirship includes the power to adjudicate community property rights. Colden v. Costello, supra; Estate of Gold, 170 Cal. 621, 623, 151 P. 12; In re Burdick, 112 Cal. 387, 44 P. 734. Neither the community property rights of the surviving spouse nor his interest in the estate and those of others could be determined if the court could not also determine whether the surviving spouse is put to an election, for only thus could it determine whether the estate to be distributed under the will included the whole community property or only the testator's share therein.

[4] Appellants contend, however, that the question whether a surviving spouse is put to an election must be left open until the time of distribution. No such rule was pronounced in Colden v. Costello, supra; Estate of McCarthy, 127 Cal.App. 80, 85, 15 P.2d 223; or Estate of Dunphy, 147 Cal. 95, 104, 81 P. 315, on which appellants rely. These cases hold simply that if a widow is put to an election, she need not decide until the estate is to be distributed whether she wishes to claim her share in the community property or the benefits provided for her in the will. If she reserves her decision, the court will make alternative provisions in the interim for the distribution of the estate. Estate of Dun-

phy, supra, 147 Cal. at page 104, 81 P. 315. In the present case the court determined that the widow could claim both her share in the community property and the bequest left her under the will, and it was therefore unnecessary for the widow to make a choice.

[5] The right of the widow to a share in the remainder interests after the life estates of the son and the daughter of the testator if the life tenants die without issue entitled to the remainder interests was likewise conclusively determined by the decree determining heirship.

[6] Appellants contend that the widow has no right to the family allowance of $100 monthly granted her by an order of the probate court on the grounds that the bequest of $200 monthly from the date of the death of the testator was in lieu of a family allowance, and that in any event she was not entitled to a family allowance for a period longer than three years within which the estate would have been closed but for her allegedly improper conduct in delaying the administration of the estate. The merits of these contentions cannot be determined in the present proceeding, for the order of the probate court granting the family allowance was neither appealed from nor modified. The order was made before the inventory was filed and was therefore subject not only to appeal (Prob.Code, § 1240), but to modification by the court after the inventory was filed. Prob.Code, § 681. Having failed to take an appeal within the time prescribed or to petition for the modification of the order after the filing of the inventory, appellants cannot attack the order collaterally in the present proceeding. Estate of Nelson, 167 Cal. 321, 324, 325, 139 P. 692; Estate of Monge, 25 Cal.App.2d 235, 77 P.2d 290; Estate of Brown, 54 Cal.App.2d 575, 581, 129 P.2d 713, 130 P.2d 188; see 11A Cal.Jur. 542.

[7, 8] Appellants question the right of the widow to any part of the executors' commissions upon the ground that she acted to the disadvantage of the estate. It is settled, however, that an executor does not lose his right to the statutory compensation because he is guilty of mismanagement of the estate. He "should be charged with losses resulting from his default or neglect, and allowed his commissions." Estate of Carver, 123 Cal. 102, 105, 55 P. 770, 771; Estate of Goodrich, 6 Cal.App. 730, 733, 93 P. 121; 3 Woerner, Administration (3d ed.) § 526. The statutes in some states have established a different rule. See Succession of Gandolfo, 173 La. 190, 136 So. 561, 83 A.L.R. 726; Woerner, ibid. As to the division of the statutory compensation between the executrices "according to the services actually rendered by each" (Prob.Code, § 901), the probate court exercised its discretion, which cannot be disturbed on appeal in the absence of a showing that the court abuse its power.

[9] Recurrent payments were made to meet interest and installments on a loan secured by a deed of trust on an apartment house, one of the assets of the estate. Appellants contend that the probate court should have charged amortization payments, as it charged interest payments, to income. They rely on the fact that under the will as well as under the statute, the payment of debts takes priority over the payment of bequests. One cannot conclude, however, that there is no income available for a bequest of income because there are debts outstanding. The loan is a charge on the corpus, and since amortization payments augment the value of the corpus, they are chargeable to corpus just as a full repayment of the loan would be.

While the lower court rightly refused to uphold the foregoing contentions, the judgment must be reversed because it erred in also refusing to uphold certain other contentions advanced by appellants.

[10-13] It was held in the proceeding to determine heirship that the widow's bequest was one of income. Appellants contend that the probate court should have computed the income available to meet the widow's bequest on the basis of an annual accounting period, deducting the expenses of such a period from the gross income thereof. If on such a basis the resulting net income was less than the $2,400 required to meet the monthly payments, the deficiency could not be made up out of the net income of another accounting period. The probate court computed the net income as a whole for a period of 113 months, the period covered by the amended second account, and determined that the amount arrived at after certain deductions was the "balance of the net income available for payment of said bequest." The widow's bequest, as one of income, was to be met by the net income of the

estate. Unlike the recipient of an annuity (Prob.Code, § 161(3) she was entitled to the periodic payments specified in the will only insofar as there was income to meet them. Estate of Brown, 143 Cal. 450, 455, 77 P. 160; Estate of Bourn, 25 Cal.App.2d 590, 599, 78 P.2d 193; Estate of Oliver, 21 Cal.App.2d 106, 108, 68 P.2d 735; see 2 Cal.Jur. 78; 2 Am.Jur. 824; 20 Words and Phrases, Perm.Ed., p. 465; Taylor v. Gardiner, 296 Mass. 411, 6 N.E.2d 357, 109 A.L.R. 717. The amount of net income available depends on what period serves as the basis for computing the gross income and expenses. The testator may himself provide for the basis of computation. It is settled in this state that in absence of such a provision in a testamentary trust the income shall be computed according to annual accounting periods and that deficiencies of one period shall not be made up out of the earnings of another. Estate of Platt, 21 Cal.2d 343, 351, 131 P.2d 825. The same rule should be applied in computing the net income of estates; otherwise the income of a beneficiary would depend on the time consumed in the administration of the estate, and a beneficiary might have an interest in prolonging the administration of the estate. The probate court, therefore, in the absence of any provision of the testator for another accounting period should have computed the net income on the basis of an annual accounting period and determined whether there was enough income in each period to meet the $200 monthly bequeathed to the widow. If upon a retrial of the case it should be determined that there was a deficiency in any of the accounting periods it cannot be made up out of the net income of any other period. Estate of Platt, supra.

[14] Appellants also attack the finding of the probate court: "That in order to pay expenses of administration, debts and other principal payments, it has been necessary for said executrices to use and apply the income receipts from said estate for such purposes. That the total amount of principal expenditures made have exceeded the total amount of principal receipts or sums available therefor as of November 17, 1943, by the sum of $11,528.70 which sum has been paid out of the net income receipts of said estate which would otherwise have been distributable to Elizabeth Clare Roberts. * * *" Under these circumstances, however, the income that was applied to expenses chargeable to corpus would not necessarily be distributable to the widow, for if upon computation of the annual net income, the income for any period exceeded the $2,400 required for the widow's bequest, the excess would be distributable to the other beneficiaries interested in the income.

[15-19] Appellants contend that an amount withdrawn by the widow on her bequest during the period covered by the first amended account was not met by the income of that period. Respondents contend that this question is not open in the present proceeding, on the ground that the payment on the bequest was ascertainable from the account and the propriety thereof was conclusively determined by the final order settling the account. An order settling an account binds those interested in the estate to the propriety as well as to the occurrence of the receipts and disbursements listed. Estate of Wear, 20 Cal.2d 124, 127, 128, 124 P.2d 12; Security First Nat. Bank v. Superior Court, 1 Cal.2d 749, 755, 137 P.2d 69; Estate of Simonton, 183 Cal. 53, 56, 190 P. 442; Estate of Rider, 199 Cal. 742, 746, 251 P. 805; Estate of McDougald, 146 Cal. 191, 195, 79 P. 878. The present case, however, involves, not a disbursement within the executor's powers, but a partial fulfillment of a bequest prior to a decree of partial or final distribution. "In making payments in anticipation of the decree of distribution, the administrator acts at his peril, and if * * * it turns out upon distribution that the payee is not entitled to receive any part of the [estate], the administrator must look for reimbursement to the person to whom the payment has been made." Estate of Ross, 179 Cal. 358, 362, 182 P. 303, 305. Since advances by the executor on a bequest are not properly a part of an account in absence of a decree of distribution, the probate court may exclude such items from an account and reserve them for consideration upon the distribution of the estate. Estate of Willey, 140 Cal. 238, 241, 73 P. 998; see 11B Cal.Jur. 760.

The probate court's approval of such an item as part of the account settled may relieve the widow of personal liability as executrix to the other beneficiaries of the estate for the amount advanced (see 34 C.J.S. Executors and Administrators, § 503, p. 411), but this case concerns, not such liability, but the interests of the beneficiaries in the estate, which can be determined only by a decree determining heirship or a decree of distribution. In the absence of such a determination the trial court's previous settling of an account in which the payment was listed does not foreclose a decision in the present proceeding as to the amount of net income available in the accounting period in question to meet the widow's bequest.

[20, 21] Appellants question the probate court's determination that certain extraordinary expenses for the apartment house are chargeable to corpus. The probate court found: "That there has been expended * * * in addition to the ordinary replacements and repairs, the following sums, to wit: 1. For a new roof ......$220.00. 2. For new coils on water heaters......$150.00. 3. For painting and renovating Robert Arms Apts. $950.00. 4. For new refrigerators $466.07. That each and all of said expenditures were of an unusual and extraordinary nature beyond the scope of ordinary operation and maintenance and which tended to increase the value of said apartment house. That said expenditures are properly chargeable to principal or corpus of the estate and said executrices are properly chargeable with the resulting increased value of said apartment house to the extent of said expenditures." The expenses in question represented no additions to the house or furnishings but merely repairs and replacements. Whether these expenses were chargeable to the corpus or income of the estate depends largely on the condition of the property when the executrices received it. "The cost of putting into tenantable repair premises which were not in such repair when received by the trustee, whether originally acquired by the trustee as part of the trust property at the time of the creation of the trust or subsequently acquired by him, is payable out of principal; but the cost of thereafter keeping the premises in repair is payable out of income." (Rest., Trusts, § 233, comment i.) The same rule of accounting for such expenses is applicable to estates.

[22] In the present case, the evidence as to these expenses did not relate to the question whether the repairs and replacements in question were urgent when the estate was established. If they were, the expenditure for these extraordinary repairs and replacements are chargeable to corpus. If the property was in tenantable condition when the executrices took office, the expenses should be charged to income. The question then arises, however, how such extraordinary expenses, ultimately chargeable to income, should be charged when the benefits of the repairs and replacements are to extend over several accounting periods. "It is a generally accepted principle of accounting that, where practicable, expenses and costs which are a charge against earnings of more than one period should be apportioned equitably to the specific periods which derive the benefit. * * * From the standpoint of good accounting practice, there is no option as to how items should be charged when the benefits therefrom clearly aid or are reasonably expected to aid subsequent periods." Montgomery, Auditing, 6th Ed., p. 246. This principle is given specific application in the Restatement of Trusts, section 233, comment *l:* "If the * * * probable life of the improvements is limited in duration, although the cost of the improvements is payable out of principal, the trustee is under a duty to the beneficiary entitled in remainder to amortize the cost of such improvements out of income, in accordance with such reasonable plan as he may adopt. * * * The result is that if the trust does not terminate before the end of the probable life of the improvements, the whole cost of the improvements will be paid out of income. This is fair because the beneficiary entitled to the income gets the full benefit of the improvements and the remainderman gets no benefit. On the other hand, if the trust terminates prior to the end of the probable life of the improvements, the payments from income will cease on the termination of the trust. This is fair because the beneficiary entitled to the income has not received the full benefit from the improvements but the remainderman receives a part of the benefit." Under this rule the expenses in the present case would first be paid out of corpus, but the amounts allocable to each accounting period would be charged to the income of that period and refunded to corpus. If it appears that the usefulnes of the repairs and replacements will continue after the termination of this estate, any amount still unrepaid to corpus should be repaid out of the income of the accounting periods

of the testamentary trust to be created with the assets of the estate for as long as the benefit of the repairs and replacements continue.

The judgment is reversed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., concurred.

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71 Cal.App.2d 181

PEOPLE v. DREYER.

Cr. 3872.

District Court of Appeal, Second District, Division 1, California.

Oct. 11, 1945.

Hearing Denied Nov. 8, 1945.

1. **Burglary 🔑41(1)**

Evidence authorized conviction of burglary in the first degree.

2. **Homicide 🔑166(1), 173**

For purpose of determining whether assault was made with intent to commit murder, character of the instrument, manner in which it was used by defendant and purpose to be accomplished were all to be considered.

3. **Homicide 🔑257(8)**

Evidence warranted conviction of assault with a deadly weapon with intent to commit murder.

4. **Criminal law 🔑742(1)**

In prosecution for assault with a deadly weapon, with intent to commit murder, credibility of witnesses was sole province of jury.

5. **Criminal law 🔑1163(6)**

Where defendant consented to procedure whereby trial court read back to jury only a summary of testimony relating to whether defendant had and used a deadly weapon instead of all the testimony, in complying with jury's request, and agreed as to contents of the statement, it would be conclusively presumed on appeal that statement made was satisfactory to defendant and that no prejudice resulted therefrom.

6. **Criminal law 🔑815(5)**

Instruction on question of involuntary intoxication was sufficient to safeguard defendant's right to a fair trial, without further instructing jury as to defendant's mental condition at the time when alleged offenses were committed, in view of evidence.

7. **Criminal law 🔑163**

Plea of once in jeopardy does not apply where jeopardy took place at same trial as conviction sought to be set aside.

8. **Criminal law 🔑180**

The dismissal, at close of trial but before argument, of counts in information charging assault with a deadly weapon did not constitute an "acquittal" and was not a bar to conviction in the same trial of greater offense of assault with a deadly weapon with intent to commit murder under another count in the information on ground of once in jeopardy.

See Words and Phrases, Permanent Edition, for all other definitions of "Acquittal".

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

William Dreyer was convicted of burglary of the first degree and of assault with a deadly weapon to commit murder, and he appeals.

Affirmed.

Morris Lavine, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Walter L. Bowers, Asst. Atty. Gen., for respondent.

YORK, Presiding Justice.

Defendant was charged in count 1 of an information filed by the district attorney with the crime of burglary; in count 2 with assault with a deadly weapon with intent to commit murder, and in count 3 thereof with assault with a deadly weapon, it being charged therein that defendant was armed at the time of the commission of said offenses.

At the conclusion of the trial, the court of its own motion dismissed count 3 of the information, and the jury found defendant guilty as charged in counts 1 and 2 thereof. From the judgment of conviction of the crime of burglary of the first degree and of assault with a deadly weapon with intent to commit murder, as well as from the order denying his motion for a new trial, defendant prosecutes this appeal urging the following grounds for a reversal of the judgment:

(1) That the evidence is insufficient to support the verdict and that the verdict is contrary to the law and the evidence;

(2) That the court erred in its conduct of the case in that it failed to have read back to the jury certain matters which the jury requested to have read to it;

(3) That the court erred in failing to instruct the jury on the question of the mental capacity of appellant.

In his reply brief, appellant presents a new point: That the verdict of guilty as to the offense charged in count 2 is contrary to law, for the reason that the dismissal of count 3 after the jury was impaneled constituted an acquittal of the charge of assault with a deadly weapon, and "therefore acquitted him of the charge of assault with a deadly weapon with intent to kill."

At about 2:30 o'clock in the morning of May 19, 1944, appellant was arrested as the result of an alleged burglary of a gasoline service station at 8101 Melrose Avenue in the city of Los Angeles. It is disclosed by the record that appellant was working for a theatrical booking agency in Hollywood and was furnished a car and gasoline for use in such employment; that on May 18, 1944, he worked in the office from 9 or 10 o'clock in the morning until 6 o'clock in the afternoon, from which time until the early hours of the next morning he was making the rounds of various night clubs to look for and to sell theatrical talent; that he left the Circle Bar on Hollywood Boulevard about 1:30 a.m. of May 19th to go to the Band Box at Fairfax and Beverly Boulevard. An hour later he was apprehended by the police under the following circumstances:

Mr. H. W. McFee, a night watchman in the employ of a detective agency guarding business houses and defense plants, arrived at his home about 2 a.m. of May 19th, and was pouring himself a cup of coffee when he heard the sound of crashing glass. He stepped to a window in his house which faced the service station next door and observed an automobile standing by the gas pumps. He immediately picked up his .45 Smith & Wesson revolver and ran over to the station which was in darkness. From light shed by an ornamental lighting fixture on the corner, Mr. McFee was able to see that the door of the station was open and the glass thereof broken. He also observed a man, whom he later identified as the appellant, standing inside but was unable to get a look at his face, so he called to him to "come out", whereupon appellant stepped to the door holding a nickel plated revolver in his left hand. McFee told him to "Come out with your hands up", whereupon appellant made a break and ran out and around the front of the automobile. McFee then ran to the rear of the automobile and back of the gas pumps so that he had three pumps lined up between himself and appellant, McFee being at one end about two feet from the pumps, and appellant at the other end about five feet from the pumps. As appellant ran around the front of the machine, he fired one shot, and as the two men stood in the positions above indicated they exchanged shots. McFee testified that he fired five shots altogether. "I fired four shots at him and when the third shot that he fired hit me, I fell; I fell over backwards and the gun was discharged in the air"; which exhausted his ammunition. Thereupon, appellant jumped in his car and drove off. In the affray, McFee received a V-shaped wound on the top of his head.

It appears that appellant drove to his room in a Hollywood hotel where he attempted to bandage his arm which had been severely injured, and was attempting to locate a doctor when he was apprehended. He was then driving a black Plymouth coupe bearing a New York license plate and the tire on the rear left wheel was completely off. The officers observing that appellant had been wounded (he having been shot four times in the left hand and arm), called an ambulance and he was taken to a hospital. He wore no coat and a search of his person revealed no firearms.

The owner of the service station testified that he locked the station when he left the night before and when he was called there early in the morning of May 19, 1944, he found the door open and the glass broken. He also discovered that ration coupons for 76 gallons of gasoline were missing from his desk.

Three .38 calibre cartridges were found at the scene and the owner of the station found a .38 calibre bullet under his desk about a month later when he was moving things around in his office. Appellant denied that he ever had a revolver and testified that he had been drinking at various night clubs on the night in question and had little recollection of what happened during that time, but dimly remembered stopping at a service station for air for his tires.

Appellant urges that there is no evidence in the record indicating that he intended to burglarize the premises, or that he entered the promises with intent to steal; also, that there is no evidence that he stole anything therefrom. He claims that the essence of burglary is entry with intent to steal or to commit some felony and that his testimony that he went into the service station to get some air for his tires stands unrebutted.

The evidence is uncontroverted that around 2:30 in the morning, appellant was found inside the service station right after the sound of breaking glass had been heard by the witness McFee, and that the glass in the door of the station had been broken near the lock. Moreover, when appellant was first questioned by Don J. Bennett, one of the arresting officers, he stated that his name was Ralph Smith and that he did not know what had happened. He then said he would tell what he knew if the officers would not let his parents know; that his name was William Dreyer and that he had broken into the service station and "that while he was in there someone approached and called to him to come out; then he stated that the person who approached started firing at him, and he stated that he had a crank, an auto crank, in his hand and when this person started firing, he threw the crank at him, and thought he hit him, because he fell back. Then he (appellant) stated at that time he jumped in the car and left. * * * He refused to state what he went into the service station for * * * that he did not want to say; that he did not want to incriminate himself." Officer Forbes, who in company with Officer Bohmfalk questioned appellant at the General Hospital on the morning the burglary was committed, testified that appellant admitted to him that he "got into a poker game where I lost all my money"; that later he realized that he didn't have any money, and going out Melrose he saw this oil station and decided he would go in and get some money, because he was broke; that he went in and broke the window with a crank or tire wrench. In explaining what happened to McFee, the night watchman, appellant told said Officer Forbes that "he figured if he could get near the door, hit him over the head with that thing and knock him down, he could make his getaway. * * * he hit the man over the head and the man started in shooting and the man dropped, and he jumped in the car and drove away." Appellant denied that he broke into the station to get some gasoline station stamps and stated he went in for money. When told that the officers doubted the story about his having a gun because they could not see how he could be shot in the left arm, appellant replied: "Well, I am left-handed." Although appellant claims he went into the service station to get air for his tire, he stated to the police officers that it was after he was shot and was looking for a doctor that he noticed the tire of his car was flat.

[1] Eliminating appellant's express admissions that he broke into the service station to take some money, and in spite of his story that he had no memory of what he did or was too intoxicated to realize what he was doing, the undisputed facts and circumstances fairly warranted the jury in inferring that appellant entered the service station with intent to steal or to commit a felony. As was so aptly stated in the case of People v. Martone, 38 Cal.App.2d 392, 394, 101 P.2d 537, 538: "The contention is made by defendant that in order to convict him of burglarious intent, it was necessary to presume such intent. With this we cannot agree. The circumstances surrounding him at the time of his apprehension furnished sufficient evidence, which, if believed by the trial judge, would warrant the inference of intent to commit a burglary. People v. Mize, 80 Cal. 41, 22 P. 80; People v. Perini, 94 Cal. 573, 29 P. 1027. Certainly, breaking a door of a building belonging to a stranger at 2 o'clock in the morning could not have been done with a view of protecting the property or for any other lawful purpose." See, also, People v. Sturman, 56 Cal.App.2d 173, 180, 132 P.2d 504.

Appellant argues that there is no substantial evidence in the record that he had a firearm or that he assaulted the night watchman with intent to kill him, or that he fired any shot at him at the time here in question. While it is true that appellant denied that he had a gun, and none was ever produced herein, he admitted that he hit McFee over the head with a crank or tire wrench which was later found in his car.

[2-4] For the purpose of determining whether the assault was made with intent to commit murder, the character of the instrument, the manner in which it was used, and the purpose to be accomplished, are all to be considered; and where it appears that a purpose to put an officer out of the way with a deadly weapon might have been formed to avoid alarm and pursuit in an attempt to escape, it cannot be said that the verdict is not justified by the evidence. Accepting appellant's version that he struck the night watchman over the head with a tire wrench or automobile crank, it still would support the verdict of guilty and warrant the jury in inferring an intent to commit murder. See People v. Cook, 15 Cal.2d 507, 516, 517, 102 P.2d 752, 757, where the weapon used was a piece of wood 2 x 4, about 2 feet long, in which case it was held that "under all the facts and circumstances of the instant case the questions of the nature of the weapon and the manner of its use in their relation to the crime committed were for the determination of the jury. People v. Lee, 23 Cal.App.2d 168, 72 P.2d 572; People v. Valliere, 123 Cal. 576, 579, 56 P. 433." In the instant cause, the jury apparently chose to believe the night watchman McFee's version of what occurred, and, as stated in People v. Corlett, 67 Cal.App.2d 33, 43, 153 P.2d 595, 599: "It was the sole province of the jury to determine which person told the truth regarding the circumstances of the affray."

The appellant complains that the court erred in its conduct of the case in that it failed to have read back to the jury the testimony relating to "whether the defendant had and used a deadly weapon." It appears that the jury requested through its foreman, Mr. Berry, that such evidence be read to it, whereupon the court in the presence of appellant, appellant's counsel, as well as the deputy district attorney, made the following statement:

"Now, may I state this to you, Mr. Berry: It will take somewhere about three or four hours to read that testimony, because we could not just pick out that testimony without reading the context along with it. I have talked with the attorneys, both Mr. Bird and Mr. Cochran, one representing the defendant and one representing the District Attorney, and we all agree as to what the effect of that testimony is. Do you think it would satisfy the jury if I made a statement as to what we all agree the testimony was in regard to this weapon situation instead of reading the testimony?

"The Foreman: Yes, your Honor, I think that would greatly simplify it, I am sure, in the mind of every juror. We would like, if it is agreeable to your Honor, to hear the testimony of Mr. McFee.

"The Court: You would like to have that read, anyhow?

"The Foreman: Yes. A Juror: Yes, we would.

"The Court: I will read the statement counsel and I have drafted, as to which we all agree. Mr. McFee testified that the defendant had a gun which he held at his side as he stepped to the door of the service station; that the defendant fired at least three shots from the gun while the defendant was holding the gun in his left hand and standing at a point at the west end of the pumps, and while he, Mr. McFee, stood at the east end of the pumps, that he, Mr. McFee, saw flashes and heard the sound of the explosions; that he was struck on the head and fell to the ground while they were in that position, and he received medical treatment for his head injury.

"The testimony also shows that three .38 caliber unexploded cartridges were found at the service station after the shooting, and also that a piece of metal of a composition similar to the bullets in the .38 caliber shells was found at the end of the pumps where Mr. McFee was standing; this piece of metal was of a definitely different composition from the bullets fired by Mr. McFee. The defendant has testified that he did not, on the night of May 18–19, have a gun in his possession; that he never has had a gun. The officers' testimony is to the effect that the defendant denied having or using a gun while at the service station, and that he stated to them on one occasion that he struck Mr. McFee with a lug wrench, and on another occasion that he threw a lug wrench at Mr. McFee; that in the conversation of May 29th, the officers showed the defendant the wrench, Exhibit 8, and the defendant stated that that was the wrench he used; the defendant denied in his testimony having told the officers anything about using a wrench, and while he was on the witness stand the defendant denied using any lug wrench, as indicated. Now, would you like some testimony read in addition to that?

"Foreman Berry: I think what you have given us is sufficient.

"The Court: I have tried to give you the ultimate facts on that subject, so far as we could recall them. Mr. Bird also calls my attention to a matter—you might recall it yourselves, but I will mention the matter to you—that the wound on the top of Mr. McFee's head was not a hole in the head but was a wound on the top of the head running, as you recall, from over the right temple, diagonally back, slanting back towards the left ear, sort of a crease or gash wound.

"A Juror: We would like to know in the testimony of Mr. McFee, which he gave to us, when he was wounded whether he at any time lost consciousness. We would like to know what his reply was to that question.

"The Court: I think counsel will agree with me that Mr. McFee testified that after he was struck on the head he lost consciousness for a short time and fell to the ground. Is that your recollection, gentlemen?

"Mr. Cochran: I think his testimony was that he was dazed by the blow and fell to the ground, and that he saw the defendant drive away.

"Mr. Bird: My recollection is that he testified he was dazed but did not entirely lose consciousness.

"The Court: I think that is a better statement of it because, as you recall, ladies and gentlemen, he did describe the automobile driving away, and so forth.

"Mr. Cochran: And he said the fifth bullet had been fired from his gun and, of course, he was helpless to do anything further.

"Foreman Berry: I think that is entirely satisfactory. We thank you very much.

"The Court: You may now retire."

Appellant urges that instead of complying with the jury's request, the court "offered them a short and unsatisfactory summary of what the testimony was as to 'the ultimate facts on that subject, so far as we could recall them.'" Also, that this procedure was highly erroneous and prejudicial, since this testimony was vital to the determination not only of "the question of innocence or guilt of the defendant, but as to whether the degree of the offense was first or second degree."

Section 1138 of the Penal Code does not define the procedure to be followed upon the return of a jury to the court for information, except to state that "Upon being brought into court, the information required must be given in the presence of, or after notice to, the district attorney, and the defendant or his counsel, or after they have (been) called." In other words, there is no requirement that testimony should be *read* to the jury.

[5] Apparently appellant consented to the procedure followed herein and also agreed as to the contents of the statement which fairly summarized the testimony relating to the possession and use by appellant of a deadly weapon. In the absence of any objection by appellant at the time, it must be conclusively presumed that the statement made was satisfactory to him and that no prejudice resulted therefrom.

[6] It is next contended that the court erred in failing of its own motion to instruct the jury as to the mental condition of appellant at the time when the alleged offenses were committed. In this regard, while he admits that he did not request that such instruction be given, appellant maintains that since the issue of his mental ability was developed by the evidence, an instruction thereon was required to the end that he should be assured a fair trial.

The evidence upon this question included the testimony of the night watchman McFee that appellant looked "very wild"; that he thought appellant was under the influence of narcotics because he believed there was something wrong with him and he thought it was something other than liquor; that the witness "figured that a .45 ought to knock a man down and if it does not knock him down, there is something wrong with him."

Appellant testified to certain lapses of memory on the night in question; that he remembered starting to leave the Circle Bar around 1:30 a.m. of May 19th but did not remember anything more until he found himself inside the service station; that a man said to him, "What are you doing there?" and he replied, "Nothing * * * I didn't know what I was doing in there, in the first place." That he remembered that the man said "Come out or I will blow your head off", and was pointing a gun at him. Appellant further testified that he followed the man to a certain point and then stopped; that he had a cigarette in his hand and as he "bent over to drop it down and step on it everything went black;" that the next thing he remembered he was in his car and "there was a lot of noise * * * the tire was gone * * * I drove to my hotel * * * I kept passing out and coming to"; that he left his hotel and went out to look for a doctor to dress his wounds and was arrested. He also testified that he started drinking at 6 o'clock the night before and during the night he drank 20 or 30 straight whiskies with beer chasers; that he did not remember having had a tire iron in his hand while he was at the service station; did not remember that he broke any glass; and did not remember hearing the sound of breaking glass; did not hear any shots fired by Mr. McFee or anyone else, but definitely denied that he had a gun in his hand or otherwise in his possession at any time that evening. With respect to conversations he had with the various police officers after his arrest, he testified either that he did not remember them or positively denied them. He also testified that he was involved in an automobile accident in 1938 and as a result received some head injuries.

An examination of the entire record in this cause discloses that appellant's argument that "the sum of his testimony in regard to his condition after 'everything went black', is that he was unconscious and did not know what transpired", is without merit. There is nothing in the evidence from which the jury could infer that appellant lost consciousness at any time during the night in question. While on the witness stand he apparently sought to leave such impression with the jury by his answers to the questions propounded, i.e., by stating that he did not remember what he was doing during the latter portion of the night, and by making many inconsistent and ambiguous statements with regard thereto. However, there was evidence that he was driving an automobile from place to place and that in various conversations with the several police officers after his arrest, he made a full disclosure as to why he went to the service station and what took place while he was there, as well as thereafter. In the circumstances presented, the instruction given to the jury on the question of involuntary intoxication was amply sufficient to protect and safeguard appellant's right to a fair and impartial trial.

At the close of the trial, and immediately preceding arguments of counsel to the jury, the court of its own motion dismissed count 3 of the information, to-wit: "Count three is at this time dismissed because it is merely a matter which, if tenable, would be included in what has already previously been charged in count two."

As will be remembered count 2 charged assault with a deadly weapon with intent to commit murder, and count 3 charged assault with a deadly weapon.

It is here contended by appellant that the dismissal of count 3 constituted an acquittal of the charge of assault with a deadly weapon and therefore resulted in an acquittal of assault with a deadly weapon with intent to commit murder of which he was found guilty as charged in count 2; that it necessarily follows that the verdict of guilty of the crime charged in count 2 is void, because assault with a deadly weapon is included in assault with a deadly weapon with intent to commit murder "and an acquittal or conviction of the lesser of these offenses is a bar to further prosecution for the greater offense."

It would appear that the opinion in People v. Horowitz, 131 Cal.App.Supp. 791, 19 P.2d 874, to which respondent calls attention and which has been cited with approval by the Supreme Court of this state, is determinative of the point here raised by appellant.

In the cited case "defendants were first charged with putting on an immoral and indecent show (count I), then with putting on an immoral and indecent scene or part of a show (count II). At the conclusion of the trial by the court without a jury, the defendants * * * were found guilty on the first count; the second count was dismissed." Appellants there contended "that if they were not guilty of the charge set forth in the second count, they were not of that contained in the first, and that as the dismissal operated as an acquittal of the one charge, their conviction of the other cannot stand."

The court stated in 131 Cal.App.Supp. at page 793, 19 P.2d at page 875, as follows:

"If we admit, for the moment only, that the dismissal was an acquittal, and that one not guilty of participating in an indecent part of a show could not be guilty of participating in an indecent show, still it does not follow that the judgments must be reversed. Authorities could be cited which would seem to support a reversal. People v. Andursky, 1925, 75 Cal.App. 16, 241 P. 591; People v. Puppilo, 1929, 100 Cal.App. 559, 280 P. 545. But we find more persuasive cases recognizing that such inconsistent verdicts may be caused, not by the confusion but the mercy of the jury, of which the appellant can neither complain nor gain further advantage. People v. Stovall, 1928, 94 Cal.App. 635, 271 P. 576; People v. Smith, 1931, 117 Cal. App. 530, 4 P.2d 268; State v. Jackson, 1926, 121 Kan. 711, 249 P. 688; State v. Axley, 1926, 121 Kan. 881, 250 P. 284. Moreover, probably to avoid the result of those cases which interpret inconsistent verdicts as acts of stupidity rather than acts of leniency, section 954, Penal Code, was amended in 1927 so that it now reads, in the part here controlling:

"'An indictment * * * or complaint may charge * * * different statements of the same offense * * * under separate counts. * * * A verdict of acquittal of one or more counts shall not be deemed or held to be an acquittal of any other count.' This last sentence is applied in People v. Ranney, 1932, 123 Cal. App. 403, 11 P.2d 405, 406, where a contention has been made that a conviction on two counts could not stand because of an acquittal on five counts. In part the court said: 'Each count must stand upon its own merit. The amendment to section 954 of the Penal Code conclusively settles this controversy adversely to the contention of appellant.' Nowhere do we find the validity of the amended section questioned; nowhere else do we find that it came to the attention of the court. We conclude that even if the dismissal be regarded as an acquittal, that is no reason why the judgment of conviction, based on ample evidence, should be reversed.

"We are of the opinion, however, that the dismissal was not an acquittal. * * * It is quite evident that, in People v. Clensey, supra, 97 Cal.App. 71, 274 P. 1018, the court considered a dismissal something else, and less, than an acquittal. A dismissal connotes a refusal to determine guilt rather than a finding that there is no guilt. Particularly is this true under the circumstances of this case. The trial judge, at the conclusion of the evidence, found the defendants guilty of the offense charged in the first count. It was apparent that the first was so allied to the second that a conviction on the second count would but lead to complications. No sentence could be imposed, for that would result in double punishment. (Citing authorities.) He did not want to find the defendants not guilty, for he was convinced of their guilt. There was but one logical way out—dismiss the superfluous count. This he had a right to do, under section 1385, Penal Code, 'in furtherance of justice'. (Citing authorities.)

"We are of the opinion, therefore, that there is no formula, framed to safeguard the rights of those charged with crime, which is offended by the affirmance of these judgments; nor is there any statute or case authority justifying a reversal."

[7] On the question of double jeopardy, it was held in the cited case, 131 Cal.App.Supp. at page 793, 19 P.2d at page 874, as follows: "It may well be that, following a reversal of these judgments, appellants could successfully press the plea of once in jeopardy against a new trial because of the fact that they had gone to trial under the dismissed count. People v. Ny Sam Chung, 1892, 94 Cal. 304, 29 P. 642, 28 Am.St.Rep. 129. A plea of once in jeopardy has no place, however, in this case, where the jeopardy referred to took place at the same trial as the conviction sought to be set aside. People v. Degnen, 1925, 70 Cal.App. 567, 234 P. 129; People v. Day, 1926, 199 Cal. 78, 248 P. 250; People v. Clensey, 1929, 97 Cal.App. 71, 274 P. 1018." See, also, People v. Amick, 20 Cal.2d 247, 252, 125 P.2d 25, quoting from the Horowitz case.

In People v. Krupa, 64 Cal.App.2d 592, 604, 149 P.2d 416, 423, analyzing section 1021 of the Penal Code which provides: "If the defendant was formerly acquitted on the ground of variance between the indictment or information and the proof, or the indictment or information was *dismissed* upon an objection to its form or substance, *or in order to hold the defendant for higher offense, without a judgment of acquittal, it is not an acquittal of the same offense.*" (Emphasis added.), the court stated: "The above section recognizes a right in the court to dismiss a charge in order to hold the defendant for a higher offense. It is not provided that the dismissal must be made before plea. It has been held that a dismissal made to hold for a higher offense after a jury has been impanelled and sworn, that is, after jeopardy has attached, will bar a *subsequent* prosecution for a higher offense in which the dismissed charge is included. People v. Ny Sam Chung, 94 Cal. 304, 29 P. 642, 28 Am.St.Rep. 129; People v. Hunckeler, 48 Cal. 331; 7 Cal.Jur. 944, 949, 953; see, also, People v. Horowitz, 131 Cal.App.Supp. 791, 19 P.2d 874."

[8] Applying the reasoning of the Horowitz case to the facts presented by the instant cause, the dismissal of count 3 did not constitute an acquittal, and was not a bar to a conviction of the greater offense where the jeopardy "took place at the same trial as the conviction sought to be set aside."

For the reasons stated, the judgment and order appealed from are, and each of them is, affirmed.

DORAN and WHITE, JJ. concur.

Hearing denied; CARTER, J., dissenting.

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71 Cal.App.2d 211

PEOPLE v. SMITH et al.

Civ. 15032.

District Court of Appeal, Second District, Division 2, California.

Oct. 15, 1945.

1. Appeal and error 🔑460(2)

An appeal does not stay proceedings on judgment abating public nuisance under Red Light Abatement Act. Code Civ. Proc. § 949; Gen.Laws 1937, Act 6161, § 7.

2. Appeal and error 🔑479(1)

An appellate court should not lend its aid to continuance of business abated as public nuisance under Red Light Abatement Act by granting supersedeas restraining execution of abatement judgment pending appeal therefrom, in absence of some showing of merit in appeal or probable error in judgment. Gen.Laws 1937, Act 6161, § 7.

3. Appeal and error 🔑478

In determining whether application for writ of supersedeas to restrain execution of judgment pending appeal therefrom shall be granted, error will not be presumed, respondent's, as well as appellant's rights must be considered, and presumption is in favor of lower court's decision until contrary is shown.

4. Appeal and error 🔑479(2)

The issuance of writ of supersedeas to restrain execution of judgment abating public nuisance pending appeal therefrom is discretionary, and court having jurisdiction of appeal should be careful not to nullify statute prohibiting such stay where judgment orders closing of building involved for any period of time. Code Civ. Proc. § 949.

5. Appeal and error 🔑479(2)

A writ of supersedeas to restrain execution of judgment, abating public nuisance under Red Light Abatement Act, pending appeal therefrom, will be denied, where record discloses nothing to influence court's discretion in favor of issuance of writ. Gen.Laws 1937, Act 6161, § 7.

◆

Proceeding by Dorsey Smith for a writ of supersedeas to restrain, pending appeal, execution of a judgment against him and others in an action by the People to abate an alleged public nuisance under the Red Light Abatement Act.

Order to show cause and temporary restraining order discharged and writ denied.

Fred N. Howser, Dist. Atty., and Robert Wheeler, Deputy Dist. Atty., both of Los Angeles, for plaintiff.

Robert A. Neeb, Jr., of Los Angeles, for defendants.

FOX, Justice pro tem.

The petitioner, Dorsey Smith, seeks a writ of supersedeas to restrain, pending appeal, the execution of the judgment rendered against him (and other nonappealing defendants) in an action filed by the District Attorney of Los Angeles County to abate an alleged public nuisance under the Red Light Abatement Act, Stats.1913, p. 20, Deering's Gen.Laws 1937, Act 6161.

[1] The judgment provided, in accordance with the authority contained in section 7 of said Act, that the designated premises be closed against their use for any purpose and so kept closed for the period of one year. An appeal does not stay proceedings on a judgment in such an action. Code Civ.Proc. § 949. Hence this application for supersedeas.

[2, 3] The question of granting or denying supersedeas in an action to abate a public nuisance under the Red Light Abatement Act was presented in People v.

Jackson, 190 Cal. 257, 263, 212 P. 4, 7. In denying the writ the court said: "The Legislature by enacting [and amending] section 949 has indicated as its opinion that there should be no stay of an action to abate the character of nuisance complained of in the case at bar, and this court ought not to lend its aid to the continuance of such business, in the absence of some showing of merit in the appeal * * *." In denying supersedeas in Nuckolls v. Bank of California, Nat. Ass'n, 7 Cal.2d 574, at page 578, 61 P.2d 927, at page 929, the court pointed out that "probable error" in the trial court's judgment "has not been made to appear." In denying an application for a writ of supersedeas in Kane v. Universal Film Exchanges, 32 Cal.App.2d 365, 367, 89 P.2d 693, 694, 91 P.2d 577, the court says that it is "well settled that in determining whether an application for the writ shall be granted, error will not be presumed; that the rights of the respondent as well as those of the appellant must be taken into consideration; and that until the contrary is shown the presumption is in favor of the lower court's decision." Probable error has not been shown by petitioner.

[4] In United States of America v. Berg, 202 Cal. 10, 258 P. 942, which was an action to abate a nuisance under the prohibition law and thus close a hotel in Ventura, the court in denying an application for supersedeas pointed out, 202 Cal. at page 15, 258 P. at page 944, that the issuance of the writ is discretionary and that the legislature, by amending section 949, Code of Civil Procedure, has indicated its opinion that there should be no stay of an execution to abate a nuisance where the judgment orders the closing of the building for any period of time, and "the court having jurisdiction of the appeal ought to be careful not to nullify the statute."

[5] Our view of the application here presented for supersedeas is well expressed in People v. Piazza, 59 Cal.App. 43, 209 P. 1017, where supersedeas was also sought in a Red Light Abatement action. It was there stated, 59 Cal.App. at pages 45, 46, 209 P. at page 1018, that "Without passing on the merits of the appeal, it may be said that an examination of the record discloses nothing to influence the court's discretion in favor of the issuance of the writ."

The order to show cause and the temporary restraining order are discharged and the writ prayed for is denied.

MOORE, P. J., and McCOMB, J., concur.

71 Cal.App.2d 213

HADGES et al. v. KOURIS et al.

Civ. 14832.

District Court of Appeal, Second District, Division 3, California.

Oct. 17, 1945.

Rehearing Denied Nov. 14, 1945.

Hearing Denied Dec. 13, 1945.

1. Judgment 🔑139

The granting or denying of motion to set aside default is addressed to trial court's sound discretion. Code Civ.Proc. § 473.

2. Appeal and error 🔑957(1)

An appellate court will not disturb trial court's order in setting aside default judgment against defendant in absence of clear showing of abuse of discretion, especially where relief is granted after having been promptly sought and it does not appear that plaintiff is prejudiced. Code Civ.Proc. § 473.

3. Appeal and error 🔑1024(4)

On appeal from order setting aside a default and default judgment, where affidavits of parties are in direct conflict, lower court's action thereon is conclusive and will not be disturbed. Code Civ.Proc. § 473.

4. Judgment 🔑162(4)

Evidence that defendant acted promptly upon discovery of default judgment, that entering of general appearance through attorney was result of mistake, and that defendant had a meritorous defense, authorized trial court to set aside default on ground that it was taken against defendant through his inadvertence, surprise, or excusable neglect. Code Civ.Proc. § 473.

◆

Appeal from Superior Court, Los Angeles; Alfred E. Paonessa, Judge.

Action by Thomas C. Hadges and others against Nick Kouris, individually and doing business as Lendaris Grocery, and another, to set aside a judgment on ground of alleged extrinsic fraud. A default judgment was entered against defendant named and, from an order granting his motion to set aside the default and the default judgment for failure to answer plaintiffs' complaint and permitting defendants to plead thereto, plaintiffs appeal.

Order affirmed.

Thomas G. Hadges, Demosthenes Hadges, and George Hadges, in pro. per., for appellants.

Alfred R. Meyers, of Los Angeles, for respondent.

DESMOND, Presiding Justice.

Plaintiffs appeal from an order granting defendant's motion, instituted under section 473, Code of Civil Procedure, to set aside a default and default judgment for failure to answer plaintiffs' complaint and permitting him to plead thereto. In support of the motion three affidavits were filed, together with a copy of a proposed demurrer and a proposed answer on behalf of defendant. A counter-affidavit by Thomas C. Hadges, one of the plaintiffs, was also before the court. The motion came on for hearing on August 25, 1944, was ordered submitted, and on August 29, 1944, the court made its order setting "aside default and default judgment."

[1, 2] The granting or denying of a motion to relieve a party from default under section 473, Code of Civil Procedure, is a matter "addressed to the sound discretion of the trial court, and, in the absence of a clear showing of abuse in the exercise thereof, an appellate court will not disturb the order of the court below" (Waybright v. Anderson, 1927, 200 Cal. 374, 375, 253 P. 148, 149); especially is this true where the trial court grants the relief, after it has been promptly sought, and it does not appear that the plaintiff has sustained any prejudice thereby. Weck v. Sucher, 1929, 96 Cal.App. 422, 424, 425, 274 P. 579.

The record in the present case indicates that on December 11, 1940, defendant [then plaintiff] recovered a judgment from plaintiffs [then defendants] in the municipal court in an action based upon (1) an open book account for goods, wares and merchandise sold and delivered and (2) an account stated for a balance due for goods, wares and merchandise sold and delivered. Almost three years thereafter, on November 13, 1943, plaintiffs filed an action in the Superior Court of Los Angeles County seeking to set aside this judgment on the ground of extrinsic fraud. No summons was issued on this complaint. Approximately seven months later plaintiffs amended their complaint. In addition to this action, two days later, on June 18, 1944, plaintiffs obtained a restraining order, restraining defendant from enforcing the municipal court judgment, which order to show cause was made returnable on June 28, 1944. The summons and complaint, together with the restraining order and order to show cause, were served personally upon defendant in Bingham, Utah, on June 23, 1944, just five days prior to the return date of the order to show cause. Defendant, in his supporting affidavit, stated that after service of the papers upon him he took them to his attorney in Salt Lake City, Utah, for the purpose of arranging "with Joseph H. Wolf, attorney in Los Angeles, to represent him in the said matter. That he had never seen or spoken to the said Joseph H. Wolf and was not acquainted with him. That it was his intention to visit Mr. Wolf in Los Angeles at the earliest opportunity for the purpose of arranging for representation." On June 28th, the date set for the hearing on the show cause order, Joseph Wolf appeared for defendant and succeeded in having the hearing continue to July 31, 1944. In his supporting affidavit, Wolf stated that when he appeared on June 28th he was advised that he would have to pay an appearance fee to enable him to request the continuance, that he paid such fee and signed a general appearance, which was handed to him by the clerk of the court; "That it was through mistake, inadvertence, surprise, and excusable neglect of affiant that he signed a general appearance for the defendant and that it was his intention to appear only for the purpose of a continuance."

In his supporting affidavit, defendant further stated that he had been advised that the order to show cause "and all other proceedings" had been continued to July 31, 1944; that he was unable to come to Los Angeles until July 28, 1944, and on that date he conferred with attorney Wolf but was unable to reach an employment agreement with him; that although thereafter he was referred to Alfred R. Meyers he was unable to contact him until 9:00 o'clock of July 31, 1944; that they both went immediately to Department 34 for the hearing on the order to show cause and for the first time learned that a default had been entered. "That he had been advised that he had ninety days within which to answer the complaint, from the date of service. * * * That the said default was entered through the mistake, inadvertence, surprise and excusable neglect of affiant in his failure to make provision for representation to avoid entry of default. That affiant herein never engaged any attorney to enter his appearance in the said action, or to waive any of the time allowed him by law for filing an appearance, or answer to the said complaint, and that when he arranged with his attorney in Salt Lake City, to arrange with * * * local counsel to appear at the date set for the first hearing of the Order to Show Cause it was not his intention to authorize the said attorney to file a general appearance." When the order to show cause was called on July 31, 1944, the court advised defendant's counsel, Alfred Meyers, that a default had been entered on July 25, 1944, six days previously, and that he could not appear before the court without first setting aside the default, then granted the preliminary injunction, and on August 1, 1944, signed a default judgment, annulling and setting aside the municipal court judgment of 1940 and permanently enjoining defendant from enforcing the same. Two days later, on August 3rd, defendant filed a notice of motion to "set aside default and ruling on injunction" and on August 4th filed a notice of motion to "set aside default judgment."

Defendant's present counsel, Alfred Meyers, also filed a supporting affidavit in which he corroborated defendant in the details of his employment and the discovery of the entry of the default. He stated further that he called Joseph Wolf, the attorney who had filed the general appearance on behalf of defendant, and learned that Saul Bernard, the attorney who had represented the present defendant as plaintiff in the municipal court action, was in the Army and that the matter had been referred to Wolf by Bernard's former associate. "That * * * the defendant, speaks English poorly and advised affiant that he had been advised that he had ninety days within which to answer and that it was his intention when he was advised that Saul Bernard was no longer practicing law, to engage Joseph H. Wolf only for the purpose of appearing at the original date set for the hearing on the Order to Show Cause, it being Mr. Kouris' intention to later complete arrangements personally for his representation in connection with the trial of the matter. * * *" Meyers stated further that he questioned the defendant at great length concerning the present action, as well as the municipal court action; that he asked defendant if he had fully and fairly stated all of the facts to him and was advised by defendant that he had done so; and that he believed defendant had a good and substantial defense to the present action.

[3] Plaintiff Thomas C. Hadges' counter-affidavit contradicted certain statements contained in the supporting affidavits, but on appeal, where such conflict exists, the action of the court below is conclusive and will not be disturbed. Waybright v. Anderson, supra; Patterson v. Keeney, 1913, 165 Cal. 465, 466, 132 P. 1043, Ann.Cas. 1914B, 232.

[4] Nothing in the record indicates any lack of diligence or indifference on the part of the defendant in protecting his rights after service of the papers upon him; on the contrary, it appears that defendant acted promptly, and particularly so upon discovery of the default. In addition, the proposed pleadings filed by defendant set up a meritorious defense to the action. Under the circumstances, we are of the opinion that the trial judge properly granted relief from the judgment which was taken against the defendant "through his mistake, inadvertence, surprise or excusable neglect."

Order affirmed.

SHINN and PARKER WOOD, JJ., concur.

MORTIMER, Building and Loan Com'r, v. LOYNES et al. *

Civ. 14606.

District Court of Appeal, Second District, Division 3, California.

Oct. 9, 1945.

Rehearing Granted Oct. 30, 1945.

1. Jury 🔑14(2)

An action by building and loan commissioner, against building and loan association's president and others for amount alleged to have been wrongfully withheld by defendants from association in connection with sale of its apartment building was an action at law, so as to entitle plaintiff to jury trial. Const. art. 1, § 7.

2. Jury 🔑14(2)

In action for fixed amount of money, fact that equitable principles are used to establish defendants' liability does not necessarily render action equitable, rather than action at law, in which plaintiff is entitled to jury trial, as law courts recognize, apply, and grant relief based on equitable principles in such actions. Const. art. 1, § 7.

3. Building and loan associations 🔑42(16)
Jury 🔑14(3, 5)
Trusts 🔑371(2)

In action by commissioner as liquidator against building and loan association's president and others for amount alleged to have been wrongfully withheld from association, allegations of amended complaint as to how defendant president acquired a yacht in exchange for trust deed notes, obtained in his dealings with association, and prayer for general relief, did not entitle plaintiff to decree declaring trust in yacht for association or requiring accounting of president's profits in such transaction, and hence did not render action equitable and deprive plaintiff of right to jury trial. St.1933, p. 308; Const. art. 1, § 7.

4. Limitation of actions 🔑100(12), 179(2), 195(5)

The word "discovery", as used in statute requiring institution of action based on alleged fraud within three years after discovery of facts constituting fraud, is not synonymous with "knowledge", and averment of lack of knowledge of such facts within statutory period is insufficient to toll statute, but plaintiff must show that he had no means of knowledge or notice which, if followed by inquiry, would have shown circumstances on which cause of action was founded and when and how facts concerning fraud became known to him. Code Civ.Proc. § 338.

See Words and Phrases, Permanent Edition, for all other definitions of "Discovery" and "Knowledge".

5. Limitation of actions 🔑179(2)

In action by commissioner as liquidator against building and loan association's president and others for amount alleged to have been fraudulently withheld from association in connection with sale of its apartment building, amended complaint, alleging circumstances under which and when defendants' alleged fraud was discovered, was sufficient as against plea that it showed on its face that cause of action was barred by three year statute of limitations, in view of confidential relationship between president and other officers and directors of association. Code Civ.Proc. § 338.

6. Appeal and error 🔑1035

In commissioner's action against building and loan association's president and others for amount alleged to have been wrongfully withheld from association in connection with sale of its apartment building, evidence that previous commissioner required defendant president to turn over to association additional investment certificates did not show that alleged misappropriation was settled and liquidated by commissioner with association's full knowledge, so as to render denial of jury trial harmless to plaintiff, in view of other evidence. Const. art. 1, § 7.

7. Building and loan associations 🔑42(16)

In action by commissioner as liquidator against building and loan association's president and others for amount alleged to have been wrongfully withheld from association by defendants in connection with sale of association's apartment building, defendants' contention that plaintiff based cause of action on only part of transaction and abandoned remainder, and hence established no ground for damages, was without merit, in view of evidence that such transactions were separate deals.

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* Subsequent opinion 168 P.2d 481.

8. Building and loan associations ⚷42(16)

Evidence that sale of building and loan association's apartment building by president thereof and others and their deals involving trust deed notes and yacht acquired by president were separate transactions and that president arranged to handle apartment deal through codefendant's broker, so as to net association less than was previously offered for building by another broker on purchaser's behalf, and personally kept difference, was sufficient to warrant conclusion that association suffered loss, so as to authorize action by commissioner liquidating the association, notwithstanding proof that association received all it was entitled to as price of trust deed notes.

◆

Appeal from Superior Court, Los Angeles County; Kurtz Kauffman, Judge.

Action by Frank C. Mortimer, as State Building and Loan Commissioner and liquidator of the Mutual Building & Loan Association of Long Beach, against Richard R. Loynes and others to recover an amount alleged to have been wrongfully withheld by defendants from the association in connection with the sale of its apartment building. Judgment for defendants, and plaintiff appeals.

Reversed.

Robert W. Kenny, Atty. Gen., and Joseph A. Ball, of Long Beach, for appellant.

Clock, Waestman & Clock and Swaffield, Swaffield & Madden, all of Long Beach, for respondents.

FOX, Justice pro tem.

This is an appeal by the plaintiff from a judgment in favor of the defendants.

The action, generally speaking, is prosecuted by the plaintiff, Building and Loan Commissioner, as liquidator of the Mutual Building & Loan Association of Long Beach, for the purpose of recovering $7,398.59, alleged to have been wrongfully withheld by the defendants from the association in connection with the sale of a furnished apartment house that belonged to the association.

In view of the questions that must be considered it is necessary to set forth the allegations of the amended complaint in considerable detail. It is alleged that defendant Loynes was president, general manager and a director of the association from May 10, 1933, to January 13, 1937, and "was during all of said time vested with and exercising the power to control and manage the business affairs and property of said Association"; that he "dictated and controlled the policies and affairs" of the association; and that "the other officers and directors had implicit faith in the supposed honesty and integrity" of said defendant. For several months prior to September 11, 1934, the association owned a piece of property in the city of Los Angeles which was improved with a fully furnished four-story brick apartment building known as the Chatham Arms Apartments. It is further alleged that on or about August 1, 1934, one Fred M. Cox, a licensed real estate broker, representing one Lillian Mercer, submitted to defendant Loynes, personally, as president and managing agent of the association, an offer to purchase said property for $62,000 net cash; that thereafter the Beverly Hills National Bank & Trust Company, as escrow agent for said Mercer, forwarded to defendant Loynes certain proposed escrow instructions which provided for the sale of said property to said Mercer for said net cash amount; that on or about August 30, 1934, the said Cox, as agent for said Mercer, offered to pay the sum of $63,500 net cash for said property; that said last mentioned offer was communicated to defendant Loynes; that none of the other officers or directors of the association had any knowledge of either of said offers or escrow instructions. It is then alleged that at or about the time of said last mentioned offer the defendant Loynes entered into a secret parol agreement with defendant Eaton, a real estate broker of Los Angeles, whereby Eaton agreed to act as a pretended purchaser of the apartment house and Loynes agreed to arrange the pretended sale to him for a sum considerably less than $63,500 and that Eaton would then sell the property to Lillian Mercer, through Cox, the real estate broker, for $63,500, and that Eaton's profit on the transaction would be divided between him and Loynes. It is further alleged that in pursuance of said agreement with defendant Eaton, the defendant Loynes, in utter disregard of the trust and confidence reposed in him as an officer and director of said association, arranged for a pretended sale of the apartment house and furnishings and certain trust deed notes belonging to the association to Eaton, through an escrow at the Farmers & Merchants Bank of Long Beach at a cash price of $55,329.06, less certain title and escrow charges. The transaction was to be handled through the National Company, Ltd., which was alleged to be a wholly owned subsidiary of the association; that on August 31, 1934, Loynes caused an application to be filed with the then Building & Loan Commissioner, Louis Drapeau (now Judge Drapeau of Ventura County), for approval of a transaction involving the exchange of said Chatham Arms Apartments and a certain trust deed note upon which there was a balance due of $9,196.18, known as the association's loan No. 12156, for outstanding certificates of the association of the face value of $147,900, naming the defendant Eaton as the purchaser. (Under an amendment to the Building & Loan Law in 1933, Chapter 31 of the Statutes of 1933, p. 308, Building & Loan Associations were permitted, during the period here involved, to exchange their properties for their outstanding investment certificates, subject, however, to the approval of the Building & Loan Commissioner. At the time of the transaction herein alleged, the investment certificates of the said association were apparently selling on the market at or about forty per cent of their face value.) The said application was approved by the Commissioner. It is further alleged that Loynes advised Cox, the broker, that Eaton had an exclusive listing on the Chatham Arms Apartments, and that Eaton had authority to enter into an escrow for the sale of the property on his own behalf and that all further negotiations should be with Eaton; that accordingly on August 30, 1934, Eaton, pursuant to directions from Loynes, entered into an escrow at the Beverly Hills Bank and Trust Company, whereby he agreed as owner to sell said apartment house property to Lillian Mercer for $63,500 in cash, less certain deductions for title and escrow charges; that on September 11, 1934, Loynes caused the association to execute a grant deed to the Chatham Arms Apartments and a bill of sale to its furnishings, conveying said property direct to Lillian Mercer; that said deed and bill of sale were delivered into escrow in the Farmers & Merchants Bank at Long Beach and that on September 14, 1934, said Bank, acting upon instructions of the defendants, transmitted said deed and bill of sale to the Eaton-Mercer escrow in the Beverly Hills Bank and Trust Company, with instructions to remit the net proceeds to the Long Beach bank; that on October 3, 1934, the Beverly Hills bank forwarded to the escrow at the Long Beach bank $63,294.64 cash; that the Long Beach bank paid $54,858.55 of this sum to the National Company, through which the association handled the deal; that the balance of $7,398.59 was paid by check to Eaton on October 4, 1934; that he cashed said check in the presence of Loynes and delivered the money to Loynes "who thereupon appropriated the same to his own use and benefit as a secret profit"; that thereafter a portion of said sum was remitted by Loynes to Eaton as the latter's share of the money thus wrongfully appropriated.

It is also alleged that at some time prior to September 28, 1934, the defendant Eaton, acting under the instructions of Loynes, caused fully secured trust deed notes of the aggregate value of $11,177.36, which he had acquired in connection with said transaction, to be transferred to certain third parties in exchange for the yacht "Phantom" which said yacht was transferred to the Sierra Investment Company, a corporation wholly owned and controlled by Loynes; that said yacht was reasonably worth the price paid therefor, to wit: $11,177.36; that between the 11th and 28th days of September, Loynes, acting for himself and in his personal interest, deposited $4,773.79 in an escrow in the Long Beach bank as the sole consideration paid by him or the Sierra Investment Company for said yacht and on said last mentioned date said sum was, pursuant to the request and instructions of Loynes, remitted by said bank to said National Company as the consideration purportedly paid by Eaton for said trust deed notes. It is then alleged that the aggregate sum of $59,632.34 (consisting of $54,858.55 realized from the Chatham Apartments deal and $4,773.79 realized from trust deed notes), which was remitted to the National Company, was used to purchase outstanding investment certificates of the face value of $147,900, which said certificates were delivered to the association and cancelled in accordance with the petition for the exchange of property for certificates which had been approved by the Building & Loan Commissioner; that due to the clever manner in which said transaction was manipulated by the defendants, nothing appeared upon the books or records of the association to indicate any irregularity in said transaction.

It is further alleged that throughout said transaction the defendant Eaton acted purely as a dummy and that no part of the purchase price for said property was advanced by him; that the defendants concealed from the other officers and directors of the association the fact that an offer had been made to purchase the Chatham Arms Apartments and furnishings for any sum in excess of that for which the property was purportedly sold to Eaton, to wit, the net sum of $54,858.55 in cash; that the defendants represented to the other officers and directors of the association that the sale to Eaton was bona fide; and that by means of said fraudulent scheme the association was defrauded of the sum of $7,398.59.

By his pleading plaintiff also lays a foundation for the recovery of exemplary damages because of the alleged fraud of the defendants.

Plaintiff prays judgment against the defendants for "actual damages" in the sum of $7,398.59 together with interest thereon from October 4, 1934, at the rate of 7% per annum; "exemplary damages" in the sum of $10,000; and costs of suit "together with such other and further relief as the court may deem just and proper."

By their answer the defendants denied the charges of fraud and the retention of secret profits and pleaded the statute of limitations in bar of the action. They did not seek any affirmative relief.

[1, 2] Plaintiff's first contention is that the court erred in denying his plea for a trial by jury. He bases this contention upon the theory that this is an action at law and that he is therefore entitled to a jury trial under the constitution. Defendants, however, contend that plaintiff's alleged cause of action is in equity and hence he is not entitled to a jury trial as a matter of right. Considering the pleadings in their entirety (Hutchason v. Marks, 1942, 54 Cal.App.2d 113, 128 P.2d 573), it is our opinion that the plaintiff's position must be sustained.

Notwithstanding the complexity of the transactions and the circuitous procedure adopted to accomplish the simple transfer of ownership of the Chatham Arms and its furnishings from the association to Lillian Mercer and the allegations of the amended complaint with reference to the disposition of certain trust deed notes and the acquisition for defendant Loynes of the yacht "Phantom," plaintiff's cause of action may nevertheless be reduced to very simple terms, viz., an action to recover a judgment against the defendants for $7,398.59 (plus interest) which represents the amount the defendants are charged with having personally received out of the Chatham Arms deal through their alleged fraudulent handling of that transaction but which should have gone to the association. It is thus apparent that this action is one at law. Austin v. Wilcoxson, 1906, 149 Cal. 24, 84 P. 417; Fallon v. Sockolov, 1921, 55 Cal.App. 33, 202 P. 909; Johnstone v. Morris, 1930, 210 Cal. 580, 292 P. 970. It is true that its foundation lies in the fact that defendant Loynes was one of the officers of the association and hence owed to it the duty of fair dealing and that he is alleged to have violated that duty and, with the aid of defendant Eaton, to have profited personally at the expense of the association. Equitable principles furnish the standard by which to measure the conduct of the defendants in this transaction. When this standard is applied the result is, in so far as the pleadings are concerned, that the defendants have a specific sum of money out of which they have defrauded the association, and which, therefore, they are not entitled to retain. Western States Life Ins. Co. v. Lockwood, 1913, 166 Cal. 185, 135 P. 496; Bainbridge v. Stoner, 1940, 16 Cal.2d 423, 427, 106 P.2d 423. From the fact that equitable principles are thus used to establish the alleged liability of the defendants, it does not necessarily follow that the action to enforce that liability is equitable. The law courts now recognize and apply many equitable principles and grant relief based thereon where, as here, the relief sought is a judgment for a fixed amount. See, Philpott v. Superior Court, 1934, 1 Cal.2d 512, 36 P.2d 635, 95 A.L.R. 990; Crouser v. Boice, 1942, 51 Cal.App.2d 198, 124 P.2d 358; and Money Had and Received, An Equitable Action at Law, by Judge Edward T. Bishop, 7 So.Cal.L.Rev. 41. None of the extraordinary powers of a court of equity are required in order to give plaintiff the relief that he seeks. A court of law can afford complete relief.

[3] Defendants point to the allegations of the amended complaint with reference to the manner in which defendant Loynes is alleged to have acquired the yacht "Phan-

tom" in exchange for trust deed notes of $11,177.36, which he obtained in his dealings with the association for $4,773.79, and insist that under these allegations and plaintiff's prayer for general relief he would have been entitled to a decree that the yacht was held in trust for the association or for an accounting of Loynes' profits in the transaction. The amended complaint did not pray for such relief and it appears that the formal prayer for general relief was not intended to be an appeal to the equitable powers of the court. It was not alleged that the purchase of the yacht was embraced within the alleged plan and agreement of Loynes and Eaton, nor was it alleged that there had been a belated discovery of the facts in the yacht transaction, which would have been necessary in order to state a cause of action arising out of it. Neither the amended complaint nor the answer alleged that the sale of the apartment property and the sale of the trust deed notes constituted a single transaction. No facts were alleged which would have made it necessary to inquire into the purchase of the yacht. The court received evidence offered by defendants for the evident purpose of showing that any profits made in the real estate sale were used in the purchase of the yacht and that the association received the full benefit of them. The answer did not plead this defense but if all the facts testified to had been pleaded, the action would still have been one at law. In this action for money, proof that there had been an expenditure of the money, authorized by the association and for its benefit, would have constituted a good defense, but a judgment sustaining it would not have required the exercise of the equitable powers of the court.

Plaintiff was entitled to a trial by jury. Art. 1, sec. 7, Calif.Const.; Farrell v. City of Ontario, 1919, 39 Cal.App. 351, 178 P. 740; Pacific Western Oil Co. v. Bern Oil Co., 1939, 13 Cal.2d 60, 87 P.2d 1045; Connell v. Bowes, 1942, 19 Cal.2d 870, 123 P.2d 456; Hutchason v. Marks, supra.

[4, 5] The defendants contend, however, that even if the plaintiff were entitled to a trial by jury, nevertheless the error was not prejudicial because the amended complaint shows on its face that the alleged cause of action is barred by the three year statute of limitations. Code Civ.Proc., sec. 338. As previously noted the transaction on which plaintiff bases his cause of action took place during August, September and October, 1934, and the complaint was not filed until June, 1940. In order to maintain his action it was therefore necessary for plaintiff to plead that he did not discover the facts constituting the fraud until within three years prior to the date he filed his complaint. As pointed out in Bainbridge v. Stoner, supra, 16 Cal.2d 423, 430, 106 P.2d 423, 428: "The word discovery as used in the statute is not synonymous with knowledge. And the court must determine as a matter of law when, under the facts pleaded, there was a discovery by the plaintiff, in the legal sense of that term. Consequently, an averment of lack of knowledge within the statutory period is not sufficient; a plaintiff must also show that he had no means of knowledge or notice which followed by inquiry would have shown the circumstances upon which the cause of action is founded. Moreover, he must also show when and how the facts concerning the fraud became known to him. Lady Washington C. Co. v. Wood, 113 Cal. 482, 45 P. 809; Consolidated R. & P. Co. v. Scarborough, 216 Cal. 698, 16 P.2d 268; Turner v. Liner, 31 Cal.App.2d 196, 87 P.2d 740." For the purpose of complying with these rules and showing that his cause of action is not barred by the statute of limitations, plaintiff repeated certain allegations with respect to the confidence of the other officers and directors in Loynes, and their reliance on his honesty and integrity; that he concealed from them the fraudulent plan and scheme by which he and Eaton made a profit from the transaction; that the other officers and directors did not know that an offer had been made by Cox to purchase the apartment house property for $63,500; that throughout the transaction Loynes represented to the other officers and directors that said property was being sold to defendant Eaton at the best price obtainable; that from May, 1933, to January, 1937, Loynes, as President, director and manager, personally managed and controlled all the business of the association and its subsidiary, the National Company, Ltd. It is further alleged that none of the other officers or directors had or acquired any knowledge of the secret profit obtained by the defendants or that the property was sold for a sum less than was originally offered therefor and that nothing appeared in the books and records of the association to indicate these facts. In this connection it is further alleged that the Building &

Loan Commissioner examined the affairs of the association at least once each year as required by law, and that the books of the association were audited by certified public accountants at least once each year, but that in none of said examinations or audits were any facts or circumstances discovered which caused or should have caused a person exercising reasonable care to discover the fraudulent conduct of the defendants; that in the course of an investigation into the affairs of the association in the early part of 1936 a deputy investigator of the Building & Loan Commissioner discussed the transaction in question with the defendants, Loynes and Eaton, and at that time both of said defendants stated that the sale of the Chatham Apartments to Eaton was bona fide and that Eaton had actually purchased said property on his own account and had actually furnished the money with which to purchase the same; that neither of said defendants ever revealed to the Building & Loan Commissioner, or any of his deputies or agents, or to any of the other officers, directors or stockholders of the association, the fact that a larger offer had been made for the purchase of said property than was actually received by the association, or the fact that Eaton had paid all or any part of the profit made in the transaction to Loynes.

With respect to the facts and circumstances leading to the discovery of the alleged fraudulent acts on the part of the defendants, the amended complaint shows that on or about the 17th day of April, 1940, Eaton was being questioned by C. Roy Smith, one of the attorneys for plaintiff (the association had been taken over in January, 1940, for liquidation by the predecessor in office of the plaintiff herein, and Smith was attorney for the then commissioner as such liquidator). It is further alleged in the amended complaint "that in the course of said examination the defendant, Eaton, at first asserted that he had purchased said Chatham Apartments in his own behalf and that he had furnished the money himself but after a considerable number of questions had been asked and answered said defendant became panicky when asked whether he had reported the profits made on said transaction in his Federal Income Tax Return for the year 1934 and finally stated to said Smith: 'I am simply tired covering up Dick's (meaning the defendant, Loynes) shady deals; I am too old and I am going to tell you the truth about the whole thing'; that thereafter said defendant admitted that he participated in said transaction merely as an accommodation to the defendant, Loynes, that he had signed all of the documents and entered into the various escrows at the request and upon the direction of the defendant, Loynes, and that he had cashed the $7,398.59 check in the presence of and paid the entire proceeds to the defendant, Loynes. That the only persons who had any knowledge of the fact that the defendant, Loynes, made the secret profit in question were the defendants, Loynes and Eaton, and that neither plaintiff nor any of the directors, officers or stockholders of said Association had any way of discovering said facts until the defendant, Eaton, consented to reveal the same as heretofore related. That the defendant, Loynes, always has and still does refuse to admit the fact that he received any portion of said secret profits or that the defendant, Eaton, was not a bona fide purchaser of said property or that either of the defendants have been or are guilty of any breach of trust or fraudulent conduct."

The foregoing allegations clearly show under what circumstances and when, in fact, the alleged fraud of the defendants was discovered. The allegations are also sufficient to show why it was not sooner discovered. The other directors and officers had confidence in and relied on the honesty and integrity of the defendant Loynes. There was no reason for them to suspect that the Chatham Arms was not being sold to Eaton for the best price obtainable. There was nothing in the books or records of the association to indicate a better price had been offered or that a secret profit had been made. There is, therefore, no reason shown or suggested as to why the other officers and directors should have investigated this particular transaction. It does not appear from the allegations of the amended complaint that the annual audits of the association revealed any irregularities with respect to the deal. It does appear that in examining into the affairs of the association in 1936 a representative of the Building & Loan Commissioner discussed the transaction with the defendants and was told that Eaton had purchased the property on his own account and had furnished the money with which to make said purchase. It was not revealed to the representative of the Commissioner that a larger offer had been made for the purchase of the property or that any portion of the profit had been paid over to Loynes by Eaton. The transaction on its face appeared regular. There was no reason to suspect fraud on the part of the defendants. Under the circumstances as disclosed by the allegations of the amended complaint it is difficult to see how the other officers and directors of the association could have been expected to make or cause to be made any other or further investigation into the particular transaction, or how they can be charged with knowledge or notice of facts or circumstances which, if reasonably pursued, would have lead to the discovery of the alleged fraud. The "rule has been somewhat relaxed, so far as the requirement of allegations stating the circumstances which are relied upon by the plaintiff as excusing discovery of the fraud are concerned, in cases involving confidential relationship." Bainbridge v. Stoner, supra, 16 Cal.2d at page 430, 106 P.2d at page 428. That principle should be applied in this case and the amended complaint should be held sufficient as against the plea of the statute of limitations.

[6] Defendants further contend that the alleged appropriation by them was settled and liquidated by the Building & Loan Commissioner with the full knowledge of the association, hence no prejudice could be suffered by the denial of a jury trial. This contention is based on the fact that in 1936 following a report dated June 15, 1936, to Building & Loan Commissioner Drapeau, by Milton O. Shaw, Chief Examiner, the commissioner required Loynes to turn over to the association additional investment certificates in the face amount of $13,714. An examination of said report and consideration of the testimony of Judge Drapeau, Examiner Shaw, witness Madson and the several entries in the association's books with respect to the Hanson trust deed note, would have furnished ample support for a finding by the trier of fact (a jury, had there been one) that the settlement related only to an alleged profit made by Loynes in connection with the sale of the trust deed notes and the acquisition of the yacht "Phantom" in the name of Sierra Investment Company on September 28, 1934 and had nothing whatever to do with the Chatham Arms deal which was closed on October 4, 1934. Furthermore, defendants did not allege in their answer that they had made a settlement of plaintiff's claim; they only denied that they had made a profit, as alleged. No finding was made with reference to the claimed settlement.

[7] Defendants also contend that plaintiff has based his cause of action on only a part of the transaction and has abandoned the remainder, hence no ground for damages could possibly be established. This argument is founded on the proposition that the sale of the Chatham Arms Apartments, and the disposition of the trust deed notes and the acquisition of the yacht "Phantom" and the other matters in relation thereto constituted a single transaction. However, a jury might reasonably have come to the conclusion from the testimony of Eaton, his statements to witnesses Smith and Shaw and from the several escrows, that the two transactions were in fact separate deals. This contention is therefore without merit.

[8] Defendants also argue that the evidence shows without contradiction that the association suffered no loss. We do not so view the evidence. As pointed out above, a jury might reasonably have concluded that the sale of the Chatham Arms, and the deal involving the trust deed notes and the yacht were separate transactions. With substantial evidentiary support, a jury could also have concluded that defendant Loynes arranged to handle the Chatham Apartment deal through Eaton so as to net the association less than had previously been offered by Cox on behalf of Lillian Mercer, and that the defendants personally kept the difference. Under such implied findings a jury would necessarily have concluded that the association did suffer a loss and return a verdict accordingly for the plaintiff. Proof that the association had received all that it was entitled to as the price of the trust deed notes would not establish the fact that it had not sustained a loss in the real estate transaction by its failure to receive the full amount for which the property was sold.

In their briefs, which consist of approximately 400 pages, counsel for the respective parties have devoted considerable space to arguing whether or not the evidence supports the findings. In view of our conclusions it is not necessary to consider that question.

The judgment is reversed.

SHINN, Acting P. J., and PARKER WOOD, J., concur.

71 Cal.App.2d 217

LASATER v. OAKLAND SCAVENGER CO. et al.

Civ. 12882.

District Court of Appeal, First District, Division 2, California.

Oct. 19, 1945.

Rehearing Denied Nov. 17, 1945.

Hearing Denied Dec. 17, 1945.

1. Death 🔑69

In measuring damages suffered by husband and adult children through death of wife and mother, jury was entitled to consider loss of society and comfort suffered by all of them and loss of services and care suffered by husband.

2. Appeal and error 🔑1004(3)
Death 🔑97
New trial 🔑76(5)

The amount of damages to be awarded for death of wife and mother resulting in loss to husband and children of society and comfort and to husband of services and care is committed first to sound discretion of jury and second to like discretion of trial judge in passing on motion for new trial, and award will not be held excessive on appeal if it appears to bear a reasonable relation to the elements of loss to be considered by jury.

3. Courts 🔑90(1)

In appraising earlier decisions on the question of excessive damages, appellate court could consider the fact that measured by its purchasing power the value of the dollar has substantially decreased.

4. Death 🔑99(4)

Award of $14,000 for death of 63-year-old woman who was in good health, had average life expectancy of 12.26 years, did all the housework for herself and husband, and was survived by husband having somewhat greater life expectancy and seven adult children, one of whom was feeble-minded, was not excessive.

5. Trial 🔑228(3)

Requested instruction that, because decedent who was struck by a truck while crossing street in the darkness was dressed entirely in black, she should have used a greater degree of care for her own safety, was erroneous in using the word degree instead of quantum or amount, and refusal to give such instruction was not error.

6. Negligence 🔑65

The "degree of care" required of a person for his own safety is always the same, that is, ordinary care, but, in some circumstances, the "quantum or amount of care" required to reach the degree of ordinary care is greater than in others.

See Words and Phrases, Permanent Edition, for all other definitions of "Degree of Care" and "Quantum or Amount of Care".

7. Appeal and error 🔑1067

Refusal to instruct on unavoidable accident in action for death of woman struck by truck while crossing street at night was not prejudicial error, where jury was clearly instructed on burden of proof, negligence, and proximate cause, and returned a verdict for plaintiff.

8. Trial 🔑260(8)

Refusal to instruct on the effect of failure of decedent who was struck by truck while crossing street at night to see truck if it was plainly visible was not error in view of instruction by court of its own motion.

◆

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by George J. Lasater, as administrator of the estate of Angela Lasater, deceased, against Oakland Scavenger Company and another for the wrongful death of plaintiff's decedent. Verdict and judgment for plaintiff, and defendants appeal.

Judgment affirmed.

Brown, Rosson & Gillis, of Oakland, for appellants.

Nichols & Richard, of Oakland, for respondent.

DOOLING, Justice pro tem.

In this action for the wrongful death of a wife and mother the jury returned a verdict for plaintiff administrator in the sum of $14,000. The trial court denied a motion for new trial and defendants have appealed from the judgment.

It is not claimed on this appeal that the evidence is insufficient to support the jury's finding of liability. The only grounds of appeal presented by appellants are that the amount of the judgment is excessive and that the court committed prejudicial error in refusing to give certain instructions proposed by appellants.

The decedent was 63 years old with an average life expectancy of 12.26 years. She was in good health. Her husband was 60 years of age with a somewhat greater life expectancy. The decedent left seven adult children. One of these is a feeble-minded woman in a state-supported institution. All of the others except the youngest son are married and living in their own homes. The youngest son at the time of his mother's death was serving in our armed forces but until his induction he had lived at home with his mother and father. One daughter is the mother of three young children. This daughter and the decedent visited each other frequently and the decedent helped her daughter in the care of the children. The decedent and her husband had been married for 27 years; she was a good wife and a good, loving mother. At the time of her death she and her husband were living alone and she did all of the housework.

[1, 2] In measuring the damages suffered by the husband and adult children through the death of their wife and mother the jury was entitled to consider the loss of society and comfort suffered by all of them and the loss of services and care suffered by the husband in being deprived of his helpmate who did all of the housework and presumably ministered to his wants as a good wife is accustomed to do. There is no fixed and absolute yardstick by which a court on appeal can measure the value of these elements of damage, it being sufficient if the amount awarded appears to bear a reasonable relation to the elements of loss entitled to be considered by the jury, and the fixing of the amount is committed first to the sound discretion of the jury and second to the like discretion of the trial judge in passing on a motion for new trial. 8 Cal.Jur. 1023, 1024.

[3] Appellants cite a number of death cases in which the amounts awarded were held on appeal to be excessive. In appraising the earlier decisions on the subject we are entitled to consider the fact, adverted to by the Supreme Court in O'Meara v. Haiden, 204 Cal. 354, at page 367, 268 P. 334, 60 A.L.R. 1381, that measured by its purchasing power the value of the dollar has substantially decreased.

The pecuniary loss to the husband in this case is unquestionably substantial. At $100 per month, a figure that may reasonably be taken under present conditions for purposes of illustration, it would cost the husband $1200 per year to employ a housekeeper to replace his wife's services in doing all of the housework. Assuming conservatively eight of her twelve plus years of expectancy during which she could continue to do all the housework this item alone would amount to $9600. Allowing so little as $25 per month for the husband's loss of services, comfort and society for the remaining 4¼ years of her normal life expectancy would bring the husband's pecuniary loss alone to $10,875. Assuming no pecuniary loss to the feeble-minded daughter and allowing the other children the trifling amount of $50 per year each for the loss of the society and comfort of a good and loving mother would bring the pecuniary loss of the six children in 12¼ years to a total of $3675.

[4] We recognize that the elements going to make up the damages for the death of a wife and mother are too intangible to admit of any such rule of thumb calculation. But the calculation none the less is enough to satisfy us that the award of $14,000 is amply supported by the evidence.

We will content ourselves with the citation of Bechtold v. Bishop & Co., Inc., 16 Cal.2d 285, 105 P.2d 984, wherein an award of $12,000 for the death of a wife and mother of two adult children was held not excessive. The decedent wife in the case was 58 years old with an expectancy of life of 16.89 years, but this was counterbalanced by the fact that the husband's life expectancy, which would measure his damages, was only 10.23 years. We cannot hold that the award of $14,000 in this case is "so excessive as to justify the conclusion that it was impelled by passion or prejudice." Bechtold v. Bishop & Co., Inc., supra, 16 Cal.2d at page 294, 105 P.2d at page 989.

[5, 6] The decedent was struck by a truck while crossing a street in the darkness. Appellants proposed an instruction that by reason of the fact that she was dressed entirely in black she should have used "a greater degree of care" for her own safety. The instruction was erroneous in using the word "degree" instead of "quantum" or "amount." The degree of care required of a person for his own safety is always the same, i.e. ordinary care, although in some circumstances the quan-

tum or amount of care required to reach the degree of ordinary care is greater than in others. While neither courts nor lawyers have uniformly observed this distinction in terminology, it is a substantial one and well established in our law. Raymond v. Hill, 168 Cal. 473, 483, 143 P. 743; Weihe v. Rathjen Mercantile Co., 34 Cal. App. 302, 305, 167 P. 287; McCormac v. Chaney, 119 Cal.App. 470, 472, 6 P.2d 978; De Greek v. Freeman, 108 Cal.App. 645, 291 P. 854; Dawson v. Lalanne, 22 Cal. App.2d 314, 70 P.2d 1002; Broun v. Blair, 26 Cal.App.2d 613, 80 P.2d 95; Jones v. Bayley, 49 Cal.App.2d 647, 654, 122 P.2d 293; McNear v. Pacific Greyhound Lines, 63 Cal.App.2d 11, 18, 146 P.2d 34.

The giving of a similar instruction, using the words "greater degree of care," was held not to be prejudicial error in Barry v. Maddalena, 63 Cal.App.2d 302, 146 P.2d 974, 977; but the court did not discuss or consider the legal accuracy of those words in its opinion in that case. Certainly we cannot hold that the trial court in this case committed error in refusing to give an instruction which embodied an incorrect and erroneous statement of the law.

[7] The court also refused two instructions on unavoidable accident. The jury was clearly instructed on the burden of proof, negligence and proximate cause and in returning their verdict for plaintiff they must have found that the defendant driver was guilty of negligence which proximately caused the death of the decedent. They must therefore have found that the death was in fact not caused by an unavoidable accident. We can find no prejudice in the failure to instruct specifically on unavoidable accident.

[8] The failure to give two proposed instructions on the effect of decedent's failure to see the defendant's truck if it was plainly visible was not error since the court of its own motion gave an instruction that "when there is evidence to the effect that one did look but did not see that which was in plain sight * * * it follows that either there is an irreconcilable conflict in such evidence or that the person was negligently inattentive." The jury was likewise instructed on the duty cast on a pedestrian crossing a street to look for approaching automobiles and that "the deceased was obligated to use ordinary care * * * to observe the approach of automobiles and to avoid injury to herself at all times in going into or on the street * * *."

The judgment is affirmed.

NOURSE, P. J., and GOODELL, J., concur.

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71 Cal.App.2d 244

EVANS v. INDUSTRIAL ACCIDENT COMMISSION et al.

No. 12910.

District Court of Appeal, First District, Division 1, California.

Oct. 23, 1945.

1. Constitutional law 🔑314

Refusal of referee, in hearing application for compensation for dermatitis, to hear testimony of petitioner's wife and union representative that dermatitis was confined to exposed parts of petitioner's body, for purpose of showing that dermatitis was produced by exposure to external irritant in course of employment and was not result of a non-industrial illness, was unauthorized and constituted a denial of due process of law. St.1937, p. 298, § 5700.

2. Workmen's compensation 🔑1697

A party is entitled to call as many witnesses as he deems necessary to establishment of his claim for compensation or defense thereto, subject to power of court reasonably to limit number who may be heard upon any one issue.

3. Workmen's compensation 🔑1697

Even though proffered evidence on application for compensation is deemed cumulative, so long as facts testified to by a party are not conclusively established or admitted, they are open to further proof.

4. Workmen's compensation 🔑1820, 1821

Under Workmen's Compensation Law, referee is not sole judge of the facts presented on application for compensation, but final decision rests with Industrial Accident Commission and commission may on same record make findings of fact contrary to those made by referee and decide case accordingly.

Petition by J. W. Evans to have annulled a decision of the Industrial Accident Commission denying petitioner compensation for dermatitis, opposed by the Industrial Indemnity Company and E. Nommensen.

Decision annulled, and proceedings remanded with directions.

Arthur L. Johnson, of San Jose, for petitioner.

Everett A. Corten and Joseph Sheehan, both of San Francisco, for respondent Industrial Accident Commission.

KNIGHT, Justice.

Petitioner seeks to have annulled a decision of the Industrial Accident Commission denying him compensation for dermatitis. The denial was based on the finding that petitioner did not contract the disease in the course of his employment; and the major point urged by petitioner for the annulment of the decision is that he was denied due process of law by the refusal of the referee to hear the testimony of certain witnesses produced by petitioner on the controlling issue as to whether the disease was contracted in the course of his employment.

The evidence received by the referee consisted of the oral testimony given by petitioner, and four medical reports. Three of the reports were made by petitioner's attending physician and the fourth by two doctors employed by the insurance carrier, who examined petitioner once, at the insurance carrier's request, about five weeks subsequent to the date on which he claimed he contracted the disease.

Petitioner was fifty years of age, and a carpenter by trade; and the following are the facts appearing from his testimony: On October 3, 1944, while engaged in remodeling a building in San Jose, he was directed by his employer to remove the planking which sealed over an old grain elevator shaft, and to clean out the pit. When the shaft was unsealed, gas and vapors arose therefrom, and petitioner descended into the pit. It was about five feet deep and five feet square, and the bottom was covered with about eighteen inches of grain hulls, including rice hulls, and about a quart of dead black widow spiders. Petitioner's sleeves were rolled up to the elbows, his shirt was open at the neck, and he was wearing a hat and glasses; and it took him about half an hour to shovel the debris out of the bottom of the pit. In doing so the dust got into the pores of the skin of his face, neck, hands and forearms. The next day he noticed a smarting sensation on those portions of his face and arms that had been exposed to the dust; and on the second day his arms were swollen. He attempted to secure an appointment with a skin specialist, but could not do so; and on October 7 he went to see Dr. John M. Hohl. The dermatitis which had developed on the exposed portions of his body became steadily worse, and there were large weeping sores on his arms and face, and the skin came off his arms, hands and face. But the unexposed parts of his body were not affected at all; nor did the skin come off around his eyes where it had been protected by his glasses. On October 12 his doctor sent him to the hospital, where he was treated with penicillin and sulfathiazole. He remained there about ten days. During his illness he lost about twenty pounds, which he later gained back; and at the time of the hearing before the commission on December 13, 1944, he had completely recovered. He also testified that he had no previous history of any dermatitis, and that his general health had always been good.

The first of the three medical reports made by petitioner's attending physician, Dr. Hohl, was dated October 14, 1944. It was entitled "Surgeon's Report." It was therein stated that "while tearing down old grain elevator [petitioner] contracted occupational dermitites on hands arms face and neck." His second report was dated December 6, 1944, and was addressed to petitioner's attorney. In that report Dr. Hohl gave the history of the case, a description of petitioner's condition, and the treatment given, and concluded, "It is my opinion that this is a contact dermitites because only exposed parts were affected." His third report was dated December 9, 1944. It was entitled "Surgeon's Final Report." The diagnosis given therein was "Occupational Dermitites."

The report of the insurance company's doctors was dated November 10, 1944. It was addressed to the insurance carrier, and referring to the conversation had with petitioner at the time they made their examination, the report goes on to say: "He states that he had no skin disturbance prior to slightly over one month ago. At that time he noted the gradual appearance of irritability and redness of the skin of his hands, forearms, and face, and to some extent, of his entire body." The examination is reported as follows: "There is a generalized, faint erythroderma, and the skin of his hands, forearms, face, and neck is chronically inflamed with some scarring. There is evidence that the condition has been worse, as the lesions on the face appear to be in a state of partial involution. There is a very dry, craqueled dermatitis of his legs. The superficial lymph nodes are enlarged in all areas and are particularly noticeable in the epitrochlears. His general health appears to be somewhat below par and there is evidence of some recent weight loss." And the opinion is given as follows: "Responsibility should not be accepted. His entire condition seems to be based upon a general disturbance, rather than one limited to the skin. The generalized nature of the lesions and the presence of superficial lymphadenophathy is strongly suggestive of a possibility of lymphoblastoma. The apparent relatively greater severity of the lesions on the exposed portions of his body is undoubtedly on the basis of an underlying internal disturbance, with aggravation by factors which would not disturb the normal person. Such factors include the routine use of soap and water, exposure to wind and weather, and relative intolerance to topical medication. His story of a possible occupational origin is inadequate to explain the disturbance. There is nothing about exposure to possibly irritating dust to account for a condition of this extent, severity and chronicity. He should be asked to have further investigation, such as hematic studies and lymph node biopsies, by his own physician at his own expense."

On cross-examination petitioner denied positively that there had been at any time any dermatitis on any unexposed part of his body; and he again stated that the dermatitis was limited to the exposed portions of his body—his arms up to the elbows and a V at his neck—and that where his glasses protected his eyes there was no breaking out on his face. Furthermore, he denied unequivocally that he had told the insurance company's doctors, as stated in their report, that he had noticed irritability and redness "to some extent, of his entire body." He also denied that at any time there had been any evidence of dermatitis on his legs. During the cross-examination which brought out these denials, the following took place:

"Q. * * * you didn't tell him [the insurance company's doctor] that this condition of irritability and redness of the skin was over your entire body to some extent; you didn't tell him that? A. Why, it was not. Why should I tell him? I don't know.

"Referee: Well, you know whether you did or not. A. No, I didn't tell him it was all over my body, because it was not.

"Referee: Well, he found something. The doctors aren't prone to do those things to any great extent, and Dr. Miller and Dr. Rees have a pretty good reputation in San Francisco for being honest in their examination. Their opinions may not always jibe with what we consider the industrial factors, but at least no one has ever accused them of deliberately lying about the man's history or the man's findings. A. I can't help that at all, because it was not all over my body.

"Referee: All right. If you say you didn't—and I say there is no reason for the doctors lying about it, and I don't believe they are. Go ahead with your examination."

At the conclusion of petitioner's testimony his attorney stated: "I have two more witnesses here"; but the referee refused to allow them to testify, saying: "The answer is 'No.' If this man hasn't told the truth I am going to be very much disappointed." Petitioner's attorney then asked: "Couldn't I put it on to show the condition around the spectacles, of his eyes. The people from the union here that saw him and his wife—" And the referee, interrupting, said: "No. No, the answer is still 'No.' The matter is submitted."

On January 9, 1945, the referee recommended that compensation be denied. Petitioner filed a petition for rehearing and offered to produce as witnesses, besides the union representative and petitioner's wife, who were present at the hearing, and whose testimony the referee refused to hear, Dr. Hohl, the attending physician, four nurses from the hospital, his employer and a fellow carpenter—all of whom petitioner alleged would testify to the definite line of demarcation of the dermatitis between the unexposed and exposed parts of his body. The petition for rehearing was referred to a different referee, and he recommended denial thereof; and on March 2, 1945, the commission made an order to that effect.

[1-3] We are of the opinion that, as petitioner contends, the refusal of the referee to hear the testimony of the two witnesses produced by petitioner at the hearing constituted a denial of due process of law and therefore was in excess of jurisdiction. Section 5700 of the Labor Code, St.1937, p. 298, provides that "Either party may be present at any hearing, in person, by attorney, or by any other agent, *and may present testimony pertinent under the pleadings.*" (Italics added.) And the general rule is as stated in 20 American Jurisprudence, at page 1043, that "A party is entitled to call as many witnesses as he deems necessary to the establishment of his claim or defense, subject to the power of the court reasonably to limit the number who may be heard upon any one issue; * * *" Even though the proffered evidence is deemed cumulative, so long as facts testified to by a party are not conclusively established or admitted, they are open to further proof. 53 Am.Jur. p. 94.

[4] Here the determination of the question of whether the dermatitis was produced by exposure to an external irritant in the course of the employment or was the result of a constitutional nonindustrial illness depended largely on whether the dermatitis was confined to the exposed areas. Petitioner testified that it was so confined, and his physician based his conclusion that the dermatitis was occupational squarely on the ground that "only exposed parts were affected." The insurance company's doctors based their conclusion that the dermatitis was non-industrial mainly on the ground that the dermatitis was present on unexposed parts of petitioner's body. Obviously, in view of the sharply conflicting evidence it could not be said that it had been conclusively established or admitted that the dermatitis was not confined to the exposed areas of petitioner's body; and that being so, it is clear that petitioner was entitled as a matter of right to present the testimony of the other witnesses to corroborate his testimony that the dermatitis was not present on the unexposed parts of his body, and that the denial of such right constituted a denial of due process of law—particularly since under the workmen's compensation law the referee is not the sole judge of the facts. The final decision rests with the commission, and it may, if it sees fit, on the same record make findings of fact contrary to those made by the referee, and decide the case accordingly.

The legal principle here involved is the same as the one presented in Walker Mining Co. v. Industrial Accident Commission, 35 Cal.App.2d 257, 95 P.2d 188. There the Industrial Accident Commission submitted and determined the employer's petition to terminate its liability without permitting it to obtain a medical examination to ascertain the present condition of the claimant and to cross-examine him in that regard; and it was held that such ruling in effect amounted to a denial of the employer's constitutional right to due process. In so holding the court said, 35 Cal.App.2d at pages 262, 263, 95 P.2d at page 190: "We are of the opinion the California Industrial Accident Commission exceeded its jurisdiction in submitting and determining the insurer's petition to terminate its liability without permitting it to obtain a medical examination to ascertain the present physical condition of the claimant, and to cross-examine him in that regard. In effect, that ruling amounted to a denial of the insurer's constitutional right to due process by refusing to permit it to cross-examine a witness upon a material issue. In the case of Saunders v. Shaw, 244 U.S. 317, 37 S.Ct. 638, 61 L.Ed. 1163, it was held that the submission and determination of a case without giving a party thereto the opportunity of presenting his evidence on a material issue resulted in a denial of due process guaranteed by the fourteenth amendment to the federal Constitution * * *. The administration of justice is founded on the principle that every litigant shall have a fair opportunity to present to the court material evidence in support of his valid claim. * * * Clearly the commission is vested with a sound discretion to regulate and control the cross-examination of witnesses in proceedings before that tribunal, and its award will not be disturbed on certiorari for mere errors of procedure. But that authority will not justify an arbitrary denial of the right of a litigant to procure competent testimony by deposition or otherwise when the application therefor is seasonably made and pursued with due diligence according to established rules of procedure."

For the reasons stated the decision is annulled, and the proceeding is remanded, with directions to the commission to proceed with such further hearing as will afford petitioner a reasonable opportunity to present whatever additional evidence may be available to him to support his claim.

PETERS, P. J., and WARD, J., concur.

JONES v. MORTIMER et al. *

Civ. 12937.

District Court of Appeal, First District, Division 2, California.

Oct. 25, 1945.

Rehearing Denied Nov. 24, 1945.

Hearing Granted Dec. 20, 1945.

1. Set-off and counterclaim 🔑9

Under the statute, the sole requisites of a "counterclaim" are that it must tend to defeat or diminish plaintiff's demand and demands must be reciprocal. Code Civ.Proc. § 438.

See Words and Phrases, Permanent Edition, for all other definitions of "Counterclaim".

2. Judgment 🔑622(2)

An assessment against stock of building and loan association in liquidation was not a "counterclaim arising out of the transaction set forth in the complaint as foundation of plaintiff's claim" within the statute so that failure of commissioner to set up the assessment in stockholder's action for services would bar the commissioner's right to set off the assessment after the stockholder recovered judgment and sought to enforce it in full, since the matters involved distinct transactions not connected with one another. Code Civ.Proc. §§ 438, 439.

See Words and Phrases, Permanent Edition, for all other definitions of "Counterclaim Arising out of the Transaction".

3. Set-off and counterclaim 🔑58

An off-set falling within statute authorizing an offset operates as a payment pro tanto. Code Civ.Proc. § 440.

4. Building and loan associations 🔑42(17)

Commissioner of building and loan association in liquidation was entitled under statute to offset unpaid assessment on stockholder's stock against stockholder's judgment for services rendered, and since offset operated as payment, statutory provision requiring commissioner to enforce unpaid assessment exclusively by suit did not apply. Code Civ.Proc. § 440; Gen.Laws 1937, Act 986, §§ 7.01 to 7.03.

Appeal from Superior Court, Santa Clara County; M. G. Del Mutolo, Judge.

Proceeding on the application of Herbert C. Jones against Frank C. Mortimer, Building and Loan Commissioner of the California Mutual Building & Loan Association in liquidation, and others to compel Commissioner to pay a judgment without setting off against it an assessment on plaintiff's stocks. From an order denying the petition, plaintiff appeals.

Affirmed.

Kenneth R. Malovos and Herman J. Mager, both of San Jose, for appellant.

Robert W. Kenny, Atty. Gen., and John J. Dailey, Roy D. Reese, and Lenore D. Underwood, Deputy Attys. Gen., for respondent.

DOOLING, Justice pro tem.

This appeal is presented on an agreed statement.

California Mutual Building and Loan Association (hereinafter called the association) is in course of liquidation by the Building and Loan Commissioner (hereinafter called the commissioner). On November 10, 1938, the commissioner levied a ratable assessment of $100 per share on the outstanding stock of the association. Appellant Jones owned four shares of the stock and the assessment against his stock amounts to $400.

On December 29, 1933, appellant commenced an action against the association and the commissioner for services rendered to the association. In this action appellant's liability of $400 to the association was not pleaded in the answer, appellant recovered judgment on February 19, 1940 in the sum of $1536.10, and costs and this judgment was set up on the records of the association as an approved claim payable out of dividends in the course of liquidation. Liquidating dividends of 50% having been declared the commissioner set up a credit on the books of the association in favor of appellant in the sum of $768.05 and set off against that sum the $400 assessment leaving a balance on the books in favor of appellant of $368.05. Appellant refused to accept this amount and filed a petition in the superior court to compel the commissioner to pay him the $768.05 in full. This petition was denied and this appeal followed.

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* Subsequent opinion 170 P.2d 893.

[1, 2] Appellant argues that the failure to plead the $400 assessment as a counterclaim in the original action operates to bar the commissioner's right to assert it now. We agree with appellant that the $400 assessment could have been set up as a counterclaim under Code Civ. Proc. § 438 as broadened by its amendment in 1927. Under that section as it now reads "the sole requisites of the counterclaim are (1) that it must tend to defeat or diminish plaintiff's demand; and (2) the demands must be reciprocal." Bond v. Farmers & Merchants Nat. Bank, 64 Cal.App.2d 842, 846, 149 P.2d 722, 724; Terry Trading Corporation v. Barsky, 210 Cal. 428, 435, 436, 292 P. 474. It does not follow, simply because the $400 obligation might have been pleaded as a counterclaim in the appellant's action for services and was not so pleaded, that the commissioner is barred to assert it under Code Civ.Proc. § 439. The latter section provides: "If the defendant omits to set up a counterclaim upon a cause arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, neither he nor his assignee can afterwards maintain an action against the plaintiff therefor." It is clear that the assessment against appellant's stock was not a counterclaim "arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim." The services rendered by appellant to the association, which formed the foundation of his claim, and the assessment were separate and distinct transactions in no way connected one with the other. The assessment therefore did not fall within the class of counterclaims covered by Code Civ. Proc. § 439.

A considerable portion of the briefs is devoted to a discussion as to whether a building and loan association in this state is entitled to enforce a "banker's lien" against a debt owing by the association under Civil Code, § 3054. We do not find it necessary to decide that question.

[3, 4] Section 440 Code of Civil Procedure provides that: "When cross-demands have existed between persons under such circumstances that, if one had brought an action against the other, a counterclaim could have been set up, the two demands shall be deemed compensated so far as they equal each other * * *." This section has been construed to make an off-set falling within its terms operate as a payment pro tanto. Estate of Gamble, 166 Cal. 253, 256, 257, 135 P. 970; People v. California, etc., Trust Co., 168 Cal. 241, 141 P. 1181; Estate of Bell, 168 Cal. 253, 141 P. 1179; In re Bank of San Pedro, 11 Cal.2d 313, 79 P.2d 1057; Automobile, etc., Co. v. Salladay, 55 Cal.App. 219, 226, 203 P. 163; Ripley Imp. Co. v. Hellman, etc., Sav. Bank, 90 Cal.App. 83, 265 P. 835; Layne v. Superior Court, 121 Cal.App. 206, 8 P.2d 895. Our statutory rule is contrary to that prevailing at common law. (See 48 C.J. 626 in which the general rule is stated and the statutory modification in California is noticed in note 17 (a).) It follows that the commissioner had the right to treat the $400 assessment as a part payment on the larger judgment obligation to appellant unless prohibited from doing so by the statutory provisions next to be noticed.

Sec. 7.02 of the Building and Loan Association Act, Deering's Calif.Gen.Laws 1937, Act 986, provides that: "The liability of stockholders pursuant to section 7.01 of this act shall be enforced exclusively pursuant to this section and the next succeeding three sections of this act."

Sec. 7.03 provides that: "If any stockholder of such association shall fail to pay said assessment in full upon the date specified * * * a right of action shall immediately accrue to the commissioner * * * to recover the amount of said assessment or the amount remaining unpaid thereon * * *" and that he shall have full power to maintain an action to enforce this liability.

Appellant argues that by virtue of the language of sec. 7.02, "shall be enforced exclusively", the commissioner's sole remedy was by action pursuant to sec. 7.03 and that he had no power to set off the $400 assessment against appellant's judgment.

It is to be noted that by the express language of sec. 7.03 such action is only to be prosecuted if the assessment is not paid; and, as we have seen, by virtue of the language of Code Civ.Proc. § 440, that "the two demands shall be deemed compensated so far as they equal each other", the two obligations pro tanto cancelled one another and the plaintiff thereby paid his assessment. Under the circumstances not only was the commissioner not required to bring suit to collect the assessment but, the assessment having been paid, he had no cause of action thereon.

The order appealed from is affirmed.

NOURSE, P. J., and GOODELL, J., concur.

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71 Cal.App.2d 154

SIMPSON v. SECURITY FIRST NAT. BANK OF LOS ANGELES et al.

Civ. 14952.

District Court of Appeal, Second District, Division 3, California.

Oct. 8, 1945.

Hearing Denied Dec. 6, 1945.

1. Action ⇨6

Complaint, alleging that plaintiff agreed to lend $700 on security of unencumbered realty, and that plaintiff employed defendant bank and defendant title guaranty company to determine whether proposed security was unencumbered, and delivered money to defendants with instructions to turn it over to borrower only if security was found unencumbered, and that defendants delivered money to borrower but that plaintiff never received security promised or a report thereon, and that each defendant claimed to be mere agent of the other, stated cause of action at law for breach of contract, and did not require court to entertain action for declaratory relief. Code Civ.Proc. § 1061.

2. Action ⇨6

Trial judge, in sustaining general demurrer to complaint without leave to amend and dismissing action, properly adopted such course as a convenient and effective means of refusing to entertain prayer for declaratory relief. Code Civ. Proc. § 1061.

3. Action ⇨6

Where facts appear from face of complaint which would justify trial court in concluding that its determination is not necessary or proper, court may sustain general demurrer to complaint for declaratory relief. Code Civ.Proc. § 1061.

4. Courts ⇨120

Where amount of loan involved was less than amount required to give superior court jurisdiction, superior court had discretion to decline jurisdiction notwithstanding prayer for declaratory relief. Code Civ.Proc. § 1061.

◆

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action by Russell B. Simpson against Security First National Bank of Los Angeles and another, for a declaration of rights of the parties to a certain contract. From a judgment of dismissal after the court sustained a general and special demurrer to a third amended complaint and denied a fourth amended complaint to be filed, the plaintiff appeals.

Affirmed.

Porter C. Blackburn, of Los Angeles, for appellant.

Roane Thorpe, of Los Angeles, for respondent Security First Nat. Bank.

Arch H. Vernon, Earl E. Johnson, and Gilbert E. Harris, all of Los Angeles, for respondent Title Insurance & Trust Co.

DESMOND, Presiding Justice.

Plaintiff, in an action for declaratory relief, sought an adjudication of the rights existing between the parties to a certain contract. The court sustained a general and special demurrer to a third amended complaint, denied a motion that a fourth amended complaint be filed and ordered the action dismissed. From this judgment of dismissal an appeal is taken.

[1] According to the complaint, the plaintiff agreed to loan to one Nicholetti

and wife the sum of $700 to be repaid in installments. The Nicholettis proposed to furnish security by assigning a leasehold interest in real property which they reported was free from encumbrance, but the plaintiff, wishing to verify this statement, employed the defendants to investigate the status of the proposed security and to determine whether it was actually unencumbered. The plaintiff deposited the sum of $700 to the credit of the Nicholettis with the defendants, Security First National Bank of Los Angeles and Title Guaranty & Trust Company, who accepted the money and agreed to make the search and report upon the availability of the proposed security. The plaintiff delivered the money with instructions to turn it over to the borrower when the security was found to be unencumbered, but not otherwise. The defendants made the investigation and delivered the money to the Nicholettis, but the plaintiff has never received from them the security promised or the report as to its status. When the plaintiff called upon the defendant, Security First National Bank, for a report upon the matter the claim was made by that bank that it was an agent merely of the other defendant Title Guaranty & Trust Company, and that the plaintiff knew the relationship of principal and agent between the two. The bank claimed that because of that relationship it had the duty merely of delivering certain papers to its principal, the defendant Title Guaranty & Trust Company, and that other duties arising out of the transaction should be performed by that company. The title company claims that they are not responsible to the plaintiff for the performance of the contract as principal but that they are merely agents of the other defendant, Security First National Bank, and that their agency was known to the plaintiff; further, that if there is any responsibility for the performance of the contract it rests with the Security First National Bank of Los Angeles. The plaintiff alleges that the Security bank is the principal and that the defendant title company is also primarily liable for the performance of the obligation of the transaction; that the obligation of both defendants is primary and several. In the closing paragraph of the complaint plaintiff states he is unable to determine which of the two defendants is primarily liable as principal, or whether both defendants are jointly and/or severally liable to the plaintiff, or in what capacity or to what extent the said defendants are responsible, or whether both defendants are in default, or if not, which of the defendants has breached the contract; that by reason of the adverse claims between the defendants and denials entered by them as to their liability under the terms of the written contract, an actual and bona fide controversy has arisen with respect to the rights and duties of the respective parties under the agreement. The complaint concludes with a prayer that the court enter its decree declaring the legal rights and duties of the plaintiffs, including the obligations of the defendants under the contract and determining to what extent either of the defendants is liable and whether a breach of contract has occurred by them jointly, severally or otherwise; and, "if the Court find a breach of said contract by the defendants or either of them, shall make and assess damages against the defendants in behalf of the plaintiff resulting from said breach jointly or severally as the evidence may determine; * * *"

The facts alleged, in our opinion, were not such as to require the court to entertain an action for declaratory relief. Plaintiff had a cause of action at law for the alleged breach of the contract, and he alleged facts which, if proved, would have rendered both defendants liable. Although he also alleged that he was uncertain whether both were liable, he prayed that the court determine that question and award him relief by way of damages. If we should assume for the purposes of our opinion that a cause of action at law, jurisdiction of which was in the municipal court, could thus be converted into one for declaratory relief, triable in the superior court, it would be within the discretion of the latter court to refuse to accept jurisdiction and to leave plaintiff to his action at law.

[2] It seems obvious to us that the trial judge in sustaining defendants' general demurrer without leave to amend and following that ruling by a dismissal of the action, adopted that course as a convenient and effective means of refusing to entertain the petition for declaratory relief. Section 1061, Code of Civil Procedure, provides for such refusal where a "declaration or determination is not necessary or proper at the time under all the circumstances." A similar ruling was made by the trial court in Moss v. Moss, 1942, 20 Cal.2d 640, 128 P.2d 526, 141 A.L.R. 1422, and the Supreme

Court, although holding that the allegations of the complaint in that case were sufficient to state a cause of action under section 1060, Code of Civil Procedure, stated (20 Cal.2d at page 643, 128 P.2d at page 528, 141 A.L.R. 1422) that "While it might be better practice for the trial court to overrule the demurrer and exercise its discretion in denying declaratory relief by some other procedure, as, for example, upon a motion to dismiss (cf. Cutting v. Bryan, 206 Cal. 254, 274 P. 326), the fact that it did so in ruling upon the general demurrer cannot be held reversible error in view of the decided cases in this state." Continuing, the court said (20 Cal.2d at page 643, 128 P.2d at page 528, 141 A.L.R. 1422): "Since we have held that this complaint was sufficient to authorize a declaration of plaintiff's obligations under the contract, we must now consider whether the trial court abused its discretion in denying declaratory relief under the circumstances here presented."

[3] We are confronted by the same problem in the instant appeal and on the authority of two cases mentioned in Moss v. Moss, supra, we decide in the present case, as the Supreme Court did in the Moss case, that the trial judge exercised a proper discretion in sustaining a demurrer without leave to amend. The two cases are A. Hamburger & Sons, Inc., v. Kice, 1933, 129 Cal.App. 68, 18 P.2d 115, and Rapaport v. Forer, 1937, 20 Cal.App.2d 271, 66 P.2d 1242, and they are cited in the Moss case as authority for the following statement of the law (20 Cal.2d at page 642, 128 P.2d at page 528, 141 A.L.R. 1422): "Where facts appear from the face of the complaint which would justify a trial court in concluding that its determination is not necessary or proper, it has been held that the court may sustain a general demurrer to the complaint for declaratory relief." In the Hamburger case, the late Mr. Justice Conrey, in a concurring opinion said (129 Cal.App. at page 70, 18 P.2d at page 116,): "The respondents, as to whom the action was dismissed, were three defendants whose individual stockholder's liability, as to each respondent, was less than $2000. These causes of action, therefore, were not within the jurisdiction of the superior court. These facts are shown by appellant's complaint. * * * And if it be contended that the dismissal for want of jurisdiction was erroneous because the court did have jurisdiction for the purposes of a declaratory judgment, I think that (without answering that question) there is, at all events, one sufficient answer to that contention. The order sustaining the demurrer of respondents 'as to jurisdiction' rested primarily upon the fact that plaintiff had not stated, against respondents, a claim amounting to a sum within the jurisdiction of the court. Having so determined, the court had at least a discretionary authority to decline to exercise against respondents the power given by statute concerning declaratory judgments. This discretion is vested in the court by the direct terms of the statute. Code Civ.Proc., § 1061." In the Rapaport case, the court, referring to A. Hamburger & Sons, Inc. v. Kice, supra, expressed its views in the following language (20 Cal.App.2d at page 276, 66 P.2d at page 1244): "The court there refused to intervene in the action seeking declaratory relief on the ground, as here, that the amount was within the jurisdiction of the municipal court, and therefore the superior court had a discretionary authority to decline to exercise the power by statute concerning declaratory judgments."

[4] As in these two cases, the amount involved appeared from the face of the complaint to be less than $2000 and, therefore, not within the jurisdiction of the superior court, so in this appeal it appears from the record that the amount of the loan was $700.

Our decision being based, as it is, on these two recent cases makes it unnecessary to dilate upon the points made in the briefs and orally. That, however, does not mean that we have failed to consider them. We have read the cases cited, including Columbia Pictures Corporation v. De Toth, 26 Cal.2d 753, 161 P.2d 217, upon which appellant strongly relies, but are not persuaded by any of them that this was not a proper case for the court to refuse to exercise its power to proceed to a declaration or determination.

Judgment affirmed.

SHINN and PARKER WOOD, JJ., concur.

71 Cal.App.2d 309

CORY v. CORY.

Civ. 7191; Sac. 5740.

District Court of Appeal, Third District, California.

Oct. 24, 1945.

Divorce ⚿312

Final divorce decree entered during pendency of appeal from order modifying interlocutory decree insofar as it fixed children's custody would be reversed under statute prohibiting entry of final judgment pending appeal. Civ.Code, § 132.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Divorce action by Kathleen B. Cory against Melvin H. Cory. An interlocutory decree of divorce was entered in 1943 in favor of plaintiff, and later, on motion of defendant, was modified insofar as it related to custody of children. On appeal by plaintiff, the order modifying the interlocutory decree was reversed, 161 P.2d 385. While such appeal was pending, the trial court entered a final decree incorporating all the terms of the interlocutory judgment, and from the final decree, plaintiff appeals.

Reversed with direction.

Clarence E. Rust, of Oakland, for appellant.

Lawrence J. Skirving, of Sacramento, for respondent.

ADAMS, Presiding Justice.

In this action an interlocutory decree of divorce was made and entered on April 13, 1943, in favor of Kathleen B. Cory, plaintiff, which decree also awarded the custody of the two small children of the parties to plaintiff. On or about August 5, 1944, on motion of defendant, said interlocutory decree was modified to provide that defendant have the care, custody and control of the boy child during the school months of each year; that plaintiff have the custody and control of the girl child until said child reached the age of six years, but that thereafter defendant was to have her custody and control during the school months.

Plaintiff appealed from said order modifying the interlocutory decree, and this court, on August 18, 1945, reversed said order (Cory v. Cory, 161 P.2d 385), and its decision has now become final.

While the aforesaid appeal was pending in this court, defendant, on or about February 23, 1945, filed in the trial court an affidavit in which he alleged, among other things, that "no motion to set aside or annul the said interlocutory decree, nor any suit brought therefor, is pending and undetermined, and that no appeal from the said decree has been taken nor pending."

Upon this affidavit the trial court, on March 2, 1945, made and entered a final decree of divorce which "ordered and adjudged that all the terms of said interlocutory judgment as it now exists are incorporated herein by reference the same as if herein set forth in full." From said final decree plaintiff has filed this appeal, making two contentions, one, that entry of the final decree while the appeal from the order amending the interlocutory decree was pending was improper and the decree so entered was void and should be set aside; and, two, that this court having reversed the order modifying the interlocutory decree, it should follow that the final decree should likewise be so reversed.

It was stipulated between the parties to this appeal that the records and briefs on the appeal from the order modifying the interlocutory decree might be considered as records and briefs on this appeal. No additional brief has been filed by respondent, but in a letter to this court counsel states that it was stipulated between counsel that "any order made in connection with the Interlocutory Decree would apply as well to the Final Decree," and that he did not intend to file any other briefs.

Section 132 of the Civil Code provides that a final decree of divorce may be entered on the motion of either party after one year has expired after the entry of the interlocutory decree; but it also provides that "if any appeal is taken from the interlocutory judgment or motion for a new trial made, final judgment shall not be entered until such motion or appeal has been finally disposed of, nor then, if the motion has been granted or judgment reversed."

In Newell v. Superior Court, 27 Cal.App. 343, 149 P. 998, a writ of mandate was sought by the defendant in a divorce action, to compel the entry of a final decree of divorce while an appeal by defendant was pending from a portion of the interlocutory decree which required him to make certain payments for the support of plaintiff. The court denied the writ, stating that while there was an interlocutory decree that had become final with respect to plaintiff's right to a divorce, the decree was subject to a pending appeal affecting the provisions made therein for the support of plaintiff; that until the determination of that appeal the trial court was not in a position to know whether it would be required to make some other and different order "affecting a matter closely connected with the granting of the divorce"; that the provision contained in section 132 of the Civil Code postponing the entry of final judgment until after final disposition of any appeal from the interlocutory decree, was adopted in recognition of the fact that in granting a divorce the court has a variety of duties to perform affecting the parties and their future welfare and that of their children, and that it was deemed advisable that in such cases all of those matters, as far as possible, should be finally adjusted in connection with the granting of a divorce.

In Webster v. Webster, 216 Cal. 485, 14 P.2d 522, an appeal was taken from that portion of an interlocutory decree of divorce which fixed the property rights of the parties. During its pendency the trial court entered a final decree. The Supreme Court cited section 132 of the Civil Code and cited and quoted from Newell v. Superior Court, supra, and then stated that, therefrom, it necessarily followed that the final decree entered by the court below was premature and improper. It appeared, however, in that case, that a motion to set aside the final decree had been made in the lower court, and that an appeal was pending from its refusal to set it aside. Regarding that appeal the court said that when it came before it for decision, from what had been said the order refusing to vacate the final decree would have to be reversed. It affirmed the portion of the interlocutory decree determining the property rights of the parties and provided that upon entering its final decree the trial court should dispose of the property according to the determination expressed in the interlocutory decree.

In Ritter v. Ritter, 103 Cal.App. 583, 284 P. 950, 951, an appeal was taken from an interlocutory decree of divorce, from certain orders thereafter made and from the final judgment. The court said that "As to the last mentioned, it is evident that the same must be reversed, for the reason that it was made and entered prior to the disposition of the appeal from the interlocutory judgment, contrary to the provisions of section 132 of the Civil Code."

Pursuant to the foregoing authorities the final decree of divorce in the instant case is reversed and the trial court is directed to provide for the care and custody of the minor children of the parties in conformity with the decision of this court on the former appeal, in any final decree hereinafter made and entered.

PEEK and THOMPSON, JJ., concur.

71 Cal.App.2d 223

RIVERA et al. v. GOODENOUGH.

Civ. 12820.

District Court of Appeal, First District,
Division 1, California.
Oct. 22, 1945.

1. Negligence 🔑136(25)

In action against general contractor building a warehouse for injuries to subcontractor's employee when one of posts erected by general contractor to support trusses fell over while employee was working on ladder braced against the post, whether truss struck the post causing post to fall over was for jury.

2. Negligence 🔑136(26)

In action against general contractor building a warehouse for injuries to subcontractor's employee when one of posts erected by general contractor to support trusses fell over while employee was working on ladder braced against the post, whether employee exercised due care for his own safety was for jury.

3. Negligence 🔑136(25)

In action against general contractor building a warehouse for injuries to subcontractor's employee when one of posts erected by general contractor to support trusses fell over while plaintiff was working on ladder braced against the post, whether post fell because of defective bracing, or because it was hit by truss or as a result of combination of the two, was for jury.

4. Negligence ⚿136(26)

In action against general contractor building a warehouse for injuries to subcontractor's employee when one of posts erected by general contractor to support trusses fell over while employee was working on ladder braced against the post, employee's contributory negligence was for jury.

5. Appeal and error ⚿996, 1001(1)

An appellate court cannot disturb a judgment when conclusion reached by jury is supported by substantial evidence, or reasonable inferences therefrom.

6. Appeal and error ⚿1064(1)

Plaintiff was not prejudiced by charge which fully, fairly, and correctly instructed on all basic issues notwithstanding there were some minor errors and some awkward language.

7. Trial ⚿267(3)

In action against general contractor for injuries to subcontractor's employee, modification of proffered instruction regarding rights of invitees by adding statement that responsibility of one having control is not absolute and that it was duty of "owner" of the premises to warn invitee of hidden dangers, but that "one extending the invitation" is under no duty to warn invitee of obvious dangers, was not error on theory that under instructions general contractor as mere "occupant" owed no duty to employee where quoted words were used consistently to refer to general contractor.

8. Appeal and error ⚿882(12)

Plaintiff having submitted instruction not based on evidence could not complain that court more fully instructed on issue thus presented.

9. Negligence ⚿138(3)

An instruction that status of invitee may be lost if person exceeds scope of invitation was not erroneous on ground that there was no evidence that plaintiff's status was anything less than that of invitee, where case was tried on theory that plaintiff was an invitee so that jury could not be confused by the instruction.

10. Trial ⚿260(1)

Requested instructions covered by instructions given were properly refused.

11. Trial ⚿260(8)

In action against general contractor for injuries to subcontractor's employee when one of posts erected by general contractor to support trusses fell over while employee was working on ladder braced against the post, refusal to give instruction that quantum of care required of inviter varies with danger to be apprehended was not error where such principle was embodied in another instruction.

12. Trial ⚿260(1)

Failure to give proffered instruction, which covered issue involved more clearly than the instruction given, was not prejudicial error.

13. Master and servant ⚿316(2)

A general contractor building a warehouse was not liable for negligent acts of subcontractor installing trusses to support roof of the warehouse.

14. Trial ⚿251(8), 260(8)

In action against general contractor for injuries to subcontractor's employee, requested instruction, that a workman is not negligent in being where his work requires him to be unless a reasonable man similarly situated would not have worked at such a place, was properly refused where assumption of risk had not been specially pleaded and issue was not submitted to jury and all elements of contributory negligence were covered by other instructions.

15. Negligence ⚿67

The conduct of plaintiff is governed by same standards as are applicable to defendants.

16. Negligence ⚿139(2)

In action against general contractor for injuries to subcontractor's employee, instruction that employee was under duty of exercising "the care and caution and skill that would be exercised by an ordinarily prudent, cautious and skillful person, acting under like circumstances", was not erroneous as requiring too great a degree of care because of inclusion of element of "skill". Civ.Code, § 1714.

17. Negligence ⚿140

In action against general contractor building a warehouse for injuries to subcontractor's employee when one of posts erected by general contractor to support trusses fell over while employee was working on ladder braced against the post, instruction that, if post fell because it was hit by truss and if general contractor's negligence did not contribute to the fall, verdict should be for general contractor, was proper.

18. Appeal and error ⚷1067

In action against general contractor for injuries to subcontractor's employee when one of posts erected by general contractor to support trusses fell over while employee was working on ladder braced against the post, refusal to give instruction on doctrine of sudden peril based on employee's testimony as to what he did after ladder began to fall was not prejudicial error, where there was no contention that employee's conduct after ladder started to fall was negligent or contributed to the accident.

19. Constitutional law ⚷29
Trial ⚷183

The constitutional amendment authorizing court to comment on the evidence is self-executing and is not limited to criminal cases. Const. art. 6, § 19.

20. Appeal and error ⚷1067

Alleged error in refusing instruction that where it is within power of a party to produce stronger evidence than that which is offered on a material point weaker evidence should be viewed with distrust was not prejudicial, where failure to produce stronger testimony was explained. Code Civ.Proc. § 2061, subds. 4, 7; Const. art. 6, § 19.

◆

Appeal from Superior Court, Santa Clara County; John D. Foley, Judge.

Action by Ed Rivera against Wells P. Goodenough to recover for injuries sustained when one of posts erected by defendant to support trusses which plaintiff and others were building fell over while plaintiff was working on a ladder braced against the post. The Industrial Indemnity Exchange, an insurance exchange, the compensation carrier of plaintiff's employer, was plaintiff in intervention. From a judgment for defendant, the plaintiff and plaintiff in intervention appeal.

Affirmed.

L. F. Hobbs, of San Jose, for appellant Ed Rivers.

Robert G. Partridge and Remington Low, both of San Francisco, for appellant Industrial Indemnity Exchange.

J. Hampton Hoge and George Olshausen, both of San Francisco, for respondent.

PETERS, Presiding Justice.

Plaintiff was employed as a carpenter by Summerbell Roof Construction Corporation. That company had a sub-contract with defendant Goodenough, the general contractor, to construct and install certain trusses to support the roof of a warehouse being built for the Sutter Packing Company by defendant. While installing the trusses plaintiff was injured when one of the posts erected by defendant to support the trusses fell over while plaintiff was working on a ladder braced against the post. Plaintiff in intervention is Summerbell's compensation carrier. The theory of the action is that defendant negligently erected and braced the post, which negligence proximately caused the injuries of which complaint is made. Defendant denied that he was negligent and affirmatively pleaded contributory negligence on the part of plaintiff. The cause was tried before a jury. A verdict was rendered for defendant. From the judgment entered on the verdict plaintiff and plaintiff in intervention appeal.

The warehouse under construction was about two hundred and fifty feet long and one hundred and sixty feet wide. The exterior walls were to be of re-enforced concrete, and the roof of tar and gravel. Running north and south down the center of the building, and along both sides, were rows of posts to support the trusses. Under the terms of the contract between Summerbell and defendant it was the duty of the defendant to erect and brace these posts. The trusses were to be constructed by Summerbell and to be installed by it on the tops of these posts. The posts were ten inches square and twenty feet apart. Each weighed close to five hundred pounds. Two metal saddles were bolted to the top of each post, forming a channel into which the ends of the trusses were to be bolted. Each post was set in a metal plate embedded in a concrete base. This base extended three and one-half feet above the floor and was sunk four feet into the ground. The tops of the posts were twenty-seven feet above the floor level. To hold the posts plumb, and to keep them in position while the trusses were being installed, each post was braced by defendant. To accomplish this, a two-by-four pointed stake twenty-six to thirty inches long was driven into the ground west of each post. This stake was driven to the "point of refusal," i. e., to the point where the stake could not be driven further without splitting. The depth varied dependent upon soil conditions. Defendant fixed the proper depth at from fifteen to eighteen inches, while other witnesses fixed it at a slightly less distance. A two-by-four stringer was nailed about three or four feet from the top of each post on the north side extending diagonally down to the stake to which it was nailed with four-inch spikes. Another two-by-four was nailed to the bottom of the post just above where it came into contact with the concrete base, and it too was nailed to the stake. This stringer was nailed to the south side of the post and stake. If any stake was not securely embedded in the ground, when the spikes were driven into the stake, the force exerted would loosen the stake and it would be replaced. In addition to this bracing a two-by-six "ribbon" was nailed from one post to the next about three or four feet from the top of each post. This ribbon was nailed to the east side of the posts. There was no stake bracing of any kind on the east side of the posts, the evidence being to the effect that the east side of the posts had to be kept clear to install the trusses.

All of the posts had been installed and braced on the day of the accident. Plaintiff, together with others of his crew employed by Summerbell, was engaged in installing the trusses. Each truss was sixty-three feet long and weighed over fifteen hundred pounds. The end of each truss was equipped with a shoe which fitted into the saddle on the top of the post to which it was bolted. In installing a truss a movable boom elevated it to a position above the tops of the posts where two employees of Summerbell, working from ladders, one at the post at the wall of the building and one at the corresponding post in the center of the building, fitted and bolted the ends of the truss into their saddles. Six trusses had been so installed before the accident. The accident occurred while the seventh truss was being installed. Plaintiff testified that he performed his part of the job the same each time.

[1] The seventh truss was elevated into position above the posts. Plaintiff and his witnesses testified that it did not strike the posts. There was substantial evidence, however, that after the accident the saddles on post number seven were badly bent, from which it could reasonably be inferred that the truss did hit the pole. This clearly was a jury question.

[2] Plaintiff testified that on the preceding posts, and on the seventh post, he placed his ladder against the southwest corner of the post at an angle of forty-five degrees. He testified that this was the only practical place to put his ladder—that it could not be placed against the west side because of the braces, nor against the north or south sides because of the ribbon, nor against the east side because he would then be working directly under the overhanging truss. He also testified that the ladder could not be placed against the ribbon because the ribbon was too low and he would overbalance the ladder. It should be here noted that by placing the ladder against the southwest corner of the post, when plaintiff ascended the ladder the weight of the ladder and plaintiff's weight (in excess of two hundred and thirty pounds) were exerted against the post in a direction that would naturally have a tendency to pull against the stake bracing, and would have a tendency to pull the stake from the ground. In other words, such weight was exerted towards the unbraced side of the post. Had the ladder been placed against the east side of the post or against the ribbon it would have had a tendency to push against the stake and force it deeper into the ground. Several of the defendant's witnesses, all carpenters of many years' experience, testified that placing the ladder against the southwest corner of the post was an obviously unsafe procedure and that it would have been practical to place the ladder against the east side of the post or ribbon. They flatly contradicted plaintiff's assertion that such procedure was not practical or that the ribbon was too low to permit this to be done. The question as to whether plaintiff exercised due care for his own safety was clearly one of fact for the jury and its implied finding that he did not cannot be disturbed.

Plaintiff ascended the ladder and when he was a few feet from the top he felt the post give way. He tried to descend and then was forced to jump. He thus received the injuries for which this action was instituted.

When the post fell it struck a pile of lumber and came to rest with its top sticking up in the air. It is a reasonable inference that the top of the post did not hit the ground or the lumber, and that the bending of the saddles on the post must have occurred from the truss striking the post. When the post fell, the bracing stake pulled out of the ground, the two-by-four stringers remaining attached thereto.

One of the witnesses for plaintiff, a fellow workman employed by Summerbell, testified that after the accident he measured from the point of the stake to the place where the two-by-four stringer was nailed to it and that the distance was but seven inches. This would indicate that the stake was driven into the ground not over that distance. It is plaintiff's theory that this was negligence and the proximate cause of the accident. It is his contention that since the stake was driven in but seven inches, and that since the evidence shows that it should have been driven in at least fifteen inches, defendant was guilty of negligence as a matter of law and that such negligence proximately caused the accident. Emphasis is placed on the rule that plaintiff was a business invitee, and that the duty of care which defendant owed to him required consideration of the type of work to be performed by him in installing the trusses. Muskin v. Gerun, 46 Cal.App.2d 404, 116 P.2d 105.

[3] The difficulty with the argument of plaintiff is that it disregards the conflicting testimony of defendant's witnesses. It is true that no witness for defendant measured the stake after the accident to ascertain how deeply the stake had been imbedded. But several of the witnesses were of the opinion that the stake had been driven in twelve to fourteen inches. They based their estimates on observation of how much of the stake remained out of the ground after it had been driven. Several witnesses testified that it looked like the other stakes; that it had been driven to the point of refusal; that it would have been useless to drive it further because it would have split. The carpenter who nailed the two-by-four stringers to the stake testified that stake number seven was solid when he drove in the spikes, and that this indicated it was driven in deep enough. Under the circumstances, it was clearly for the jury to determine whether the post fell because of defective bracing, or because it was hit by the truss, or as a result of a combination of the two. Its implied finding that the bracing was not defective is amply supported by competent and substantial evidence.

[4, 5] The record also abundantly supports the jury's implied finding that plaintiff was guilty of contributory negligence in placing the ladder as he did. As already pointed out, there was competent substantial evidence that placing the ladder on the southwest corner was obviously unsafe and dangerous, and that it was practical to have placed it elsewhere. A clearer case for the jury on this issue can hardly be imagined. An appellate court has no power to disturb a judgment when the conclusion reached by the jury is supported by substantial evidence, contradicted or uncontradicted, or by reasonable inferences from that evidence. Crawford v. Southern Pacific Co., 3 Cal.2d 427, 45 P.2d 183; In re Estate of Bristol, 23 Cal.2d 221, 143 P.2d 689. This rule applies with equal force to verdicts in favor of a defendant as well as to those in favor of a plaintiff.

[6] Plaintiff directs numerous allegations of error at the instructions, and contends that the jury was over-instructed in favor of the defense, citing Muskin v. Gerun, 46 Cal.App.2d 404, 116 P.2d 105. We have read the entire charge. On the whole, the jury was fully, fairly, and correctly instructed on all basic issues. While there were some minor errors in language used, and some of the instructions use somewhat awkward language, none of the errors were substantial and certainly none was prejudicial.

[7] At plaintiff's request the jury was properly instructed as to the legal rights of invitees and the duties of an occupant toward such invitees. The court modified one such proffered instruction by adding to it the proper statement that the responsibility of one having control of the premises is not absolute, and then stated that it was the duty of the "owner" of the premises to warn the invitee of hidden dangers of which he has or should have knowledge, but that "the one extending the invitation" is under no duty to warn the invitee of obvious dangers. Plaintiff contends that under this instruction the jury was told that only the owner—the Sutter Packing Company, not a party to this action—was under a duty to warn the invitee of non-obvious

dangers. Impliedly, according to plaintiff, the jury was told that a mere occupant, such as defendant, owed no such duty to plaintiff. A reading of the instructions as a whole shows that the words "owner," "occupant," and "the one extending the invitation" were used consistently by the court to refer to the defendant. Although the use of the word "owner" was unfortunate, the jury could not have been materially confused and no prejudice could have been suffered.

[8, 9] Plaintiff contends that it was error to instruct that the status of an invitee may be lost if the person exceeds the scope of the invitation. It is the theory of the plaintiff that, although this was a correct statement of the law, to so instruct was error for the reason that there was no evidence that plaintiff's status was anything less than that of invitee. Plaintiff submitted, and the court gave instruction number 7 which dealt with the differences between a licensee and invitee, and the differences in the duties owed to them at the time of his entrance to the premises. The challenged instruction dealt with how the status of invitee may be lost after entrance to the premises. The two instructions would seem to be complementary. Plaintiff having submitted an instruction dealing with the rights of licensees as well as invitees cannot complain that the court more fully instructed on the issue thus presented. Although it is error to instruct on issues without evidentiary support a litigant cannot complain of error he himself invites. 3 Am.Jur., p. 432, § 880. Moreover, a reading of the record demonstrates that the entire case was tried on the theory that plaintiff was an invitee and this was not seriously challenged by defendant. The jury could not have been confused by the instruction.

[10-12] Plaintiff next urges that the court failed to instruct that the quantum of care required of the invitor is proportionate to the danger, and in this connection sets forth three requested instructions that were refused, numbered by plaintiff 10, 27 and 28. Proffered instructions 27 and 28 were properly refused because covered by given instructions 13 and 41. Requested instruction 10 dealt directly with the principle that the quantum of care varies with the danger to be apprehended. The instruction undoubtedly stated a correct principle of law and properly could have been given. There was no other instruction as clear as the proffered one on the issue involved. In instruction 40 the jury was told, however, that "defendant was required to use ordinary care to erect and maintain said pole in a reasonably safe condition for the use reasonably required thereof by plaintiff." By necessary inference this instruction embodied the principle of the refused instruction. Unlike the case of Muskin v. Gerun, 46 Cal.App.2d 404, 116 P.2d 105, where the jury was merely instructed that defendant was under a duty to exercise reasonable care, and where no instruction was given that such reasonable care depended on the nature of plaintiff's work, and where failure to so instruct was one of the grounds upon which a reversal was predicated, in the instant case the jury was told that the duty of defendant was to erect and maintain the pole "in a reasonably safe condition for the use reasonably required thereof by plaintiff." While the instruction proffered by plaintiff covered the issue more clearly than did the one given, inasmuch as the principle was covered by the instructions, we cannot hold that it was prejudicial error to have failed to have elaborated on the issue.

[13] Objection is made to the language employed in instruction 31 dealing with the principle that the defendant as general contractor was not liable for the negligence, if any, of Summerbell, as subcontractor. Plaintiff has misconstrued the language of the instruction. The instruction, somewhat awkwardly it is true, told the jury that defendant was not liable for Summerbell's negligent acts. That is a correct statement of the law.

[14] It is also urged that error was committed in refusing to give requested instruction numbered 16, to the effect that a workman is not negligent in being where his work requires him to be unless a reasonable man similarly situated would not have worked at such a place under the circumstances. This instruction was a negative one on the doctrine of assumption of risk, and also involved certain elements of contributory negligence. Assumption of risk had not been specially pleaded by the defendant, and that issue was not submitted to the jury. So far as the issue of contributory negligence is concerned, all the elements contained in the proffered instruction were covered elsewhere by instructions 19 and 20.

[15, 16] Plaintiff next objects that instruction numbered 29 required too great a degree of care of plaintiff in stating that he was under the duty of exercising "the care and caution and skill that would be exercised by an ordinarily prudent, cautious and skillful person, acting under like circumstances." The objection is to the element of "skill" included within the instruction, the contention being that while a defendant is liable for want of ordinary care and skill, a plaintiff is barred only by want of ordinary care. This contention is based on the somewhat awkward phraseology of § 1714 of the Civil Code. That section provides that everyone is liable "for an injury occasioned to another by his want of *ordinary care or skill* * * * except so far as the latter has, willfully or by *want of ordinary care,* brought the injury upon himself." (Italics added.) In spite of the difference in the language of the section in referring to the degree of care required of the plaintiff and defendant it is well settled that the conduct of the plaintiff is governed by the same standards as are applicable to defendants. See cases collected 19 Cal.Jur., p. 577, footnote 10. Any other rule would be discriminatory and unsound.

[17] Objection is made to instruction 32 on proximate cause, and plaintiff also contends it was error to refuse to give certain instructions offered by him on this issue. The issues involved in the refused instructions were covered by instructions 13 and 41. As we read instruction 32 it simply told the jury that if the post fell because it was hit by the truss, and if the defendant's negligence did not contribute to the fall of the pole, the verdict should be for defendant. That is a correct statement of the law.

[18] Plaintiff also urges that his proposed instruction 19 on the doctrine of sudden peril should have been given. He claims evidentiary support for such an instruction because of his testimony as to what he did after the ladder began to fall. While the giving of the instruction would probably have been proper, it cannot be said that the refusal to give it was prejudicial. There was no suggestion or contention that plaintiff's conduct after the ladder started to fall was negligent or contributed to the accident. Under such circumstances, the failure to instruct on the immaterial issue cannot be held to have been error.

Plaintiff's final contention is that the court erred in refusing a requested instruction on Code of Civil Procedure, § 2061(7) to the effect that where it is within the power of a party to produce stronger evidence than that which is offered on a material point, weaker evidence than that offered should be viewed with distrust. Plaintiff contends that proper occasion existed for giving the requested instruction because of defendant's failure to produce the stake or to produce evidence of measurements made of the stake.

[19, 20] A somewhat similar provision of § 2061 found in subdivision 4 was held to be unconstitutional in Hirshfeld v. Dana, 193 Cal. 142, 223 P. 451, on the ground that it authorized the court to make an unlawful charge on the facts. Defendant contends the same rule applies to Sub. 7 of the section and that the constitutional amendment (Art. VI, § 19) giving the court power to comment on the evidence is applicable only to criminal cases. The rule of the Hirshfeld case was specifically overruled in People v. Dail, 22 Cal.2d 642, 656, 140 P.2d 828, where it was held that regardless of the constitutional provision such cautionary instructions are proper. The contention that the constitutional amendment does not apply to civil cases clearly lacks merit. The constitutional provision is self-executing and contains no language limiting its operation to criminal cases. For these reasons it is quite apparent that in a proper case the proffered instruction should be given. In the instant case defendant's witnesses all testified that no measurements of the stake were taken by them. Obviously, therefore, the failure to produce that testimony was explained. The stake was not produced, it apparently having been lost shortly after the accident. Under these circumstances failure to give the proffered instruction cannot be held to have been prejudicial. The reasons why defendant did not, and could not, produce stronger evidence were so clearly before the jury that it could not possibly have been confused or misled by the failure to instruct on this issue. The record shows that defendant produced at the trial the strongest evidence available to him. For these reasons the error, if error it was, in refusing to give the instruction cannot be held to have been prejudicial.

The judgment appealed from is affirmed.

KNIGHT and WARD, JJ., concur.

PEOPLE v. MELONE et al.

Cr. 2345.

District Court of Appeal, First District, Division 1, California.

Oct. 24, 1945.

Rehearing Denied Nov. 8, 1945.

1. Criminal law ⟹824(7)

An instruction, on court's own motion, covering subject of an accomplice and necessity for corroboration of testimony of accomplice, is necessary only when accomplice witness is called by the people. Code Civ.Proc. § 2061; Pen.Code, § 1111.

2. Criminal law ⟹824(7)

Where no request was made for an instruction concerning corroboration of accomplice's testimony, failure to give such instruction was not error even though two codefendants appeared as witnesses for the defense, in view of fact that testimony of codefendants was not the sole testimony relied on by prosecution to connect defendant with offense. Code Civ.Proc. § 2061; Pen.Code, § 1111.

3. Criminal law ⟹511(2)

Corroboration of testimony of accomplice need only tend to connect defendant with offense charged and need not be sufficient in itself to sustain a conviction. Pen. Code, § 1111.

4. Criminal law ⟹1170½(5)

In prosecution for burglary and grand theft, refusing to permit prosecuting witness to answer cross-examination question as to whether watch, purportedly lost before burglary and for which insurance company had made payment, had never been lost, was not prejudicial error in view of such witness' testimony that she did not then have the watch.

5. Criminal law ⟹1170(4)

In prosecution for burglary and grand theft, refusing to permit prosecuting witness to answer question as to how many times a codefendant stayed in witness' house was not prejudicial error where question had been answered several times.

6. Criminal law ⟹1170(2)

In prosecution for burglary and grand theft, refusing to permit prosecuting witness to answer certain question regarding the kind of place to which a codefendant took witness to enable her to buy a case of liquor for a friend was not prejudicial error, where operator of the place gave testimony from which it could be readily ascertained what kind of place it was.

7. Witnesses ⟹269(2)

In prosecution for burglary and grand theft, where police officer had testified that he had occasion twice previously to visit home of prosecuting witness, cross-examination of officer on the admittedly collateral question, not raised on direct examination, of how many times he and prosecuting witness had drinks together in the house, was improper as not bearing on question whether entering of the house was with permission of prosecuting witness.

8. Witnesses ⟹269(15)

A party who has not opened his case is not permitted to do so by propounding, under guise of cross-examination, question which relates, neither directly nor collaterally, to subject matter of the original examination and, if he wishes to propound such questions, he should, when permitted, call witness as his own.

9. Witnesses ⟹269(1), 280, 282

The opposite party may cross-examine witness regarding any facts stated in his direct examination or connected therewith and in so doing may put leading questions, but, if he examines him as to other matters, such examination is to be subject to the same rules as direct examination. Code Civ.Proc. § 2048.

10. Criminal law ⟹286, 772(6)

In prosecution for burglary and grand theft, where defense was based on a confession of entry into the home and an admission that certain property had been removed therefrom, but it was claimed that owner consented to entry and taking of property, instruction regarding plea of confession and avoidance was erroneous since there is no such plea recognized in a criminal action. Pen.Code, § 1016.

11. Criminal law ⟹1186(4)

In prosecution for burglary and grand theft where defense was based on a confession of entry into house and an admission that certain property had been removed therefrom but it was claimed that owner consented to the entry and taking of property, instruction regarding plea of confession and avoidance, but correctly stating position of defendant, was not prejudicially erroneous even though the use of the word "plea" was technically incorrect. Pen.Code, §§ 1016, 1093, subd. 6; Const. art. 6, § 19.

12. Criminal law ⚷322

Where there was nothing in record to indicate that verdict had not been recorded in the official minutes, presumption existed that official duty had been regularly performed. Code Civ.Proc. § 1963.

13. Criminal law ⚷892

The recording of verdict in the rough minutes, if followed expeditiously by recording in the official minutes so that no injury could befall the legal rights of the people or the defendant, would be sufficient. Pen.Code, §§ 1093, 1258, 1404.

◆

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Gerald Melone and Sipiron Balenzuela were convicted of burglary and grand larceny, and Sipiron Balenzuela appeals.

Affirmed.

Alfred J. Hennessy, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., and David K. Lener and Miriam E. Wolff, Deputy Attys. Gen., for respondent.

WARD, Justice.

Appellant, Sipiron Balenzuela, was charged with burglary and grand theft jointly with Gerald Melone and Ralph Dugger in an information containing two counts. It was alleged that the articles stolen and the premises burglariously entered were the property and home respectively of Dorothie S. Kok and were located in the town of Hillsborough in the county of San Mateo. The three defendants were convicted and sentenced on each count. It was ordered that the sentences should run concurrently. Balenzuela is the only defendant to appeal.

Preliminarily it should be stated that defendant Melone and Mrs. Kok had become acquainted several years or more prior to the burglary. Melone joined the Merchant Marine in 1942 and made several trips to various places in the south seas, including Australia. In Australia he purchased a tennis racket, and in May, 1944, when he arrived in San Francisco he telephoned Mrs. Kok as he claims to present the tennis racket through her to her daughter. Mrs. Kok drove to San Francisco and met Melone at his suggestion at an inn or bar. Here the two indulged in a drink of a "Scotch high ball." Mrs. Kok subsequently, through Melone, purchased a case of Scotch whisky of the value of about $70 for which she paid $100. The proprietor of the establishment testified that "somebody went south" with the difference. Mrs. Kok invited Melone to her home in Hillsborough for the week-end covering August 4th, 5th and 6th, 1944. At that time Mrs. Kok's mother was occupying the guest room in the house. Upon the arrival of Mrs. Kok and Melone near midnight, Mrs. Kok's daughter was transferred from her room to Mrs. Kok's bed, and Melone occupied the daughter's room. Melone testified that he occupied the guest room. Without contradiction in the testimony it appears that about *noon* on August 5th some conversation arose relative to jewelry and furs and Mrs. Kok said she would show some of her jewels to Melone. She proceeded to her bedroom, followed by Melone, and produced a number of articles of jewelry and several fur garments. At a later date Melone invited Mrs. Kok to attend a theatrical performance, which she refused. On August 15th, upon the statement of Melone that a certain orchestra was to open an engagement at a San Francisco hotel, Mrs. Kok accepted an invitation to dine with Melone. She drove to San Francisco in her automobile and met Melone at his suggestion at a certain inn, saloon or bar. The evidence is conflicting relative to the time consumed in this inn. Upon leaving, Melone, who had been given the keys of the car, insisted on filling the tank of the car though Mrs. Kok protested that she had sufficient gasoline for all present purposes. On arrival at the hotel Mrs. Kok alighted, entered the lobby and retired temporarily to a rest room. Meanwhile the parking of the car was left to Melone. The couple dined and danced. During the evening an announcement over the loud speaker requested Mrs. Kok's presence at the hotel office. It was agreed that the call probably had reference to the parking of the car. Melone left the table and upon his return stated that the call was about the parking of the car. They continued for a half hour or more to dance and then left. Melone produced the keys of the car and drove a short distance. After asking Mrs. Kok if she had the nerve to stand a shock, he proceeded to tell her that the call at the hotel was not about parking the car but was a telephone message that her home had been burglarized. Mrs. Kok insisted upon stopping at another hotel and telephoning her home relative to the safety of her children. A police officer answered the phone, said that the children were all right, verified the fact of the burglary, told of the condition of the clothes closets and jewel boxes and requested Mrs. Kok's presence as soon as possible. The couple drove a short distance further when Melone said Mrs. Kok had better proceed to Hillsborough alone. She said she was nervous, afraid to drive and requested him to accompany her. Melone replied that his presence with her would cause unfavorable comment. Before he left the car Mrs. Kok asked him if he had anything to do with the theft. He replied that she was "silly." The above statements in some respects are contradictory to the testimony of Melone given on the trial but are fairly consistent with several signed statements made by Melone shortly after his arrest. On the return to her home Mrs. Kok found that her two children were not injured physically. She discovered losses in jewels and furs running into thousands of dollars. Later she suggested to a police officer that she feared Melone had something to do with the theft upon several theories, namely, his action in refraining from telling her the truth about the telephone call at the hotel, and the fact that during Melone's week-end visit a $100 bill resting near the jewel box had been missing. The officer called Melone at San Francisco on the telephone. On the trial, in response to a question relative to the nature of the conversation, the officer testified: "I called this number, and before I had a chance to answer, why, the party on the other end asked me if I was Jimmy. I said I was, and he wanted to know if I got everything. I told him I had. He asked me if the cops had caught up with them. I told him 'no.' He wanted to know if I got the hundred dollars in the drawer. I told him 'yes.' And the first thing I started to ask him where I would meet him the next day, and I could not understand the name of this club or place, so I had to ask him a couple of times. It was the Criterion Club, or something like that. I told him I would meet him the next day at twelve o'clock and that was all the conversation that night." Melone was later questioned at his home and at the Hall of Justice, admitted making preparation for the burglary and theft, but claimed that a number of people were implicated, including the owner of the stolen property. Melone mentioned Dugger's name. Inspector James P. Johnson testified:

"He [Melone] said that he knew Dugger, that he had sailed in the Merchant Marine with him, he knew that he had a record in our gallery Identification Bureau. We went to the Bureau of Identification. * * * We went downstairs then, were unable to locate who Balenzuela was up until this time, we went downstairs, and he had a telephone number which we checked and found it to be listed to 124 Hermann Street. Mr. Melone made a call, or two calls, and from what he told me that they were there but would not answer. So Officer Kurrell and Greely and myself immediately left and went to the premises at 124 Hermann. We rang the front door bell. Kurrell was in the rear, Greely in the front, and I went to the front door, rang the front door, and got no response, went around to the back, and I noticed the window opened. And I obtained a ladder and placed it against the window and went through the window into the house, the flat. I saw Dugger and Balenzuela just getting up out of the bed. They had their underwear on. I went back to the window and called Officer Kurrell in and opened the front door for Officer Greely.

"Q. What time of the day was it when you went in and they were just getting out of bed? A. I would say it was in the neighborhood of four o'clock in the afternoon.

"Q. Will you continue? A. We made a search of the premises. I stayed principally with the two men. Officer Kurrell called from the front room and he said, 'I have some furs, I have located some furs.' So he came in, and I went back in there, and it is a sort of a day bed, one of those combinations three-quarter couches, with the department under where you put the bedding. We had already thrown that up, and the furs were in plain view, and I went a little bit further down in the left-hand corner of the couch and found the bag containing the jewels. * * * I asked Dugger for a suitcase, one that belonged to his father, and I packed the furs and the jewelry in the suitcase." I asked him what he had to say about this property that

I had found. He said, 'I have not got anything to say. What do you want me to say? You got the stuff and you got me.' I asked Balenzuela what he knew about it. He said, 'I do not know nothing about it,' he said, 'The only time I saw that stuff was up in the Cal-Hyde last night.' * * * We brought Dugger and Balenzuela into the Hall of Justice, Room 402, and turned the property over to Chief Wisnom. In making the search of the premises, Officer Kurrell called to me and I left the dining room and went into the bedroom that they had occupied. When I got into the building at 124 Hermann, he handed me a diagram of a map, supposedly of a place in Hillsborough. I put that in an apartment of my book, and when I got back to the hall I turned it over to Chief Wisnom. They were booked and around 5:00 o'clock that day, Gerald Melone identified Balenzuela as being the second man that he had been talking to. Balenzuela was taken into the show-up room in the Hall of Justice and Melone was on the other side of transparent glass, and he identified him as being the man that he had made reference to. I also talked to Melone about the telephone call, in fact, about his participation in this affair. He said that Mrs. Kok was short of money and requested that he have the place burglarized so that she could collect the insurance. He said that he met her in the Cal-Hyde Club about 9:00 o'clock that evening, that Balenzuela and Dugger were in the place at the time, that they left immediately. He said that he drove Mrs. Kok's car, that he made two stops to buy some gasoline, and that when he arrived at the hotel he saw Dugger and turned the keys over to Dugger. I asked him about the 'phone call that he had received from the Hillsborough Police, and why he did not tell Mrs. Kok at the time he had received it. He said that he did not wish to have a hysterical woman on his hands in the dining room. I asked him when he first told her of the telephone call. He said, 'Not until they got in the car, her car.' And I asked him how he approached and broached the subject to her. He said, 'Well, I asked her how her nerves were,' and then he told her."

It appears that a map of the Hillsborough premises and the roads leading thereto had been drawn by Melone. It is contended that a second diagram, also the handiwork of Melone, was made with the assistance of Mrs. Kok. The latter testimony is positively denied by Mrs. Kok. In reference to the drawing, the record disclosed the testimony of Officer Kurrell:

"Q. I now show you what appears to be a form of a V-mail letter with certain lines and drawings on it, and ask you whether or not you recognize that document? A. Yes, I do.

"Q. And where did you find that document? A. In an inside coat pocket.

"Q. What kind of a coat? A. A regular suit coat.

"Q. At that time where was the coat? A. Hanging on the back of a chair in the bedroom where these fellows were sleeping.

"Q. Now, did you afterwards, after you found that document, did you notice who put on that coat? A. Yes I did.

"Q. Who was it? A. Balenzuela.

"Q. That is Sipiron Balenzuela, the man who is sitting here, one of the defendants in this case? A. That is right.

"Q. And did you show it to the other officers there? A. I did.

"Q. Whom did you show it to? A. To Inspector Johnson and to Officer Greeley. * * *

"Q. I will ask you to look at People's Exhibit #33 and ask you as to whether or not this indicates a portion of the Hillsborough home, or a rough diagram or drawing of the den and dining room? A. Yes it does."

On appeal the main contentions presented are that the defendant was convicted upon the uncorroborated testimony of self confessed accomplices and that the court failed to give an instruction on the necessity of corroboration of an accomplice's testimony. Prior to the trial and subsequent thereto Balenzuela was represented by separate or at least additional counsel. On the trial the record disclosed that all defendants were represented by one set of counsel. A reading of the entire transcript shows that any evidence introduced by the prosecution or the defense or any motion or objection presented by the defense was offered on behalf of or against all defendants and not specifically on behalf of or against Balenzuela. No request was made to limit the testimony to one or more defendants (People v. Peterson, 66 Cal.App.2d 420, 152 P.2d 347) and no request was made for an instruction concerning corroboration.

Melone and Dugger appeared as witnesses for the defense but Balenzuela did not. The contentions on appeal that the testimony of Melone and Dugger tended to prove the case for the People by the admission of the entry into the premises, the taking of the property therefrom when Balenzuela was present, and the preliminary steps leading up to the denounced act, may be accepted for the purpose of determining the question whether the instruction in reference to the necessity of corroboration of an accomplice's testimony should have been given.

[1, 2] Under certain facts and circumstances the court may, and under other facts and circumstances must, on its own motion, give instructions on the subject of an accomplice and the necessity for corroboration of the testimony of such accomplice (Penal Code, sec. 1111; Code Civ.Proc., sec. 2061; People v. Warren, 16 Cal.2d 103, 104 P.2d 1024), but an instruction by the court on its own motion covering section 1111 is necessary only when the accomplice witness is called by the People. To give, without request, such an instruction when the accomplice witness is called by the defense may prejudice the constitutional rights of the witness by unnecessarily and inadvisedly commenting on the evidence and discrediting the witness. 8 Cal.Jur., p. 303, sec. 357; People v. McEvers, 53 Cal.App.2d 448, 128 P.2d 93.

[3] Appellant's related contention that he was convicted on the uncorroborated testimony of an accomplice is not supported by the evidence and it is, therefore, unnecessary to decide whether a person can be convicted upon the uncorroborated testimony of an accomplice, where such testimony is introduced by the defense. In this case the appearance of other defendants on the stand and the giving on the trial of testimony of the so-called accomplices was not the sole testimony relied upon by the People in their case to connect the appellant with the commission of the offense. The corroboration necessary under Penal Code, sec. 1111, while it need do more than raise a suspicion of defendant's guilt, need only tend to connect him with the offense charged, and need not be sufficient in itself to sustain a conviction. 4 Cal.Jur. Supp. (1943 Rev.) 710. Balenzuela was sleeping in the apartment in which the stolen articles were found the day after the alleged offense. He admitted that he had been at the inn where the whole scheme was planned, according to the defense, by his statement to the arresting officers when they found the property: "I do not know nothing about it, the only time I saw that stuff was up in the Cal-Hyde last night." A rough map of the Hillsborough premises and the main roads leading thereto was found in the pocket of the coat which Balenzuela put on when he was taken into custody.

[4] Secondary in importance as presented by appellant is the claim that prejudicial error occurred by the court's action in refusing to permit Mrs. Kok to answer certain questions propounded by defendants' counsel. The points raised are specifically set forth in the opening brief. Question No. 1 referred to a purported loss of a "pendant watch" prior to the burglary charged in the information, to-wit, on cross-examination the following question was propounded: "Q. And isn't it a fact that the insurance company paid you $950, and some odd dollars or in that neighborhood, for that watch? A. Yes. Q. And as a matter of fact, it had never been lost, is that right, too?" The question related to an entirely collateral matter that had not been developed on direct examination. The defendants could not disprove an answer, if given. The court, the district attorney, and the attorney for the defense argued earnestly for or against the admissibility of the evidence. In the midst of the argument the attorney for the defense asked: "Have you got that watch now?" Mrs. Kok interrupted the flow of objections and answered: "I certainly have not." The particular information which counsel sought to elicit appears in the record.

[5] Question No. 2: "How many times did he stay in your house?" That question was answered several times. As an instance: "Q. Now, Mrs. Kok, isn't it a fact that, since you have known him, and, as I say, between four and five years, he has frequently spent the week-end with you at your house in Hillsborough? A. I told you before he has only spent one week-end at my house."

[6] Question No. 3: "A. I said Mr. Melone took me to this bar over on Market Street where I could buy this case of Scotch for this friend of mine that wanted a case of Scotch. Q. What kind of a

place was that?" The particular question was technically objectionable. However, it might have been reframed. The witness had given testimony relative to the transaction at the "bar over on Market Street." In addition, Melone gave some information and the owner and operator gave particular details from which testimony it could be readily ascertained what "kind of a place" it was.

[7-9] Question No. 4. "And many times you and Mrs. Kok had drinks together in that house?" The question was directed to a police officer who testified that he had occasion twice previously to visit the Kok home. The question had no bearing on the real issue in the case, namely, whether the entry to the house was with the permission of Mrs. Kok. Appellant admits that each of the above questions was directed to collateral matters but is content to claim without further elucidation that the rulings were prejudicial error. None of these matters were referred to on direct examination. "A party who has not opened his case is not permitted to do so by propounding, under the guise of cross-examination, questions which relate, neither directly nor collaterally, to the subject matter of the original examination; if he wishes to propound such questions, he should, when permitted, call the witness as his own." 27 Cal.Jur., sec. 77, p. 101. "The opposite party may cross-examine the witness as to any facts stated in his direct examination or connected therewith, and in so doing may put leading questions, but if he examine him as to other matters, such examination is to be subject to the same rules as a direct examination." Code Civ.Proc. sec. 2048. People v. David, 12 Cal.2d 639, 86 P.2d 811; People v. Montgomery, 47 Cal.App.2d 1, 117 P.2d 437.

[10, 11] The next claim of error by appellant concerns one instruction by the trial court. The court instructed: "In this case the defendants have come forward and under what is in the nature of a plea of confession and avoidance have said: 'Yes, we did all those things, but we did it without the intent because we did it at the behest, or at the request, or to satisfy some purpose of Mrs. Kok.'" "Now, as I say, this defense is in the nature of a plea of confession and avoidance. We did it, but we are not guilty. We are not guilty because we did it at the 'behest,' or, to use the language of some of them, 'under the orders of the owner of that property.' Obviously, I do not steal from you if you give me your property. Obviously, if this property was taken at the suggestion of the owner, to satisfy any purpose, whim, or whatnot of the owner, it is not burglary and it is not theft. And you are, of course, to weigh that circumstance in connection with all of the other circumstances in this case." There is no such plea recognized in a criminal action in this state. Penal Code, sec. 1016. The instruction must be declared erroneous. However, the court has the right to comment on the evidence. Penal Code, sec. 1093(6); Const.Calif., Art. VI, sec. 19. This comment is not technically in accord with law but the defense was based on a concession of entry into the home designated in the information and an admission that certain property had been removed therefrom. It was claimed that Mrs. Kok consented to the entry, etc. The jury understood the contention of the defendants and by their verdict showed they did not believe the defendants. The use of the word "plea" was technically incorrect, otherwise the statement of the position of defendants was an apt characterization. In view of these facts it may not be said that the instruction was prejudicially erroneous.

[12, 13] The final contention of appellant is: "That the verdict purportedly returned by the trial jury was, and is, void, because of its being incomplete inasmuch as the clerk failed to record the verdict in full, or at all, in the official minutes and/or read the verdict, as recorded, to the jury and then inquiry made of the jury if it was their verdict as recorded, and the jury was ordered discharged without affirming the verdict as recorded." There is nothing in the present record to indicate that the verdict was not recorded in the official minutes. The presumption is that official duty has been regularly performed. Code Civ. Proc., sec. 1963. However, the recording in the rough minutes, if followed expeditiously in the official minutes so that no injury could befall the legal rights of the People or defendants, would be sufficient. Penal Code, secs. 1093, 1258, 1404; People v. Gilbert, 57 Cal. 96; People v. Sing Chan, 64 Cal.App.2d 167, 148 P.2d 81; People v. Kelso, 25 Cal.2d 848, 155 P.2d 819.

The judgment is affirmed.

PETERS, P. J., and SCHOTTKY, Justice pro tem., concur.

27 Cal.2d 104

PHILLIPS v. CITY OF PASADENA.

L. A. 19321.

Supreme Court of California.

Oct. 19, 1945.

1. Municipal corporations ⚷736

A municipality may be held liable for creating or maintaining a nuisance notwithstanding a governmental activity is involved. Civ.Code, § 3479; Code Civ.Proc. § 731.

2. Municipal corporations ⚷698

The unlawful barricading of a public street constitutes a nuisance for which a person specially injured may maintain an action and where such obstruction cuts off all means of ingress and egress, the nuisance is especially injurious within meaning of the rule. Civ.Code, §§ 3479, 3493; Code Civ.Proc. § 731.

3. Municipal corporations ⚷698

In action for damages caused by city's closing of street leading to plaintiff's resort, complaint which stated facts relative to barricading of street and which alleged that closing was unlawful was sufficient as against a general demurrer, notwithstanding failure to allege that street was not vacated pursuant to street opening act. Civ.Code, §§ 3479, 3482, 3493; Code Civ. Proc. § 731; St.1941, p. 765 et seq., § 3200 et seq.

4. Municipal corporations ⚷698

Plaintiff in order to state cause of action against city for damages caused by city's closing of street leading to plaintiff's resort was not required to negative existence of facts which city might assert as basis of its right to exercise the police power. Civ.Code, §§ 3479, 3482, 3493; Code Civ.Proc. § 731.

5. Limitation of actions ⚷55(6)

A nuisance which will presumably continue indefinitely is considered permanent and limitation runs from time it is created, but if nuisance may be discontinued at any time it is considered continuing in character.

6. Limitation of actions ⚷55(6)

Every repetition of a continuing nuisance is a separate wrong for which person injured may bring successive actions for damages until the nuisance is abated, notwithstanding an action based on original wrong may be barred. Civ.Code, §§ 3479, 3482, 3493; Code Civ.Proc. § 731.

7. Municipal corporations ⚷741(1)

An action against city for damages caused by city's closing of street leading to plaintiff's resort, which was brought more than six months after street was closed but within six months after date when plaintiff first became aware that city intended to keep the gate locked permanently was not barred because of failure to file a claim within six months after closing of street as required by city charter as prerequisite to maintenance of action on such claim, where complaint disclosed that gate could have been removed at any time, so that locked gate did not as matter of law constitute a permanent nuisance. Civ.Code, §§ 3479, 3482, 3493; Code Civ.Proc. § 731.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by J. R. Phillips against the City of Pasadena to recover damages for closing of a road by which patrons reached plaintiff's resort. From a judgment of dismissal entered on sustaining demurrer to plaintiff's complaint, plaintiff appeals.

Reversed.

Prior opinion, 154 P.2d 732.

Roland Maxwell, of Pasadena, for appellant.

Harold P. Huls, City Atty., and H. Burton Noble, Asst. City Atty., both of Pasadena, for respondent.

GIBSON, Chief Justice.

Plaintiff appeals from a judgment of dismissal entered upon the sustaining of a demurrer.

The complaint alleges that for more than thirty years plaintiff has been the owner of Camp Oak Wilde, a mountain resort operated on land leased from the federal government in the Arroyo Seco Canyon, outside the city limits of Pasadena. The only safe means of ingress and egress to the resort was by a road partly within the limits of defendant city which was used by plaintiff, his patrons and the public generally, except for brief periods when obstructed or damaged by heavy rainfall. In 1938, defendant city closed the road by placing a locked gate across it at an intersection within the city, which was later removed on plaintiff's demand. The road was again closed in the same manner in March, 1941. Plaintiff alleged that because defendant had on a previous occasion removed the barrier on his demand, it did not become apparent that it was defendant's intention to permanently obstruct the road until after July 16, 1941. It is further alleged that as a result of the unlawful obstruction of the road during the period of six months prior to January 16, 1942, plaintiff's resort business was destroyed and he was damaged through the loss of patronage. Plaintiff's verified claim which was presented to the city on January 17, 1942, was rejected.

[1, 2] It is the rule in this state that a municipality may be held liable for creating or maintaining a nuisance even though a governmental activity is involved. Hassell v. City and County of San Francisco, 11 Cal.2d 168, 78 P.2d 1021; Adams v. City of Modesto, 131 Cal. 501, 63 P. 1083; Peterson v. City of Santa Rosa, 119 Cal. 387, 392, 51 P. 557; Lind v. City of San Luis Obispo, 109 Cal. 340, 42 P. 437; Wood on Nuisances, 3d ed., vol. 1, p. 104; vol. 2, p. 1004. Anything which unlawfully obstructs the free passage or use in the customary manner of a public street is a nuisance, and any person whose property is injuriously affected or whose personal enjoyment is lessened by a nuisance may maintain an action for damages or abatement. Civ.Code, § 3479; Code Civ.Proc. § 731. The unlawful barricading of a public street constitutes a nuisance for which a person specially injured may maintain an action (Civ.Code, § 3493; Gardner v. Stroever, 89 Cal. 26, 26 P. 618; Cushing-Wetmore Co. v. Gray, 152 Cal. 118, 120, 92 P. 70, 125 Am.St.Rep. 47; Strong v. Sullivan, 180 Cal. 331, 333, 181 P. 59, 4 A.L.R. 343) and where such an obstruction cuts off all means of ingress and egress the nuisance is especially injurious within the meaning of the rule. Gardner v. Stroever, supra.

[3, 4] Defendant contends, however, that the city has general authority to vacate streets whenever public interest or convenience so requires, and that the complaint is fatally defective because of the absence of allegations showing that the street was not closed pursuant to such authority. The Street Opening Act of 1889, Streets and Highways Code, § 3200 et seq., St.1941, p. 765 et seq., confers on the city the right to vacate streets and prescribes a definite procedure to be followed, with provisions for compensation. If the street were closed under express authority of a statute, the erection of the barrier could not be deemed to create a nuisance (Civ.Code, § 3482), but it does not necessarily follow that an injured party is not entitled to damages. 4 McQuillin, Municipal Corporations (Rev.Ed.1943), § 1422. Plaintiff did not specifically allege that the street was not vacated pursuant to the authority contained in the act but he stated the facts relative to the barricading of the street, and alleged the closing was unlawful. This was sufficient as against a general demurrer. Moreover, defendant concedes in its briefs that it did not purport to proceed under the act, but asserts that the street was closed under its police power because it concluded the street was unsafe for use. Even if we assume that defendant could permanently close the street under its police power, plaintiff, in order to state a cause of action, was not required to negative the existence of facts which defendant might assert as the basis of its right to exercise such power.

Defendant next contends that the complaint shows the claim was not filed within time. The city charter provides that all claims for damages must be presented within six months after the occurrence, event or transaction upon which the claim is founded. The road was closed in March, 1941, and the claim was not filed until January, 1942, more than nine months thereafter. Plaintiff asserts that the maintenance of the locked gate constituted a continuing nuisance, giving rise to separate causes of action, and that he filed his claim for damages within six months after July 16, 1941, when he first became aware that defendant intended to keep the gate locked permanently. He waives all claims to damages accruing prior to July 16, 1941.

[5, 6] Where a nuisance is of such character that it will presumably continue indefinitely it is considered permanent, and the limitations period runs from the time the nuisance is created. Strong v. Sullivan, 180 Cal. 331, 334, 181 P. 59, 4 A.L.R. 343; 39 Am.Jur. p. 391. On the other hand, if the nuisance may be discontinued at any time it is considered continuing in character. Kafka v. Bozio, 191 Cal. 746, 751, 218 P. 753, 29 A.L.R. 833; Strong v. Sullivan, supra. Every repetition of a continuing nuisance is a separate wrong for which the person injured may bring successive actions for damages until the nuisance

is abated, even though an action based on the original wrong may be barred. Kafka v. Bozio, 191 Cal. 746, 751, 218 P. 753, 29 A.L.R. 833; Strong v. Sullivan, 180 Cal. 331, 334, 181 P. 59, 4 A.L.R. 343; 2 Wood on Nuisances (3d ed.), p. 1308; to the same effect are: Vowinckel v. N. Clark & Sons, 216 Cal. 156, 164, 13 P.2d 733; Collins v. Sargent, 89 Cal.App. 107, 116, 264 P. 776; Williams v. Blue Bird Laundry Co., 85 Cal. App. 388, 395, 259 P. 484; cf. Knight v. City of Los Angeles, 26 Cal.2d 764, 160 P. 2d 779; Natural Soda Prod. Co. v. City of Los Angeles, 23 Cal.2d 193, 143 P.2d 12.

[7] We cannot say, as a matter of law, that the locked gate constituted a permanent nuisance, since it appears from the allegations in the complaint that it could have been removed at any time. If the nuisance was in fact continuing in character, the claim was filed within time.

The judgment is reversed.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.

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27 Cal.2d 98

BOARD OF SOCIAL WELFARE v. LOS ANGELES COUNTY et al.

S. F. 17113.

Supreme Court of California.

Oct. 16, 1945.

1. Mandamus 🔑23(1)

The State Board of Social Welfare is a "party beneficially interested" within statute providing that mandamus must be issued upon verified petition of party beneficially interested, and hence is a proper party to maintain mandamus to compel county officials to issue a warrant to a needy aged person. Code Civ.Proc. § 1086; St.1941, p. 2299, § 103.5; St.1943, pp. 2254, 2435, 1590, §§ 140, 222, 2183.1.

See Words and Phrases, Permanent Edition, for all other definitions of "Party Beneficially Interested".

2. Mandamus 🔑23(2)

Where question is one of public right and object of mandamus is to procure enforcement of public duty, relator need not show that he has any legal or special interest in result, it being sufficient that relator is interested as a citizen in having the laws executed and duty enforced. Code Civ.Proc. § 1086.

3. Paupers 🔑11

An application for issuance of duplicate old age aid warrant to replace one that has been lost or destroyed need not be made before original warrant has been canceled for nonpresentation to county treasurer, but county auditor must upon filing of affidavit described in the statute issue duplicate warrants to replace those previously issued. St.1943, pp. 2254, 2435, 1590, §§ 140, 222, 2183.1.

4. Paupers 🔑11

That statutes providing for replacement of lost or destroyed old age aid warrants became effective after loss and cancellation of one of such original warrants did not bar old age aid recipients' rights to duplicate warrants, since such statutes do not purport to create a new right in payee to receive additional aid, but only provide a method for payments from county treasury of money to which he was already entitled. St.1943, pp. 2254, 2435, 1590, §§ 140, 222, 2183.1.

5. Paupers 🔑11

County could not justify its refusal to issue to recipients of old age aid duplicate warrants to replace county warrants which had been issued in payment of such aid but which because they were not presented for payment were canceled by the county, on theory that to permit recipients to secure replacements of lost or destroyed warrants with no limitation of time within which application must be made would enable them to accumulate warrants and hold them for indefinite period, and thus amass an estate for recipients' heirs. St.1937, p. 1078, § 2003; St.1943, pp. 2254, 2435, 1590, §§ 140, 222, 2183.1.

6. Mandamus 🔑168(2)

The State Board of Social Welfare was not entitled to mandamus to compel county to issue to recipients of old age aid duplicate warrants to replace warrants originally issued in payment of such aid where recipients did not show that they had complied with statutory provisions requiring affidavits, etc. St.1943, pp. 2254, 2435, 1590, §§ 140, 222, 2183.1; Code Civ. Proc. § 1086; Pol.Code, § 4082.

In Bank.

Proceeding in mandamus by the Board of Social Welfare to compel the County of Los Angeles and others to issue to recipients of old age aid duplicate warrants to replace warrants originally issued in payment of such aid.

Writ denied, and alternative writ theretofore issued discharged.

Robert W. Kenny, Atty. Gen., and Clarence A. Linn, Deputy Atty. Gen., for petitioner.

J. H. O'Connor, County Counsel, and S. V. O. Prichard, Asst. County Counsel, both of Los Angeles, for respondents.

SCHAUER, Justice.

Petitioner, the Board of Social Welfare of this state, by this mandamus proceeding seeks to compel respondents to comply with its orders to issue to three recipients of aid for the aged duplicate warrants to replace certain county warrants which had been originally issued in payment of such aid but which because they were not presented for payment were cancelled by the county, pursuant to the provisions of section 222 of the Welfare and Institutions Code, St.1943, p. 2435, after the expiration of six months from the respective issue dates. One of the original warrants was not presented for payment because the recipient thereof was an inmate of the county hospital and physically unable to cash his warrant; the other two warrants had been lost in the mails. Each of the three aged persons—Karl Schamesberger (acting through a guardian), William C. Weitzel, and Eugene Dosse—informally applied to the County Auditor of the County of Los Angeles for, but was denied, the issuance of a new warrant; each then appealed to the petitioner welfare board, which, as stated above, ordered respondents to reissue the warrants. Respondents refused, and this proceeding followed.

Respondents, in defense of their refusal to issue duplicate warrants to the three aid recipients, argue that the law makes no provision for appeal to the state welfare board upon refusal by a county auditor to issue such duplicate warrants; that because the original warrants were cancelled by the county auditor pursuant to the provisions of section 222 of the Welfare and Institutions Code, it is now (and at the times of the respective applications was) too late for the aid recipients to apply for duplicate warrants; and that inasmuch as such recipients have not complied with the provisions of sections 140 and 2183.1, St. 1943, pp. 2254, 1590, of the same code they are not entitled to the writ sought.

[1, 2] Although respondents' first point —that no provision is made by the law for appeal to the state welfare board upon refusal by a county auditor to issue a duplicate warrant to replace one which has been lost or destroyed, and that such board is without specifically stated power to order the issuance of such duplicate warrant—appears to be technically correct, it is to be noted that by section 103.5 of the Welfare and Institutions Code, St.1941, p. 2299, "It is * * * declared that provision for public aid to the needy aged * * * as in this code provided is a matter of Statewide concern. The board is * * * designated as the single State agency with full power to supervise every phase of the administration of the public assistance plans [for the needy aged]. * * *" We are therefore of the opinion that although such board may be without specific authority to directly order the issuance of a duplicate warrant by a county auditor under such circumstances as are here depicted, nevertheless the board is a "party beneficially interested" in the issuance of such warrant, within the meaning of the provision of section 1086 of the Code of Civil Procedure that "It [the writ of mandamus] must be issued upon the verified petition of the party beneficially interested" (see 16 Cal.Jur. §§ 53–56, pp. 850–856), and is a proper party to maintain mandamus proceedings against county officials who fail or refuse to issue a warrant to a needy aged person who is a member of a class entitled thereto. Persons who are members of such a class are ordinarily financially, and often physically, unable to maintain such proceedings on their own behalf, and to deny to them the assistance of the welfare board under such circumstances would tend to defeat the purpose of the legislation which seeks to provide for them during needy old age.

The rule is stated thus in 35 American Jurisprudence 73, section 320: "By the preponderance of authority * * * where the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the relator need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced. * * * [P. 76, § 322.] Generally, when a power or duty is imposed by law upon a public board or officer, and in order to execute such power or perform such duty, it becomes necessary to obtain a writ of mandamus, it or he may apply for the same." Here the provision of public aid to the needy aged is a matter of state-wide concern, under the administration of the social welfare board which is "designated as the single State agency with full power to supervise every phase of the administration of the public assistance plans for which grants-in-aid are received from the United States Government in order to secure full compliance with the provisions of Titles 1 and 4 of the Federal Social Security Act [42 U.S.C.A. §§ 301 et seq., 601 et seq.]" (Welf. & Inst.Code, § 103.5), and we are satisfied that such board may properly maintain this mandamus proceeding.

[3, 4] Respondents next assert that inasmuch as section 222 of the Welfare and Institutions Code provides that "Any county warrant issued for the giving of aid to, and payable to, * * * a needy aged person, * * * or the guardian, trustee, disbursing agent, or any custodian of the funds or estate of any of them, shall be canceled if not presented to the county treasurer for payment within six months after the date of issuance," the application for issuance of a duplicate warrant to replace one that has been lost or destroyed must be made before the original warrant has been canceled for nonpresentation to the county treasurer. We are not in sympathy with such a position. By sections 140 and 2183.1 of the same code it is provided that "*Whenever* a warrant for [public aid] * * * has been lost or destroyed before it has been paid by the county treasurer, the amount due thereon may be recovered by the payee by filing with the county auditor an affidavit, setting forth the fact of the loss or destruction of the warrant, together with all material facts relative thereto known to the affiant, the amount, the name of the payee, and the date and number of the warrant if the same are known to the affiant. Upon receipt of the affidavit, and without the filing of any bond by the payee, the county auditor shall [in sec. 2183.1 the word "may" appears, rather than "shall"] issue and deliver to the payee of the original warrant a duplicate warrant for the full amount of the original warrant, and the county treasurer shall pay the duplicate warrant in lieu of the original warrant." (Italics added.)

No such limitation period as that contended for by respondents is provided by the quoted sections, and we perceive no sound basis upon which it could be read therein. As was stated by this court in Dana v. City and County of San Francisco, 1861, 19 Cal. 486, 491, "The warrant is not intended to constitute a new debt, or evidence of a new debt, against the county, but is the prescribed means the law has devised for drawing money from the county treasury." See, also, Ser-Vis v. Victor Valley Irr. Dist., 1923, 190 Cal. 732, 740, 214 P. 223. The aid recipients here involved were issued the original warrants because they were entitled to payment from the county treasury of the sums for which such warrants were drawn. A clear and explicit method is provided by sections 140 and 2183.1 of the Welfare and Institutions Code for the replacement of lost or destroyed warrants, regardless of whether such warrants have been cancelled for nonpresentation, and we are of the opinion that in cases such as these a county auditor must, upon filing of the affidavit described in such sections, issue duplicate warrants to replace those previously issued. In the case now before us two of the original warrants were admittedly lost and the third we presume has been destroyed (inasmuch as respondents state that section 2183.1 provides a method which could have been followed by each of the three aid recipients). Although sections 140 and 2183.1 became effective after the loss and cancellation of one of such original warrants that fact is immaterial, since such sections do not purport to create a new right in the payee to receive additional aid, but only provide a method for the payment from the county treasury of money to which he was already entitled.

[5] Respondents have suggested, also, that to permit aid recipients to secure replacements of lost or destroyed warrants, with no limitation of the time within which application therefor must be made, will enable them to accumulate "warrants and hold * * * them for an indefinite period of time, thus to amass an estate for heirs of the aged recipient." The suggestion lacks persuasive force. If the Legislature has not, by the use of reasonably clear language, itself imposed such a limitation we should not, in the face of the express legislative admonition (Welf. & Inst. Code, § 2003, St.1937, p. 1078) that "this chapter [chap. 1, div. III, which includes sections 2000 to 2230] shall be liberally construed," write it in. Furthermore, it is obvious that lost or destroyed warrants could not as such be "accumulated," and if it did come to pass that there was any substantial accumulation of funds evidenced by such warrants, a seemingly remote possibility, it would be no concern of the respondents as to *when* the money should be spent so long as all the conditions which otherwise entitled the recipient to receive the aid were existent. No contention is advanced that the applicants' rights have been barred by the lapse of time through the operation of any statute other than section 222 of the Welfare and Institutions Code and we imply no holding that such rights may not eventually be barred by an appropriate statute.

[6] Respondents' final contention is that inasmuch as the aid recipients here involved have not shown that they have complied with the provisions of sections 140 and 2183.1 of the Welfare and Institutions Code they are not entitled to the writ applied for. This contention is supported by the record. As appears hereinabove by such sections it is provided that "*Whenever* a warrant for [public aid] * * * has been lost or destroyed before it has been paid * * * the amount due thereon may be recovered by the payee by filing with the county auditor an affidavit setting forth the fact of the loss or destruction of the warrant, together with all material facts relative thereto known to the affiant, the amount, the name of the payee, and the date and number of the warrant if the same are known to the affiant. Upon receipt of the affidavit, and without the filing of any bond by the payee, the county auditor shall [sec. 2183.1, "may"] issue and deliver to the payee of the original warrant a duplicate warrant for the full amount of the original warrant, and the county treasurer shall pay the duplicate warrant in lieu of the original warrant." (Italics added.)

Although petitioner asserts in its brief that in each of the three cases, "It is admitted that appropriate application [for a duplicate warrant] was made," the record fails to disclose any factual basis justifying such assertion. Petitioner has cited to us and we have discovered no provisions of law other than sections 140 and 2183.1 of the Welfare and Institutions Code and section 4082 of the Political Code which would authorize a county auditor to issue a duplicate warrant for the payment of aid. The only application provided for by such statutes requires the presentation of the affidavit therein described. (The requirement of section 4082 of the Political Code that an applicant for a duplicate county warrant to replace one which has been lost or destroyed before payment must file with the county auditor, in addition to an affidavit of loss or destruction, a bond of indemnity, admittedly does not apply here.) It appears from the stipulated facts that no such affidavit was at any time filed by or on behalf of any of the applicants for a duplicate warrant. In view of such fact it must be held that no mandatory duty on the part of the auditor to issue such duplicate warrants has been presently shown.

For the reasons stated above the application for the peremptory writ of mandate is denied and the alternative writ heretofore issued is discharged. Such orders are without prejudice to the right of each of the applicants hereinabove named to make formal application for the issuance of a duplicate warrant in accordance with the provisions of sections 140 and 2183.1 of the Welfare and Institutions Code.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SPENCE, JJ., concurred.

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27 Cal.2d 81

BOARD OF SOCIAL WELFARE v. LOS ANGELES COUNTY et al.

S. F. 17111.

Supreme Court of California.

Oct. 16, 1945.

1. Paupers 🔑42

The statutory provisions for appeal to State Social Welfare Board from determination of county board of supervisors of application for old age aid, and for payments, if awarded, to commence from date applicant was first entitled thereto, subserve a clear public purpose by securing to those entitled to aid the full payment thereof from date they were first entitled thereto, regardless of errors or delays by local authorities. St.1941, p. 3029, § 2182.

2. Paupers ⚷39(3)

It is the mandatory duty of county to furnish old age aid according to plan therefor which is laid down by applicable statutory provisions and obligation to pay becomes a debt due from county to applicant as of date applicant was first entitled to receive aid. St.1937, p. 1078 et seq., § 2000 et seq.; St.1941, p. 3029, § 2182.

3. Paupers ⚷39(3)

The mere fact that applicant for old age aid has managed to ward off starvation pending receipt of payments to which he was previously entitled does not justify county's refusal to make such payments. St.1937, p. 1078 et seq., § 2000 et seq.; St. 1941, p. 3029, § 2182.

4. Paupers ⚷42

An express finding by State Social Welfare Board that an applicant for old age aid is in present need of payments to which he had earlier become entitled is not essential to avoid charge that making of retroactive payments would constitute a gift of public money in violation of constitution. St.1937, p. 1078 et seq., § 2000 et seq.; St.1941, p. 3029, § 2182; Const. art. 4, §§ 22, 31.

5. Paupers ⚷42

The awarding of retroactive old age aid by State Social Welfare Board implies a finding that need existed as of the period or periods during which, according to the board's determination, the applicant was entitled thereto, and that such need has not been alleviated. St.1937, p. 1078 et seq., § 2000 et seq.; St.1941, p. 3029, § 2182.

6. States ⚷119

Where judgment ordering payment of retroactive old age aid to applicant was entered prior to her death, the payment of retroactive aid to the estate of deceased applicant would not constitute "gift of public money" in violation of Constitution. St. 1937, p. 1078 et seq., § 2000 et seq.; Const. art. 4, §§ 22, 31.

See Words and Phrases, Permanent Edition, for all other definitions of "Gift of Public Money".

7. Descent and distribution ⚷8
Paupers ⚷39(1)

The right to old age aid is strictly personal and the aid, as such, is inalienable, but proceeds of aid when paid, whether in the form of money or other store of value, or right to receive which has become vested and final, is subject to devolution as an ordinary incident of property right. St. 1937, p. 1078, § 2001.

8. Abatement and revival ⚷68

The old age aid to which applicant was entitled became a debt owing to her by the county as of date and in amount in which it should originally have been paid to her, and order directing payment of retroactive aid was required to be complied with even though the applicant had died. St.1937, p. 1078, § 2001.

9. Abatement and revival ⚷68

Where aid awarded to minor children was discontinued on death of their mother, but was restored on application of the children's half-sister, order of State Social Welfare Board for payment of retroactive aid to the children for the period during which aid had been discontinued was required to be complied with. St.1937, p. 1068 et seq., § 1500 et seq.; St.1939, p. 2845, § 1551.

◆

In Bank.

Original mandamus proceeding by the Board of Social Welfare against the County of Los Angeles and others to compel the respondents to make certain payments of public aid.

Peremptory writ of mandate granted.

Robert W. Kenny, Atty. Gen., and Clarence A. Linn, Deputy Atty. Gen., for petitioner.

J. H. O'Connor, Co. Counsel, and S. V. O. Prichard, Asst. Co. Counsel, both of Los Angeles, for respondents.

SCHAUER, Justice.

Petitioner, the Board of Social Welfare of this state (hereinafter sometimes termed the welfare board), by this original mandamus proceeding seeks to compel respondents, the county of Los Angeles, its board of supervisors, and its auditor, to make certain payments of public aid which were ordered retroactively by petitioner. Three separate factual situations in which respondents have refused to make payments ordered by the welfare board are presented. For the reasons hereinafter stated we have concluded that in each case petitioner's position must be sustained and its order complied with by respondents. Although the same basic principles control the several cases their respective problems vary sufficiently to make it expedient to discuss each case individually.

The Holmes Case

The first case is that of one Ira K. Holmes, who, on September 4, 1941, filed an application with the board of supervisors for aid as a needy aged person, pursuant to the provisions of the California Old Age Security Law (Welf. & Inst. Code, div. III, St.1937, p. 1078). From March 1, 1942, to November 30,. 1943, Holmes, in accordance with the determination of such board received aid in certain sums, never more than $40 a month. On September 28, 1943, Holmes, on the ground that he was entitled to greater aid than he had been receiving, appealed to the State Board of Social Welfare, petitioner herein, from the determinations of the board of supervisors (see Welf. & Inst. Code, § 2182, St.1941, p. 3029). Pending such appeal the board of supervisors reconsidered Holmes' application and increased the amount allowed to him each month from $40 to $50, effective December 1, 1943. On July 28, 1944, the welfare board considered the appeal theretofore made to it by Holmes from the determinations of the board of supervisors, and directed the county to pay to Holmes the total sum of $292 as additional aid to which he had become entitled between March 1, 1942, and November 30, 1943. At the hearing on such appeal a representative of the county appeared and agreed that the prior determinations of the board of supervisors had been erroneous but denied the right of the State Welfare Board to order that such errors be corrected retroactively.

Section 2182 of the Welfare and Institutions Code, pursuant to which Holmes appealed to the welfare board, provides that, "If any applicant or recipient is dissatisfied with the action of the board of supervisors, he shall, upon filing a petition with the State Department of Social Welfare, have the right of appeal. * * *

"The State Social Welfare Board shall consider the appeal, and shall dismiss the appeal or award aid as prescribed in this chapter. The county board of supervisors shall then pay to such aged person the sum awarded, if any, by the State Social Welfare Board, the payments, if awarded, *to commence from the date the applicant was first entitled thereto.*

"Payments of aid shall be commenced as of the first day of the month in which the application is granted, ***unless otherwise directed by the State Social Welfare Board in cases in which an appeal is taken; but in no event shall the aid commence prior to the date of application.*** * * *

"If the applicant or recipient feels himself aggrieved by any decision of the State Welfare Board, he may file with the superior court of the county in which he resides, a petition, praying for a review of the entire proceedings in the matter, upon questions of law involved in the case." (Italics added.)

The sole defense advanced by respondents in support of their refusal to pay to Holmes the aid retroactively ordered by the welfare board is that the payment of such aid without a finding of "present need" by the welfare board constitutes a "gift of public money" in violation of the provisions of our state Constitution (art. IV, § 31) that the Legislature shall have no power "to make any gift or authorize the making of any gift, of any public money * * * to any individual * * *; *provided,* that nothing in this section shall prevent the Legislature granting aid pursuant to Section 22 of this article" (which section contemplates the payment of aid to, among others, "aged persons in indigent circumstances"). (Italics added.)

To sustain their position respondents rely upon the cases of County of Los Angeles v. Jessup (1938), 11 Cal.2d 273, 78 P.2d 1131; Goodall v. Brite, (1936), 11 Cal.App.2d 540, 54 P.2d 510, and County of Alameda v. Janssen (1940), 16 Cal.2d 276, 106 P.2d 11, 130 A.L.R. 1141. The factual situations presented by the first two of those cases, however, are clearly distinguishable from that now before us and the third case appears to be more persuasive toward the conclusion urged by petitioner than toward that sought by respondents. The Jessup case involved the constitutionality of certain legislation which purported to retroactively release *all* liens and mortgages lawfully held by the counties of this state as security for old age assistance paid by such counties regardless of whether the property which constituted the security was still owned by the recipient of aid or had been by him transferred to third parties subject to a county lien. It was properly held that to discharge the lien in favor of the heir or grantee of the recipient of the aid who had acquired such property subject to the lien, or to release the lien upon properties of persons who never were entitled to aid, would constitute a gift in violation of section 31. But manifestly we have no such situation before us now. In the Brite case it was held that the acceptance and treatment by a county hospital, without compensation therefor, of patients who were financially able to secure efficient hospitalization elsewhere constituted an unauthorized gift by the county of public funds to private persons. In contrast is our decision in the Janssen case, by which we held constitutional legislation which authorized the release of liens held by a county as security for old age assistance paid, only if the property was still owned by a qualified recipient of aid or, in the event it had passed to another, if the county received an amount equal to the value which might be realized upon foreclosure of the lien. The ground for such holding was that "the legislature seems clearly justified in its belief that the release of liens held against the property of indigent recipients of aid is for the general public welfare." See pages 282-284 of 16 Cal.2d, page 15 of 106 P.2d, 130 A.L.R. 1141.

[1-3] In the case now before us we are of the view that the provisions for appeal to the State Social Welfare Board and for "the payments, if awarded, to commence from the date the applicant was first entitled thereto" likewise subserve a clear public purpose by securing to those entitled to aid the full payment thereof "from the date * * * [they were] first entitled thereto" regardless of errors or delays by local authorities. It was the mandatory duty of the county to furnish aid according to the plan therefor which is laid down by the applicable provisions of the Welfare and Institutions Code. (County of Los Angeles v. Frisbie (1942), 19 Cal.2d 634, 639, 122 P.2d 526; see, also, County of Los Angeles v. Payne (1937), 8 Cal.2d 563, 573, 66 P.2d 658; San Francisco v. Collins (1932), 216 Cal. 187, 190, 13 P.2d 912; County of Sacramento v. Chambers (1917), 33 Cal.App. 142, 147–149, 164 P. 613.) The obligation to pay became a debt due from the county to the applicant as of the date the latter was first entitled to receive the aid. (See State of California v. Poulterer (1860), 16 Cal. 514, 526.) The bare fact that an applicant has by one means or another managed to ward off starvation pending receipt of the payments to which he was previously entitled provides no sufficient excuse for a county to refuse to make such payments. To hold otherwise would, as suggested by petitioner herein, provide a money-saving device for the counties at the expense of those of our citizenry least able to bear the burden thereof.

[4, 5] Nor does it appear that an express "finding" by the welfare board that an applicant for aged aid is in "present need" of the payments to which he had earlier become entitled, is essential to avoid the charge that the making of such payments would constitute a "gift of any public money" in violation of the Constitution. On the contrary, the awarding of retroactive aid by the welfare board implies a finding that the need existed as of the period or periods during which, according to its determination, the applicant was entitled thereto, and that such need has not yet been alleviated. If, perchance, it has been upon the bounty of friends and neighbors that the applicant has subsisted in the meantime, then (in the absence of other available resources) he is still in need of, and is entitled to, retroactive payment of his relief money in order that he may repay such advances. A contrary holding would serve to unfairly penalize those whose humanity has led them to make direct advances to the support of the applicant, even though they, in common with other citizens, had contributed through the channels of taxation to the fund from which the applicant was legally entitled to relief payments.

The Pitt Case

The next case concerns one Sarah A. Pitt, who, on August 16, 1938, filed with the board of supervisors her application for old age assistance (see Welf. & Inst. Code, div. III). Approximately six and one-half months later, viz.: On March 1, 1939, such board determined that Mrs. Pitt was entitled to assistance in the sum of $35 per month, less the sum of $27 per month which was fixed as the value of board and room then being contributed by Mrs. Pitt's daughter. On December 1, 1939, such board determined that the daughter was unable to contribute to Mrs. Pitt's support, and increased the aid payments to $35 per month. On February 2, 1942, Mrs. Pitt appealed to the welfare board, petitioner herein, asking that it direct the board of supervisors and the county of Los Angeles to pay to her as additional aid the sum of $35 per month for the period from August 16, 1938, to March 1, 1939 (the six and one-half months' period between the filing of her application for aid and the commencement of payment thereof), plus the sum of $27 per month for the period from March 1, 1939, to December 1, 1939, upon the ground that her daughter was not at any time able to contribute any sum to her support.

On September 25, 1942, the welfare board made its written findings of fact in which, in addition to a recital of certain of the facts set forth above, it is stated that "The county was unable to complete the investigation of this application within ninety days from its date, August 16, 1938, and on application to the Social Welfare Board was granted an additional ninety days according to law. The investigation was completed within the additional ninety days allowed and aid was granted beginning March 1, 1939. * * * No claim of lack of ability to contribute to her mother's support was made by the daughter prior to the filing of this appeal February 4, 1942. The claim now is to recompense the daughter for money expended during the period of her mother's care. Retroactive aid is the only question involved." From such facts the board determined that "The county exercised due diligence under the law as it existed in 1938 and 1939. * * * Appellant (Mrs. Pitt) was in receipt of full support for the period during which she was eligible and was therefore not in need. Retroactive aid denied and the appeal dismissed."

Following the above set forth determination of the welfare board, and in January, 1943, Mrs. Pitt applied to the superior court in Los Angeles county for a writ of mandate to compel the welfare board to grant the relief she had sought from such board. On February 2, 1944, the superior court, after proceedings duly had, found "That the Board of Supervisors * * * failed, neglected and refused to make the necessary investigation on petitioner's claim for old age security without any unnecessary delay and with all diligence, contrary to the law * * * and that petitioner was entitled to receive aid in the sum of Thirty-Five ($35.00) Dollars per month from November 16, 1938, to March 1, 1939. * * * That the Board of Supervisors * * * was in error in determining that the daughter of petitioner * * * was a person able and responsible * * * to furnish any support to petitioner, and that petitioner was entitled to receive aid in the sum of Thirty-Five ($35.00) Dollars per month, instead of Eight ($8.00) Dollars per month, from March 1, 1939, to December 1, 1939. * * * That the State Department of Social Welfare was in error in its interpretation of the laws * * *, and in refusing to grant to petitioner any relief on her appeal * * *," and ordered the welfare board "to determine petitioner's right to retroactive aid, in accordance with the rulings of the Court herein, and to cause such retroactive aid (in the sum of $365) to be paid to petitioner forthwith." Such judgment became final. On April 12, 1944, Mrs. Pitt died, and on June 30, 1944, in compliance with the judgment, the welfare board ordered the board of supervisors of Los Angeles county to "pay to the estate of Sarah A. Pitt, her legal counsel, or both, the sum of * * * ($365) for the following period of time: November 16, 1938, until February 28, 1939, at the rate of $35 per month, and from March 1, 1939, to December 1, 1939, in the sum of $27 per month."

[6-8] In addition to the arguments advanced in the Holmes case, supra, respondents assert that the payment by them to "the estate of Sarah A. Pitt, her legal counsel, or both," of the retroactive aid ordered by the welfare board would constitute an unlawful gift of public money. Especial reliance is placed by respondents upon the recent case of Creighton v. County of Pope (1944), 386 Ill. 468, 54 N.E.2d 543, 153 A.L.R. 802, 803, wherein it was held by the Supreme Court of the State of Illinois that a cause of action to compel the payment of aid to a needy blind person died with the claimant. However, as pointed out by petitioner welfare board the judgment of the superior court ordering it to forthwith pay retroactive aid to Mrs. Pitt was entered prior to her death; and, moreover, a declared basis of the decision in the Creighton case is that statutes granting relief to needy persons "are in derogation of the common law and must be construed strictly" (see page 475 of 386 Ill., page 547 of 54 N.E.2d, 153 A.L.R. 802), while by section 2003 of our Welfare and Institutions Code it is provided that our Old Age Security Law shall be liberally construed. The right to the aid (ordained by § 2001) is strictly personal and the aid, as such, is declared to be "absolutely inalienable" (Welf. & Inst. Code, § 2006) but there is no suggestion in the statute that the proceeds of the aid when paid, whether in the form of money or other store of value, or the right to receive which has become vest-

ed and final, shall not be subject to devolution as an ordinary incident of the property right. (Cf. Estate of Lindquist (1944), 25 Cal.2d 697, 154 P.2d 879.) The aid to which Mrs. Pitt was entitled became a debt owing to her by the county as of the date, and in the amount in which, it should originally have been paid to her. Respondent has shown no defense to the prima facie right established by petitioner. Accordingly we are of the view that, as in the Holmes case, respondents must comply with the final order of the welfare board.

The Neal Case

[9] In the third case we are concerned with the rights of two minor children, Amel Arthur Neal and Jack William Neal, who from May 1, 1943, through December 30, 1943, received aid, pursuant to application therefor and granting thereof by the board of supervisors, in the sum of $30 per month (see Welf. & Inst. Code, div. II, part 2, St.1937, p. 1068 et seq., § 1500 et seq.). On December 17, 1943, the mother of the children was killed in an accident; on December 29, 1943, the charities department of the county of Los Angeles learned of such fact, and aid was discontinued as of December 30, 1943, on the ground that the whereabouts of the children was unknown. However, on December 30, 1943, a half-sister of the children notified such charities department that the children were living with her and requested that aid for them be forwarded to her. A reinvestigation of the case was made by the charities department but aid was not restored until March 1, 1944. On June 15, 1944, appeal was made to the Board of Social Welfare asking that aid be awarded for the months of January and February, 1943; on July 27, 1944, the welfare board ordered that such aid, in the sum of $60 for each child, be paid by the county of Los Angeles.

Section 1551 of the Welfare and Institutions Code, St.1939, p. 2845, which provides for appeal to the State Welfare Board if aid for a needy child is denied by a county after application therefor, directs that "The State Social Welfare Board shall consider the appeal, and shall dismiss the appeal or award aid * * *. The county shall then pay for the needy child the sum, if any, awarded by the * * * Board, the payments, if awarded, to commence at the time the * * * Board directs. The decision of the board shall be binding upon the county."

In view of what we have said concerning the Ira K. Holmes case, supra, it is apparent that here, as in that case, respondents must comply with the order for payment of retroactive aid to the Neal children.

It is ordered that the peremptory writ of mandate issue commanding the respondents to make the payments of aid ordered by the State Board of Social Welfare to the several persons entitled thereto according to the views hereinabove expressed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SPENCE, JJ., concurred.

27 Cal.2d 90

BOARD OF SOCIAL WELFARE v. LOS ANGELES COUNTY et al.

S. F. 17112.

Supreme Court of California.

Oct. 16, 1945.

1. Paupers 🔑51
Statutes 🔑220

The section of statute relating to repayment of old age assistance not only requires that refunds, ordered by State Welfare Board, to persons repaying county more than amount of excess aid paid them, be paid to them by county as to portions collected thereby after operative date of such section, but should be liberally construed as legislative rule for guidance of board and county in interpreting previous section, providing for repayment of excess aid, as constituted both before and after adoption of later section. St.1937, pp. 1078, 1093, §§ 2003, 2222; St.1943, p. 1592, § 2223.5.

2. Paupers 🔑51

The term "excess aid" in statutes requiring return to state and county of excess aid paid thereby to aged persons means only amount by which total payments to such persons exceeds sums they are entitled to receive under prevailing statutes and encompasses only amount by which value of their property exceeds maximum value allowed them during period in which they receive aid. St.1937, pp. 1085, 1093, §§ 2163, 2164, 2222; St. 1943, p. 1592, § 2223.5.

See Words and Phrases, Permanent Edition, for all other definitions of "Excess Aid".

3. Paupers ⟹51

The statutory provision relating to repayment of old age assistance should not be regarded as amendment or enlargement of rights conferred on recipient by a previous provision for return to county of excess aid paid to one acquiring property or income exceeding amount allowed during continuance of such aid, but as interpretative of such rights. St.1937, p. 1093, § 2222; St.1943, p. 1592, § 2223.5.

4. Statutes ⟹220

A Legislature's expression of intent of statute by later statute may be considered in determining meaning and effect of earlier statute, though not binding on court in construction thereof.

5. States ⟹119

The statutes providing for repayment to county of excess aid paid thereby to aged persons and State Welfare Board's orders directing refunds to such persons of excessive amounts repaid by them to county are not unconstitutional as authorizing the making of gifts of public money to private persons. St.1937, p. 1093, § 2222; St.1943, p. 1592, § 2223.5; Const. art. 4, § 31.

◆

In Bank.

Mandamus proceeding by the Board of Social Welfare to compel the County of Los Angeles and others to comply with the board's orders to return to certain recipients of old age assistance sums of money secured from them in repayment of assistance claimed by the county to have been illegally obtained.

Peremptory writ granted.

Robert W. Kenny, Atty. Gen., and Clarence A. Linn, Deputy Atty. Gen., for petitioner.

J. H. O'Connor, Co. Counsel, and S. V. O. Prichard, Asst. Co. Counsel, both of Los Angeles, for respondents.

SCHAUER, Justice.

In this mandamus proceeding the State Board of Social Welfare seeks to compel respondents to comply with its orders to return to certain recipients of old age assistance various sums of money which respondent county of Los Angeles had demanded and secured from such recipients in repayment of assistance which the county claimed had been illegally obtained. The following three factual situations are presented:

1. Prior to December 1, 1941, one Fannie Vos received aid, pursuant to an award by the Board of Supervisors of Los Angeles County, in the sum of $40 a month; between January 1, 1942, and May 31, 1943, she was paid as aid from such county the total sum of $520. At that time a needy aged person was entitled to aid notwithstanding the possession of cash or other personal property up to $500 (Welf. & Inst. Code, § 2163) and real estate of an assessed net value up to $3,000 (Welf. & Inst. Code, § 2164), but upon coming into possession of property in excess of such amounts was required to report such fact immediately to the board of supervisors (Welf. & Inst. Code, § 2222).

During the month of December, 1941, the recipient had come into possession of the additional sum of $805.29 as the proceeds of the sale of certain real property, but (assertedly because of illness) she failed until some time during May, 1943, to inform the county of the receipt of such money. At that time she still had a balance of $550 on hand from such $805.29, of which the county board of supervisors demanded that she deliver to the county the sum of $520 in repayment of the aid she had received between January 1, 1942, and May 31, 1943. On July 29, 1943, Mrs. Vos, in partial compliance with such demand, repaid to the county the sum of $400, and on October 5, 1943, appealed to the State Board of Social Welfare from the order of the board of supervisors that she make such repayment. The welfare board, on December 17, 1943, determined that "As the appellant (Vos) was possessed of $305.29 in excess of the $500 permitted under the Welfare and Institutions Code at a time when she was receiving Old Age Security, this amount is collectible, but none in excess of this amount. The Board therefore orders the return to the appellant of $94.71."

2. Prior to April 3, 1940, the county awarded to one Mary Prahl old age assistance in the sum of $40 a month. On April 30, 1940, she assigned to the county as security for repayment of aid theretofore

received (as the result of a prior application and award), her beneficial interest in a second trust deed which then had a face value of $970.78 and a market value of something over $825.16. On October 13, 1942, the county had realized from payments on the trust deed sufficient funds to pay off the previously existing debt. It thereupon reassigned to Mary Prahl the trust deed, the face value of which had been reduced to $816.02 and the market value to $693.62. On November 30, 1942, the board of supervisors found that Mrs. Prahl was, and had been from May 1, 1940, to November 30, 1942, because of her ownership of such trust deed, ineligible for old age assistance payments and that she had illegally received payments in the sum of $40 per month for a period of thirty-one months, or a total of $1,240. Aid to her was thereupon discontinued and was not restored until February 1, 1943, on which date she reassigned to the county, pursuant to its order, the trust deed mentioned hereinabove. In February, 1944, the county sold the trust deed for $720.85; that sum, when added to other repayments received by the county from Mrs. Prahl, made a total of $840.85 which she had repaid to it on account of the $1,240 which it asserted she had illegally received as assistance. On October 4, 1943, Mrs. Prahl appealed to the state welfare board, and on March 23, 1944, that board determined that "As the trust deed and note were out of the possession of the appellant (Prahl) during the entire period of receipt of Old Age Security with the exception of November of 1942, and as the appellant had no use of this for her own support, it is the determination of the Board that the appellant could not be considered possessed of excess personal property and that therefore the collection on the trust deed made by the county was erroneous. Of the $840.85 retained by the County, $800.85 is ordered returned to the appellant, the $40 to be retained by the county for repayment of aid paid for the month of November of 1942."

3. Prior to November, 1940, one James L. Gilkerson received old age assistance from the county of Los Angeles in the sum of $40 a month, and from that date through May, 1941, he continued to receive assistance in the same monthly sum. However, during such seven-month period from November, 1940, through May, 1941, he owned and was in possession of personal property of a value between $500 and $531.30. In August, 1941, the county demanded that Gilkerson repay to it the sum of $280 as aid received by him during such seven-month period, and on August 19, 1941, he made the repayment as demanded. On September 2, 1943, he appealed to the state welfare board in an effort to recover the $280 so repaid to the county; on November 19, 1943, the welfare board found that he had at all times acted in good faith and had made "no attempt to conceal from the county the true facts," and determined that "appellant (Gilkerson) had no fraudulent intent, and that the money was collected by the county erroneously; and that in accordance with Section 2222.7 of the Welfare and Institutions Code, $248.70 ($280 less $31.-30) should be returned to appellant. * * *."

Section 2222.7 of the Welfare and Institutions Code, St.1943, p. 1591, pursuant to which the welfare board ordered the above-described repayments to recipients of aid, became effective May 7, 1943 (operative July 1, 1943), and provides as follows: "Whenever the State Department of Social Welfare finds that moneys collected from recipients in repayment of aid granted * * * have been collected erroneously, because of mistake of law or fact, refunds shall be made as provided in this section. * * * This section shall be applied retroactively, to require the refund of all repayments erroneously collected from recipients of aid within the two years immediately preceding its effective date. * * *" It should be here noted that part of the repayments to the county in the three cases under consideration occurred within the two years immediately preceding July 1, 1943, and part of them subsequent to that date.

Respondents assert that although the above-quoted section allows the welfare board to order the refund of repayments erroneously collected within two years prior to the effective date of such section, the question as to whether or not a collection was erroneous must be measured by the law as it existed at the time the events occurred and the collection was made (citing State Commission in Lunacy v. Welch, 1912, 20 Cal.App. 624, 129 P. 974), and not in accordance with the law at and subsequent to July 1, 1943; and that the welfare board has "obviously attempted to measure the right of repayment" by the provisions of section 2223.5 of the Welfare and Institutions Code (effective May 7, 1943, operative July 1, 1943), rather than by the provisions of section 2222 of such code as it read prior to May 7, 1943, the provisions of which latter section, claim respondents, are controlling here and effectively negate the right or power of the welfare board to order the refunds which respondents have refused to pay. Petitioner welfare board, on the other hand, states that it is in no wise seeking to uphold its orders by reliance upon section 2223.5 and contends that the repayments collected by the county were erroneous under the law as it existed prior to the adoption of that section.

[1] We are of the opinion that section 2223.5 not only clearly requires that the refunds ordered by the welfare board be paid by the county so far as concerns those portions of the collections made by the county subsequent to July 1, 1943, from the aid recipients here involved, but that such section may properly and (according to the mandate of Welf. & Inst. Code, § 2003, St.1937, p. 1078, that "This chapter shall be liberally construed") should be construed as a rule supplied by the Legislature for the guidance of both the welfare board and the counties of the state in the correct interpretation of section 2222 as it was constituted both before and after the adoption of section 2223.5.

Prior to May 7, 1943 (the effective date of section 2223.5), section 2222 and other applicable sections of the Welfare and Institutions Code, St.1937, pp. 1085, 1093, read as follows:

Section 2163: "No aid * * * shall be granted or paid to any person who owns personal property the value of which exceeds five hundred dollars [increased to $600 by amendment operative July 1, 1943] * * *."

Section 2164: "No aid * * * shall be granted or paid to any person who owns real property the assessed value of which * * * exceeds three thousand dollars at the time such person makes application for aid."

Section 2007, St.1941, p. 2084: "Any person who, knowing he is not entitled thereto, obtains or attempts to obtain aid to which he is not entitled, or a larger amount than that to which he is legally entitled * * * is guilty of a misdemeanor. * * * Whenever any person has illegally obtained aid * * * he shall make restitution, and all actions necessary to secure restitution may be brought against him."

Section 2222: "If, at any time during the continuance of aid, the recipient thereof * * * becomes possessed of any property or income in excess of the amount allowed under the provisions of this chapter, the recipient shall immediately notify the board of supervisors of the receipt and possession of such property or income. *The board may,* on inquiry and with the approval of the State Department of Social Welfare, *either cancel the aid or vary the amount thereof in accordance with circumstances.* Any excess aid theretofore paid shall be returned, in equal proportions to the State and the county participating in the granting of such aid * * *." (Italics added.)

[2] It will be noted that the above sections provide no exact definition in so many words of the term "excess aid" as used in section 2222, and prior to the adoption of section 2223.5 in 1943 no such definition was supplied by any other legislative enactment. However, the very words *"excess aid"* seem to imply contemplation of a situation in which the recipient was actually entitled to aid but had been overpaid. If, for example, we assume that (all in a period prior to July, 1943) a recipient of aid possessed property believed by him in good faith when he applied for and received the aid payments to be worth no more than $500, but subsequently found to be worth $510, and if we assume further that during the period of such belief he had regularly been paid aid aggregating $1,000 (assumed to be a proper amount if his property was worth no more than $500), then what sum constitutes the excess aid which he received? Is it $1,000 or $10? Obviously it cannot be the entire $1,000, as respondents here would have us hold it to be, because before there can be an excess there must first be a proper or correct amount, all above which would then make up the excess; the whole, however, could not be "excess." The noun "excess" is defined by Webster's New International Dictionary (1943 ed.) as "State of surpassing or going beyond limits; the fact of being in a measure beyond sufficiency * * *; that which exceeds what is usual, proper, proportionate, or specified. * * *" Consequently it seems reasonable to hold that excess aid is only that amount by which the total payments to the recipient

exceed the sum which he was entitled to possess and to receive under prevailing statutes; and it is our opinion that the statutes now being considered contemplate that an aid recipient may and should be allowed at all times to possess personal (or real) property of the maximum value specified by section 2163 (or 2164) of the Welfare and Institutions Code (in these cases, $500 personal property), over and above any aid paid to him, and that the term "excess aid" encompasses only the amount by which the value of his property exceeds the maximum value allowed to him during the period he is an aid recipient. It is, of course, implicit in every case that the application shall have been made in good faith; i. e., that the applicant shall not have knowingly misrepresented the facts.

[3] We are of the view that section 2223.5 of the Welfare and Institutions Code (effective May 7, 1943) should be regarded not as an amendment or enlargement of the rights conferred by section 2222 but rather as interpretative of those rights. It (section 2223.5) specifies that: "Notwithstanding the provisions [evidently referring to the somewhat ambiguous and uncertain language] of Section[s] 2222 * * * a person who has received aid in good faith, honestly believing himself to be entitled thereto, but who is found to have possessed property in excess of the amount allowed under the provisions of this chapter, shall be considered to have been ineligible for aid only during the period for which the excess property, if it had been applied to his support at the rate of the aid granted to him, would have supported him. In such case the recipient shall repay only the aid he received during such period of ineligibility." No claim is made by the county that any of the three recipients named above did not act in good faith in applying for and receiving aid.

[4] The express declaration of legislative intent as now supplied by section 2223.5, quoted above, seems to point with reasonable certainty to the proper construction, announced above, of the uncertain language of section 2222 and we conclude that the refund orders of the welfare board, with which we are here concerned, are correct and must be obeyed by respondents. As was aptly observed by this court, speaking through Mr. Justice Carter, in Stockton Savings & Loan Bank v. Massanet, 1941, 18 Cal.2d 200, 204, 114 P.2d 592, 595, "This expression by the legislature * * * of the intent of the [earlier] Act, although not binding upon this court in its construction of [such] Act, is a factor that may properly be considered in correctly determining the meaning and effect of the [earlier enactment]. [Citations.] That is not giving a retroactive effect to a statute, because the meaning of the statute to be interpreted has always been the same. The subsequent legislation interpreting the statute construed, does not change the meaning, it merely supplies an indication of the legislative intent which may be considered together with other factors in arriving at the true intent existing at the time the legislation was enacted."

[5] The further argument is advanced by respondents that payment by them of the refunds to aid recipients which have been ordered by the welfare board would constitute the making of a gift to private persons of "public money or thing of value" in violation of section 31 of article IV of the Constitution. A similar contention was advanced, but rejected by this court, in County of Alameda v. Janssen, 1940, 16 Cal.2d 276, 106 P.2d 11, 130 A.L.R. 1141. In that case we upheld legislation authorizing county boards of supervisors to release liens held by counties against the real property of aid recipients, as security for aid received, if the property affected by the liens was still owned by the respective aid recipients. Upon the grounds and for the reasons fully and clearly expressed in that case, we hold constitutional the legislation here involved, as well as the orders of the welfare board issued pursuant to such legislation.

It is ordered that the peremptory writ of mandate issue commanding the respondents to make the payments ordered by the State Board of Social Welfare to the persons entitled thereto according to the views hereinabove expressed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SPENCE, JJ., concur.

71 Cal.App.2d 257

TRUJILLO v. TRUJILLO.

Civ. 7161.

District Court of Appeal, Third District, California.

Oct. 23, 1945.

1. Time ⟹10(9)

Where Thanksgiving Day was included in the limitation period for perfecting an appeal, the time was extended one day, and, where last day of extended time fell on a Sunday, time was further extended to the following day, so that notice of appeal filed on that day was timely. Code Civ.Proc. §§ 12a(b), 939.

2. Divorce ⟹312

Where separate preliminary order awarding custody of minor child to plaintiff pending divorce action was made October 20, and no appeal was perfected until the following January 22, appeal was too late. Code Civ.Proc. § 939.

3. Divorce ⟹165(5½)

Evidence that defendant in divorce case attempted to avoid service of process by locking himself in a parked automobile and rolling up the windows, that process server, after reading order to show cause to defendant in a loud clear voice, placed summons, complaint and order to show cause under windshield wiper, and that defendant attempted to dislodge them by starting wiper and then drove off with documents still under wiper, supported finding of due personal service of process and warranted denial of defendant's motion to vacate interlocutory judgment of divorce thereafter entered. Code Civ. Proc. §§ 473, 473a.

4. Divorce ⟹165(1), 184(5)

Upon motion to set aside an interlocutory decree of divorce or a final judgment, where evidence is conflicting, court has discretion to grant or deny the motion, and in absence of a clear showing of abuse of discretion, order will not be interfered with. Code Civ.Proc. §§ 473, 473a.

◆

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by Frances Laura Trujillo against Manuel Trujillo for divorce. From an interlocutory decree for plaintiff, from an order awarding plaintiff custody of a child and maintenance, from the entry of default, and from an order denying defendant's motion to vacate interlocutory decree, defendant appeals.

Affirmed.

Joseph Scott and G. L. McFarland, both of Los Angeles (R. B. Hibbitt, of Sacramento, and J. Howard Ziemann, of Los Angeles, of counsel), for appellant.

Horace H. Appel, of Los Angeles, and Grover W. Bedeau, of Sacramento, for respondent.

THOMPSON, Justice.

An interlocutory decree of divorce was entered November 21, 1944, against the defendant on the ground of extreme cruelty. An infant child was awarded to the custody of plaintiff. She was also granted $140 per month for maintenance of the child, and attorney's fees. Upon notice the defendant on December 19, 1944, moved to set aside the interlocutory decree and his previous default, with leave to appear and answer the complaint, under Section 473 of the Code of Civil Procedure, on the ground of plaintiff's alleged failure to serve him with process. At the same time he also moved for a change of place of trial. The motions were heard on affidavits of the respective parties. The evidence was conflicting on the question of previous service of summons and complaint. January 18, 1945, the motions were denied. The defendant gave notice of appeal January 22, 1945, from the interlocutory decree, from the order awarding plaintiff custody of the child and maintenance, from the entry of default and from the order denying the motion to vacate the interlocutory decree.

[1] The appeal from the interlocutory decree was perfected within sixty days from the time of entry as required by Section 939 of the Code of Civil Procedure, estimated pursuant to Section 12a of the same Code. That decree was entered November 21, 1944. Thanksgiving Day, which was proclaimed by both the President and the Governor, was included in the period of limitation. That holiday had the effect of extending the time one day. Sec. 12a, subd. (b), C.C.P. The last day therefore fell on Sunday, January 21st, which extended the time, under that sec-

tion, to the following day, upon which the notice of appeal was actually filed. The appeal from that decree was therefore not too late.

[2] The separate preliminary order, made October 20, 1944, awarding the custody of the minor child to plaintiff pending the action, was not appealed from within sixty days thereafter. Assuming, without so deciding, that an appeal lies from that order, no appeal was perfected until January 22, 1945, which was too late to become effectual.

The validity of the default of the defendant is involved on the appeal from the order denying the motion to set it and the interlocutory decree aside under Sections 473 and 473a of the Code of Civil Procedure for alleged failure to serve process of the action on the defendant as required by law. There is no appeal from the mere entry of default, but the validity of that proceeding will be determined by our disposition of the appeal from the order denying defendant's motion to set the interlocutory decree aside for mistake, inadvertence and lack of notice of the pendency of the divorce suit.

The complaint for divorce was filed in Sacramento County, and summons was issued on October 6, 1944. Affidavit of service of process on the defendant was filed. The default of the defendant for failure to appear or answer the complaint was duly entered November 20, 1944. The interlocutory decree of divorce was entered the following day. The motion to set aside the default and the interlocutory decree was made on December 19, 1944, upon affidavits of the respective parties. The evidence regarding the due service of the summons, complaint and order to show cause, is conflicting. The affidavit of D. Giss avers that he was experienced in serving processes in legal actions, including divorce proceedings, having done so for a period of twenty years; that on October 10, 1944, he personally served upon the defendant, at his place of employment in Los Angeles, copies of the complaint, summons and an order to show cause, by reading to him the order to show cause and explaining the nature of the documents and the necessity of appearing and answering in the action, and by leaving with him the copies thereof. The affiant averred that the defendant attempted to avoid service of process by entering his automobile which was parked on a street near his place of business with the door of the car locked, but that the window adjacent to which the affiant stood was at first open; that the affiant explained to the defendant the nature of the documents which he attempted to serve and read to him the order to show cause "in a loud and clear voice," but that the defendant rolled the window up and refused to accept the documents; that the affiant then placed them under the windshield wiper in plain view of the defendant, who first tried to dislodge the papers by starting the windshield wiper, but failed to do so until after he had driven away. The defendant's affidavits varied somewhat on the essential circumstances of that transaction. He admitted the presence of Mr. Giss at the time and place of the attempted service but insisted that he did not know what it was all about, or that any suit had been filed against him. He stated that, while Giss did talk to him, he failed to hear what he said because the window was closed. He admitted that the documents were placed under the windshield wiper, and that when he drove away they were dislodged and lost and that he never learned of their nature or contents.

[3] Upon the foregoing conflict of evidence, the court found that the defendant was duly served with the summons and complaint in the divorce action, in Los Angeles, on October 12, 1944, and that his default for failure to appear or answer the complaint was duly entered, and the court thereupon denied the motion on January 18, 1945, to set aside the default or the interlocutory decree of divorce. The court was warranted in assuming the truth of the averments of Mr. Giss that he left the copies of the documents in the custody and control of the defendant with an explanation of the nature thereof, and that the defendant knew the nature of the documents and the purpose of leaving them with him, but deliberately attempted to avoid service by dislodging them from the windshield wiper. The evidence adequately supports the finding of due personal service of process, and warrants the denial of defendant's motion to vacate the interlocutory judgment.

[4] Upon motion, under Sections 473 and 473a of the Code of Civil Procedure, to set aside an interlocutory decree of divorce or a final judgment, where the evidence is conflicting, the court has a sound discretion to grant or deny the motion,

and in the absence of a clear showing of abuse of discretion, the order will not be interfered with on appeal therefrom. Beard v. Beard, 16 Cal.2d 645, 107 P.2d 385; Johnson v. Johnson, 117 Cal.App. 145, 3 P.2d 587; McDonald v. McDonald, 173 Cal. 175, 159 P. 426; Riskin v. Towers, 24 Cal.2d 274, 280, 148 P.2d 611, 153 A.L.R. 442; Zuber v. General Development Co., 136 Cal.App. 411, 28 P.2d 939; 14 Cal.Jur. p. 1072, § 115.

The interlocutory decree of divorce, including the award of custody of the minor child and for maintenance contained therein, and the order denying relief under Sections 473 and 473a of the Code of Civil Procedure, are affirmed.

ADAMS, P. J., and PEEK, J., concur.

* * *

FONG CHUCK v. CHIN PO FOON et al.*

Civ. 12890.

District Court of Appeal, First District, Division 1, California.
Oct. 22, 1945.

1. New trial 🔑155

The 60-day limit within which trial court may pass on motion for new trial starts to run from date of filing and serving notice of intention to move for new trial and not from date of notice of entry of judgment if the first date is earlier.

2. New trial 🔑155

A determination under statute permitting trial court in passing on motion for new trial to set aside findings and judgment and enter judgment for the other side must be made within the 60-day time limit prescribed for determination of motions for new trial. Code Civ.Proc. § 662.

3. Courts 🔑114

Courts of record on their own motion or upon motion of either party ex parte or on notice have inherent power to correct nunc pro tunc or otherwise clerical errors in their records in order that such records shall speak the truth.

4. Courts 🔑116(6)

Judicial errors may not be corrected as clerical errors but it is for trial judge in first instance to determine whether error is clerical or judicial, and his determination in absence of clear showing to the contrary is final, and the judge may rely on his memory and in such cases his recollection is conclusive.

5. Courts 🔑116(3)

If trial judge makes up his mind as to disposition of a pending matter and so informs the clerk, clerk's failure to enter order on that date is a "clerical" and not a "judicial error" and may be corrected.

See Words and Phrases, Permanent Edition, for all other definitions of "Clerical Error" and "Judicial Error".

6. Appeal and error 🔑1011(1)

In determining correctness of order of trial court correcting a clerical error, conflicts in testimony must be disregarded.

7. New trial 🔑164

The court cannot grant motion for new trial and then order judgment entered for the other side, but the proper procedure is to deny motion for new trial and at same time and as part of such ruling to grant alternative relief provided by the statute. Code Civ.Proc. § 662.

8. Courts 🔑116(3)

Where defendants' notice of motion for new trial was filed on June 15, 1944, and on August 15, 1944, an order was filed setting aside judgment for plaintiff and ordering judgment for defendants, court on October 24, 1944, properly denied plaintiff's motion to strike the order of August 15th and made an order to correct the minutes to show that order entered August 15th was entered August 14th within 60 days from date of motion for new trial. Code Civ.Proc. § 662.

9. Brokers 🔑106

A complaint alleging that defendants who owned realty on certain date gave broker written authority to sell the realty for a certain sum, and that plaintiff agreed to purchase and defendants refused to sell, and which did not plead estoppel or ratification, did not state a cause of action for specific performance. Civ.Code, §§ 1624, 2309.

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* Subsequent opinion 165 P.2d 534.

10. Brokers 🔑94

A broker's written authority to list property for sale is insufficient to confer authority to enter into a binding contract of sale. Civ.Code, §§ 1624, 2309.

11. Brokers 🔑94

A broker's authority under written listing of realty is to secure a purchaser, and unless writing expressly so provides broker cannot enter into a contract of sale so that where broker is authorized "to sell" he merely has authority to find a purchaser and cannot bind owner by contract of sale if no such power is expressly conferred. Civ.Code, §§ 1624, 2309.

12. Brokers 🔑94

A letter authorizing brokers to quote realty at certain price merely conferred authority upon brokers to seek a purchaser with no legal authority to bind seller to a buyer, and hence purchaser was not entitled to specific performance of contract on basis of such letter.

13. Brokers 🔑103

A vendor's "quoting" of a higher price for realty could not be a ratification of a broker's purported contract to sell at a lower price.

Appeal from Superior Court, San Francisco County; Sylvain J. Lazarus, Judge.

Action by Fong Chuck against Chin Po Foon and others for specific performance of an agreement to purchase real estate. From a judgment denying specific performance, from an order purporting to correct clerical errors and from an order refusing to set aside and strike from the files an order directing judgment to be entered for defendants, plaintiff appeals.

Affirmed.

J. H. Sapiro, of San Francisco, for appellant.

J. H. Brill, of San Francisco, for respondents.

PETERS, Presiding Justice.

Plaintiff appeals from a judgment denying him specific performance of an agreement to purchase real estate, from an order purporting to correct clerical errors, and from an order refusing to set aside and strike from the files an order directing judgment to be entered for defendants. The following table of dates discloses the problems involved on the appeals from the two orders:

ment ordered for plaintiff.
ment order for plaintiff.

June 15, 1944—notice of motion for new trial served, and filed.

June 16, 1944—findings and conclusions signed and judgment entered decreeing specific performance of contract.

June 23, 1944—motion for new trial argued and submitted.

August 15, 1944—61 days after service of notice of motion for new trial an order was filed setting aside the findings and judgment and ordering judgment for defendants.

September 15, 1944—judgment for defendants filed.

October 24, 1944—court denied plaintiff's motion to strike order of August 15, 1944, and made an order purporting to correct the minutes to show that the order actually entered August 15th was entered August 14th, on the ground that August 14th was the date the order was actually made.

Plaintiff contends that the trial court had no power thus to correct the minutes under the facts disclosed by the record. This argument is based on the following premises:

[1] 1. The 60 day time limit within which a trial court may lawfully pass on a motion for a new trial starts to run from the date of filing and serving notice of intention to move for a new trial and not from the date of notice of entry of judgment if the first mentioned date is earlier. This premise is entirely sound. Rubens v. Whittemore, 2 Cal.App.2d 575, 38 P.2d 153; Iske v. Stockwell-Kling Corp., 128 Cal.App. 192, 17 P.2d 203. Under this rule the time within which the trial court lawfully could pass upon the motion for a new trial expired on August 14, 1944.

[2] 2. A determination under § 662 of the Code of Civil Procedure, which section permits a trial court in passing on a motion for a new trial to vacate and set aside the findings and judgment and enter judgment for the other side (Clarke v. Fiedler, 44 Cal.App.2d 838, 113 P.2d 275; Spier v. Lang, 4 Cal.2d 711, 53 P.2d 138; Wyman v. Monolith Portland C. Co., 3 Cal.App.2d 540, 39 P.2d 510), must be made within the 60 day time limit prescribed for the hearing and determination of motions for a new trial. This premise is likewise sound.

Gustafson v. Blunk, 4 Cal.App.2d 630, 41 P.2d 953; Knight v. Paulton, 125 Cal. App. 688, 14 P.2d 94; see discussion 8 Cal. Jur.Supp. p. 545, § 130b.

3. The order by which the court directed that the original findings and judgment be set aside and judgment entered in favor of defendant was signed and filed August 15, 1944. This was too late, being the 61st day from the serving and filing of notice of intention to move for a new trial. Thereafter, when plaintiff moved to set aside this order on the ground that it had been filed too late, the court, on October 24, 1944, entered its order correcting the clerical error to make it read made and filed August 14, 1944, and expunging the August 15th date from the files. This order recites that on August 14th the court had determined to enter judgment in favor of defendant and so informed the clerk and directed the clerk to enter such an order, but the clerk, through mistake and inadvertence, did not enter such order until the 15th, but that the motion was actually determined on the 14th. The court thereupon denied the motion to set aside the original order. The appellant urges that under the facts the court had no power to make the challenged orders of October 24, 1944. This basic premise is unsound.

[3-6] It is well settled that courts of record, on their own motion or upon motion of either party, ex parte or on notice, have inherent power to correct, nunc pro tunc or otherwise, clerical errors in their records in order that such records shall speak the truth. Judicial errors may not, of course, be so corrected. However, it is for the trial judge in the first instance to determine whether the error is clerical or judicial, and his determination, in the absence of a clear showing to the contrary, is final. In making such determination many times the facts are completely within the knowledge of the trial judge. He has a right to rely on his memory, and in such cases his recollection is conclusive. Carpenter v. Pacific Mut. Life Ins. Co., 14 Cal.2d 704, 96 P.2d 796; Livesay v. Deibert, 3 Cal.App.2d 140, 39 P.2d 466; King v. Emerson, 110 Cal.App. 414, 288 P. 1099, 294 P. 768; Keller v. Cleaver, 20 Cal. App.2d 364, 67 P.2d 131; Bastajian v. Brown, 19 Cal.2d 209, 120 P.2d 9; Serpa v. Davidson, 51 Cal.App.2d 619, 125 P.2d 603. It is now also well settled that if the trial judge makes up his mind as to the disposition of a pending matter and so informs the clerk, the failure of the clerk to enter the order on that date is a clerical and not judicial error and may be corrected. Keller v. Cleaver, 20 Cal.App. 2d 364, 67 P.2d 131; see, also, Livesay v. Deibert, 3 Cal.App.2d 140, 39 P.2d 466. These rules apply to the facts here presented. Disregarding conflicts in the record created by the testimony of the clerk, and disregarding conflicts in the judge's own testimony, as we must (Bastajian v. Brown, 19 Cal.2d 209, 120 P.2d 9), the evidence supports the findings contained in the October 24th order. The trial judge stated that he knew that August 14th was the last day he could act; that late in the afternoon of that day he called in the clerk and discussed the matter; that he first told the clerk he had decided to grant the motion for a new trial, and then told the clerk he had decided to order judgment entered in favor of defendants. He was positive in his recollection that on the 14th he told his clerk that he had decided to set aside his original findings and judgment and order judgment for defendants; that there was no doubt that he had made up his mind and signified his intention to his clerk on the 14th.

[7, 8] Plaintiff contends that reading the judge's statements as to his recollection as a whole and giving due consideration to the clerk's testimony, all that appears is that on the 14th the trial judge had determined to grant the motion for a new trial and was then in doubt as to whether he could enter judgment for defendants, which doubt he did not resolve until the 15th. It is urged that while the court perhaps could have corrected its order in October to grant the motion for a new trial it had no power to then order judgment for defendants. It is the law, as already pointed out, that when a motion for a new trial is made the court may either grant that motion or, under § 662 of the Code of Civil Procedure, order judgment for the other side. It is also the law that the court cannot grant the motion for a new trial and then order judgment entered for the other side. The proper procedure is to deny the motion for a new trial, and, at the same time and as part of such ruling, to grant the alternative relief provided by the section. Sparr v. Byers, 139 Cal.App. 668, 34 P.2d 787; Spier v. Lang, 4 Cal.2d

711, 53 P.2d 138; Bureau of Welfare, etc., v. Drapeau, 21 Cal.App.2d 138, 68 P.2d 998; Gruben v. Leebrick & Fisher, 32 Cal. App.2d Supp. 762, 84 P.2d 1078. It is true that the clerk testified that on the 14th the trial judge told him he had decided at least to grant the motion for a new trial but that he might order judgment for the defendants, but that he was in doubt about his power to do so, and requested the clerk to ask the attorney for the defendants to call on the 15th to discuss that question. He also testified that the judge did not definitely decide to exercise the power until the 15th. This evidence would have supported a finding that the trial judge did not rule on the motion until the 15th, which was too late. But that testimony did no more than create a conflict. The trial judge stated that on the 14th he had definitely decided to order judgment entered for defendants and so informed the clerk, and that he assumed it would be entered that day. It is true that during his testimony the trial judge occasionally confused the granting of a new trial with an order directing entry of judgment for the other side, but reading his testimony as a whole it supports the order of October 24th. All conflicts with the supporting testimony must be disregarded. That being so, the two orders of October 24, 1944, must be affirmed.

On the merits, the judgment denying specific performance entered September 15, 1944, must be affirmed. The evidence shows the following facts: In October or November of 1943 the father of the owner of the property orally listed the real property in question with the licensed real estate brokers Hogan and Vest at a price of $30,000 net. This would mean $30,000 plus a commission of $1,250. On January 7, 1944, the real estate firm and plaintiff, who was then a tenant in the building in question, executed a document designated as a "Uniform Agreement of Sale." This agreement recites that $500 has been received from plaintiff on account of the purchase price of the real property in question. The conditions of sale are set forth in detail. It is signed by W. T. Hogan for Hogan and Vest, "Agent for Seller." Immediately under the broker's signature is the following:

"The undersigned, hereinabove designated as the purchaser, hereby agree[s] to purchase the above described property for the price and according to the conditions above specified. Subject to Approval of Seller

(Signed) Fong Chuck, Purchaser."

Immediately below this is a printed form of approval intended to be signed by the seller. The trial court found that this agreement of January 7, 1944, was signed by Hogan without the written authority of defendant owner. That finding is supported by the uncontradicted evidence, and is not challenged by plaintiff.

The evidence shows that on January 8, 1944, the broker delivered to defendant owner copies of the above agreement that had been signed by the broker and plaintiff. The total purchase price stated in that agreement was $31,250. Defendant owner signed "Chin" in the space for approval on one of the copies but then stated that he would not sell unless the $30,000 net also included his income tax on the transaction. He testified that he customarily signed his name "Chin, Po Foon," and that "Chin" was not intended as a complete signature—that he signed "Chin" and then discovered that his and Hogan's intentions were not clear and for that reason did not complete the signature. He also stated that he and his father told Hogan when they listed the property and when he brought the agreement to them that they would not sell unless they could invest the money received in some suitable property. Defendant owner then wrote the broker a letter admittedly drafted by Hogan and recopied by defendant owner and addressed to the broker, reading:

"In regard to the property owned by me at 822-1/2 824 Washington Street my father in quoting a price of $30,000.00 net did not figure in his price the income tax which amounts to some $2,200.00. I am now quoting to you the correct price we want for the property

$30,000.00	net
1,250.00	selling charge
2,200.00	tax
$33,450.00	total"

This letter was signed by defendant owner and dated January 10, 1944. When it was delivered to Hogan, defendant owner and his father also discussed with Hogan prospective properties that were to be purchased by defendant owner if the sale went through, and Hogan gave defendant's father the addresses of three such properties, none of which were acceptable to defendant owner.

On January 11th the plaintiff re-executed the contract above referred to, changing the price to $33,450, and inserting the words "I hereby increase my offer to Thirty Three Thousand Four Hundred and Fifty ($33,450.00)." Hogan took the re-executed document to defendant owner telling plaintiff he would get the seller's signature. Defendant owner then refused to approve or to go through with the sale.

[9-11] The complaint in this action simply alleges that defendants own the property, that on January 11, 1944, the defendants gave Hogan written authority to sell the property for $33,450, that plaintiff agreed to buy and defendants refused to sell. No estoppel or ratification is pleaded. It seems quite clear that the complaint does not state a cause of action (Thompson v. Scholl, 32 Cal.App. 4, 161 P. 1006), and that under the evidence the findings in favor of defendants are amply supported. There is no allegation or proof that defendants ever executed an agreement for the sale of the real property or that the broker had written authority to execute a contract of sale on the defendants' behalf. All that the pleadings and the proof show is that on January 10th the broker had written authority to list the property for sale. That is not sufficient to confer authority to enter into a binding contract of sale. Under §§ 2309 and 1624 of the Civil Code the authority of an agent to enter into a contract on behalf of his principal to sell real property must be in writing. The law is clear that a broker's authority under a written listing of real property is simply to secure a purchaser, and unless the writing expressly so provides, he has no authority to enter into a contract of sale. Thus where the broker is authorized "to sell" he merely has authority to find a purchaser and he has no authority to bind the owner by a contract of sale, if no such power is expressly conferred, These principles are elementary and have frequently been stated by the courts. See many cases collected and commented on 4 Cal.Jur. p. 565, § 13; 3 Cal.Jur.Supp. p. 175, § 13. It must be remembered that we are not here dealing with cases involving the broker's right to his commission. Normally, the commission is earned when the broker produces a purchaser ready, able and willing to buy. But whether Hogan earned his commission on this deal is not involved in this case, and we refrain from expressing any opinion thereon. We mention the point only because most of plaintiff's cases deal with the rights of the broker. Those cases are not in point.

[12] It is perfectly clear that when the property was orally listed with the brokers in 1943 they had no valid authority at all, in the absence of some facts, not here contended to exist, constituting an estoppel. On January 7, 1944, when Hogan signed the uniform agreement of sale as agent for the seller and accepted the $500 deposit from the buyer, it is equally clear that, then having no written authority at all, he had no legal right to bind the sellers to anything. That is admitted by plaintiff. Moreover, this so-called agreement obviously was an offer to buy inasmuch as it expressly provided it was subject to approval of the seller. So much is clear. This document provided for a selling price of $31,250. This was presented by the broker to the defendant owner for his approval. He started to write his name thereon, but before he had completed his signature, refused to go on with the transaction. So far it is clear, and plaintiff admits, no contract at all had been consummated. At that moment the sellers could have lawfully refused to sell to plaintiff or to any one else. Then defendant owner, at Hogan's dictation and request, signed the letter of January 10th. That letter is the key to the entire case. What does it provide? It is addressed to the brokers and simply authorizes them to quote the property at $33,450. It is obvious that if an authorization "to sell" does not empower the broker to enter into a contract to convey, then an authorization "to quote" the property confers no such authority. All that the letter of January 10th did was to list the property with the brokers at the fixed price. When Hogan received this letter he had written authority to seek a purchaser but no legal authority to bind the seller to a buyer.

[13] This legal relationship was not changed by what happened on January 11th. On that date the prospective purchaser was shown the letter of January 10th and thereupon re-executed the documents of January 7th with the new purchase price of $33,450 inserted, and with the statement "I hereby increase my offer to Thirty Three Thousand Four Hundred

and Fifty ($33,450.00)" likewise written on the face of the document. This document still contained the provision that it was subject to the approval of the seller, which approval was never given. Legally the document constituted and the plaintiff designated it an offer to buy. That offer never having been accepted, and there being no facts pleaded or proved to constitute an estoppel, no contract of sale was ever entered into between plaintiff and defendants. Nor did the letter of January 10th constitute a ratification of what the agent had done on January 7th. It seems too clear to require citation of authority that the "quoting" of a higher price could not be a ratification of a purported contract at a lower price.

For the foregoing reasons the orders and judgment appealed from are affirmed.

KNIGHT and WARD, JJ., concur.

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71 Cal.App.2d 398

ADAMS v. ALEXANDER.

Civ. 3296.

District Court of Appeal, Fourth District, California.

Oct. 29, 1945.

Rehearing Denied Nov. 21, 1945.

Hearing Denied Dec. 27, 1945.

1. Assault and battery 🔑40

$3500 damages for assault and battery was not excessive in view of injuries sustained, loss of earnings and impairment of earning capacity.

2. Judgment 🔑368

In action for assault and battery where defendant filed answer pleading self-defense, denial of motion to vacate judgment on ground of mistake of fact and of law, inadvertence, surprise and excusable neglect of defendant and his former attorney who had allegedly advised defendant not to appear at trial because he had no defense, and that while plaintiff was sure to obtain judgment, amount of judgment would be small, was not an abuse of discretion under circumstances. Code Civ.Proc. § 473.

Appeal from Superior Court, Orange County; Raymond Thompson, Judge.

Action for damages for assault and battery W. W. Adams against Wm. Eugene Alexander, Jr. From an adverse judgment and from an order denying a motion for relief under Code of Civil Procedure, § 473, the defendant appeals.

Affirmed.

A. V. Falcone, of Los Angeles, for appellant.

Roland Thompson and George E. Bradley, both of Santa Ana, for respondent.

BARNARD, Presiding Justice.

This is an action for damages for assault and battery. The plaintiff, who was an osteopathic physician, had for some time been treating the defendant's father. The defendant had believed that the plaintiff was attempting to influence his father with respect to changing his will and to having the defendant removed as administrator of the estate of his mother, who had recently died.

On April 29, 1943, in response to a call from the nurse the plaintiff called at the home of the defendant's father. The defendant met him as he approached the house and after a few words struck him a number of times. The plaintiff was 81 years old and it appears that he was rather severely beaten He bled profusely and had to sit down for half an hour before he was able to return to his home, which was two blocks away. He collapsed when he reached home and was treated by two doctors.

The defendant was arrested on a charge of assault and battery, and after consulting two attorneys a plea of guilty was entered and the defendant paid a fine of $50. Thereafter, and on June 8, 1943, this action was filed. The defendant consulted an attorney who told him nothing could be done until he was served with summons. He successfully evaded service of summons for some months, but service was finally made by publication, based on the ground that the defendant was concealing himself to avoid the service of summons. An answer was then filed pleading self-defense, it being alleged that the plaintiff had "wholly provoked" the attack by attempting to influence the defendant's father in the respects above noted, and that immediately prior to the attack the plaintiff "made a motion with his hand toward his pocket as if to draw a gun" and that the defendant, believing himself in danger, struck the plaintiff.

The action was set for trial on March 27, 1944, at 10 o'clock a. m., it being conceded that both defendant and his attorney had notice thereof. No appearance was made at the trial by the defendant or his attorney and after waiting twenty-five minutes the judge instructed the clerk to call the defendant's attorney, who told the clerk that neither of them intended to appear and that the court might hear the action and the case would be left to the judgment of the court. After hearing the plaintiff's evidence a judgment for $5,125 was entered in favor of the plaintiff on the same day.

Thereafter, the defendant moved, under section 473 of the Code of Civil Procedure, to vacate and set aside the judgment on the grounds of mistake of fact and of law, inadvertence, surprise and excusable neglect of himself and his former attorney, and also moved for a new trial. The court denied the motion for relief under section 473 and took the motion for a new trial under advisement. Later, he decided he would grant a new trial solely on the issue of damages unless the plaintiff consented to a reduction of the judgment to $3,500. With the plaintiff's consent, the judgment was reduced to that amount and a new trial was denied. The defendant has appealed from the judgment and from the order denying his motion for relief under section 473.

[1] The only point raised in connection with the appeal from the judgment is that the same is excessive and not supported by the evidence. There is evidence that the respondent was only semi-conscious for some hours after the assault; that he was only able to sleep on one side and then only intermittently for many weeks following the assault; that every night between the date of the assault and the date of the trial he suffered from attacks of suffocation, making it necessary for his wife to take steps to revive him; that for the first three months he had to spend two-thirds of his time in bed during the daytime; that up to the date of the trial he had lost $900 in earnings; that his earning capacity was still impaired; that he was still having a good deal of pain and suffering from the injury to his head; that he was still suffering from headaches; that his hearing was impaired; that his heart was seriously affected and was giving him a great deal of discomfort, especially at night time; and that there was some permanent injury to his heart.

That the respondent suffered considerable injury cannot be questioned. Upon the record before us it cannot be held, as a matter of law, that the amount finally allowed by the trial court is either without evidentiary support or so excessive as to indicate that it was the result of passion or prejudice.

[2] It is further contended that the court erred in denying the appellant's motion for relief under section 473. Eight affidavits were filed by the appellant in support of his motion and ten counter-affidavits were filed by the respondent. These present many serious conflicts, although the appellant argues that there is no conflict with respect to one fact which constitutes the "crux of this motion", namely, that his former attorney had advised him not to appear at the trial because he had no defense, that he had no evidence to introduce, and that while the respondent was sure to get a judgment the amount of the judgment would be small. It is argued that this fact brings this case squarely within the rules applied in Douglass v. Todd, 96 Cal. 655, 31 P. 623, and Tuttle v. Scott, 119 Cal. 586, 51 P. 849.

In Douglass v. Todd, the appeal was from an order vacating a default judgment. The defendant's affidavit stated facts showing a sufficient defense to the action and the question presented on appeal was whether the fact that the defendant had been advised by his attorney that he had no defense was a sufficient ground upon which the court might grant the motion for relief. It was held sufficient to sustain the action of the court. It was not held, however, that a court has no discretion in such a matter, especially where the facts are somewhat different. In Tuttle v. Scott, which is also an appeal from an order vacating a judgment after default, the sufficiency of the respondent's excuse for not answering was not questioned and the only question presented was whether the affidavit showed a meritorious defense to the action.

In the instant case, there is not only a serious question as to the merits of the defense which might have been made, but a serious question and much conflict as to the sufficiency of the appellant's excuse for not appearing and defending at the trial, after having filed an answer in which the defense on which he relies had been set up. While it is now claimed that his former attorney was mistaken in fact and in law in believing that he had no defense to the action it appears that this attorney not only knew of his claim of self-defense, but that he had set up the same in the answer which was filed. Instead of having overlooked this defense it would appear that this attorney merely decided that this defense could not be proved. That he was correct in so thinking sufficiently appears from the affidavits filed in connection with this motion, including those on behalf of the appellant. The respondent was 81 years old at the time of the attack, the appellant had already pleaded guilty to a charge of assault and battery, and the claim that he thought the respondent was reaching for a gun, taken with the surrounding circumstances, could not reasonably be expected to have made much of an impression upon the trial court. Regardless of the cause of the appellant's animosity towards the respondent, and of whether or not he was justified in believing that the respondent was interfering in his own and in his father's business, it rather clearly appears that the physical attack made by the appellant on this aged man was entirely unjustified, and that nothing contained in the affidavits could reasonably be expected to change the court's conclusion in this regard.

While an appearance at the trial should have been made for the purpose of having the question as to the amount of the damages completely presented there is no showing that the appellant could have produced evidence which could reasonably be expected to have affected the result. The only showing attempted in this regard is a statement in the affidavit of the nurse, who was present on the occasion in question, to the effect that she had frequently seen the respondent walking along the street and that she could see nothing wrong with him. Aside from the weakness of this evidence it appears from other affidavits that this nurse had made decidedly conflicting statements at other times.

Aside from other conflicting matters, it appears that the trial court felt that the appellant had deliberately absented himself from the trial on the theory that he did not care whether a judgment, or how much of a judgment, was obtained against him since he believed that he could conceal his assets and settle for a nominal amount. It appears that the appellant's former attorney advised him to cover up his assets and to sell his father's house, and told him that they could then settle any judgment which would be obtained, which would not be very much, on their own terms. An effort was made by this attorney and another attorney to settle the judgment but without success.

While the appellant states in his affidavits that he did not attempt to cover up his assets, other facts appear which would justify a contrary inference. The appellant's father had died in the meantime. His estate, appraised at $22,676.20, had been distributed to the appellant before the date of the trial. The appellant had conveyed the only two pieces of real property thus received, one to a corporation and one to his sister-in-law. Executions had been issued and returned unsatisfied and rather strenuous efforts to locate something on which an execution could be levied were unsuccessfully made. Finally facts were discovered which indicated that the transfer of the property to appellant's sister-in-law had been made without sufficient consideration. Shortly after execution was levied on that property the appellant filed his notice of motion for relief under section 473, and then filed a notice of motion for a new trial.

Under the circumstances here appearing, and especially in view of the conflicts on matters material to the questions presented, it cannot be held that the trial court abused its discretion in refusing to grant the appellant the relief he asked for. As a practical matter, it would seem probable that the appellant and his former attorney decided to gamble on the amount of the judgment that would be entered, and that the appellant was not only disappointed in the result but became actively interested only when he found that he was not judgment-proof.

The judgment and the order appealed from are affirmed.

MARKS and GRIFFIN, JJ., concur.

71 Cal.App.2d 361

PEOPLE v. VICENCIO.

Cr. 1919.

District Court of Appeal, Third District, California.

Oct. 26, 1945.

1. Criminal law ⚷1144(13)

Appellate court must assume in favor of the verdict the existence of every fact which jury could have reasonably deduced from the evidence and then determine whether such facts are sufficient to support the verdict.

2. Rape ⚷51(1)

Evidence sustained conviction of rape.

3. Criminal law ⚷304(6)

Appellate court must take judicial notice for purpose of establishing venue of prosecution for rape that city of Benicia is situated in Solano county, Cal.

4. Criminal law ⚷564(2)

Venue in a criminal case need not be proved beyond a reasonable doubt.

5. Criminal law ⚷1159(6)

If circumstances reasonably justify verdict of jury, opinion of appellate court that such circumstances might also reasonably be reconciled with the innocence of accused will not justify appellate court in interfering with determination of the jury.

6. Rape ⚷51(3)

Evidence warranted inference that accused had accomplished sexual penetration as required by statute to constitute rape. Pen. Code, § 263.

7. Criminal law ⚷1159(5)

Where jury could reasonably infer from the evidence, both direct and circumstantial, that accused had accomplished sexual penetration, appellate court could not reverse conviction of rape on ground that penetration was not proved. Pen.Code, § 263.

8. Rape ⚷51(3)

In prosecution for rape, sexual penetration may be shown by the circumstances and surroundings and may be proved by circumstantial as well as direct evidence. Pen.Code, § 263.

9. Criminal law ⚷1159(1)

The right to draw proper inferences from the evidence is a function of the jury, and as long as its conclusions do not do violence to reason, appellate court may not substitute its finding of the ultimate fact for that reached by jury.

10. Criminal law ⚷374

Testimony of prosecutrix concerning similar previous acts by accused was not inadmissible in prosecution for rape of 13 year old girl on ground that such evidence was only corroborative and prosecution had not proved sexual penetration so as to establish the corpus delicti, where there was evidence from which jury could reasonably infer that accused had accomplished penetration. Pen.Code, § 263.

11. Criminal law ⚷563

While corpus delicti must be proved by evidence outside of accused's declarations or admissions, prosecution need not establish it by proof to the same degree of certainty as is required to establish the fact of guilt, slight or prima facie proof being sufficient.

12. Criminal law ⚷563

The corpus delicti may be proved by circumstances shown in evidence or by reasonable inferences therefrom, and direct or positive evidence is not essential.

13. Criminal law ⚷563

Evidence proving corpus delicti need not in itself connect accused with perpetration of offense charged.

14. Criminal law ⚷680(2), 1153(3)

The corpus delicti should be established as early in trial as is practicable, but the order of proof is a matter within the discretion of trial court whose rulings thereon will not be disturbed except upon clear proof of an abuse of such discretion.

◆

Appeal from Superior Court, Solano County; Joseph M. Raines, Judge.

Rick T. Vicencio was convicted of rape, and he appeals.

Judgment affirmed.

Paul E. O'Hara and Thomas F. O'Hara, both of Vallejo, for appellant.

Robert W. Kenny, Atty. Gen., and D. K. Lener, Jas. O. Reavis, Deputy Attys. Gen., for respondent.

PEEK, Justice.

From the judgment on a verdict of guilty of the crime of rape as charged in the information defendant has appealed on the grounds (1) that the evidence was insufficient to justify the verdict; (2) that the verdict was contrary to law, and (3) that the court erred in admitting certain evidence over the objection of defendant.

The prosecuting witness was a child of the age of thirteen years. She and her mother lived in the city of Benicia with the defendant and his son, who was approximately the same age as the prosecutrix. Defendant was employed as a watchman at the United States Army Arsenal near Benicia while the girl's mother worked at the United States Navy Yard at Mare Island. On the day of the crime the defendant returned from his work on the night shift at approximately 8:30 o'clock in the morning and immediately went to bed. The mother had already left for work on the day shift at the Navy Yard. Both the boy and girl were home at the time. About noon of that day defendant sent the boy on an errand leaving only the girl, who was then cleaning the house, and himself in the home. At his request she entered his bedroom to arrange some clothing. Upon entering the room he called her to the bed in which he was lying and thereupon committed the acts charged in the information. Concerning the act of intercourse itself, her testimony was that she did not know whether or not there had been actual sexual penetration. She did state, however, that she felt some pain "partly in the inside and partly on the outside." She also testified to the effect that immediately after the commission of the act described defendant indicated that he had experienced seminal emission. She was allowed to testify further to a number of similar acts perpetrated by defendant upon her, commencing when she was approximately eight years of age and repeated at various intervals until the time when she made complaint to her mother. In regard to two such instances, corroborating testimony was furnished by defendant's son, who likewise admittedly had participated in acts of intercourse with her. Two physicians called by the prosecution testified that the girl was as fully developed physically as a mature married woman who had not borne a child, and that a physical examination disclosed that she had participated in acts of sexual intercourse over a considerable period of time, although it could not be determined whether such an act had been engaged in at the time mentioned in the information. These witnesses expressed a doubt whether under the circumstances the girl would have experienced internal pain from an act of sexual intercourse with an adult male; but one of them stated in effect that if the act were distasteful to her the mental pain experienced under such conditions might be mistaken for physical pain.

[1, 2] In reviewing the evidence in relation to the first contention made by defendant the court is guided by the well-established rule that "We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict." People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, 780. Applying this rule to the facts disclosed by the record herein, we cannot say "that upon no hypothesis is there sufficient substantial evidence, circumstantial or otherwise, to support the conclusion reached in the lower court" (People v. Paris, 59 Cal. App.2d 699, 702, 139 P.2d 671, 672), and therefore we cannot disturb the findings of the jury. People v. Ogden, 41 Cal. App.2d 447, 107 P.2d 50. See also People v. Stangler, 18 Cal.2d 688, 692, 117 P.2d 321.

The appellant's second assignment of error indicates three separate contentions, (1) that the venue was not established; (2) that sexual penetration of the prosecutrix was not proven, and (3) that the circumstantial evidence disclosed by the record was as consistent with innocence as with guilt.

[3, 4] Upon the question of venue the record discloses testimony by the prosecuting witness, her mother and the defendant that they resided at a certain address in the city of Benicia, though no one testified that Benicia was located in Solano county or in the State of California. Admittedly such testimony established the fact that the act charged took place in the city of Benicia, and if, as stated in the case of Communist Party, etc., v. Peek, 20 Cal.2d 536, 546, 127 P.2d 889, 896, "the test is whether sufficient notoriety attaches to the fact to make it

proper to assume its existence without proof", then it must necessarily follow that Benicia, the one time site of our state capitol [1853], must be judicially known by this court to be situated in Solano county, California, without further proof than is disclosed by the record herein. Furthermore it is not necessary that venue in a criminal case be proven "beyond a reasonable doubt." People v. Bastio, 55 Cal.App.2d 615, 617, 131 P.2d 614, 616; People v. Montgomery, 32 Cal. App.2d 43, 45, 89 P.2d 184; People v. De Soto, 33 Cal.App.2d 478, 480, 92 P.2d 466.

The second phase of defendant's second contention is predicated upon section 263 of the Penal Code, wherein it is provided that sexual penetration, however slight, is necessary to constitute the crime of rape, and that as the testimony in this regard is as consistent with innocence as with guilt the judgment must be reversed. In support thereof he has cited the case of People v. Lamson, 1 Cal.2d 648, 36 P.2d 361. However, it must be noted that in the case so relied upon by appellant the only question, according to the later decision in People v. Newland, supra, upon which a majority of the justices of that court concurred, was in the reversal of the judgment of conviction.

[5] This court, in the case of People v. Dunn, 40 Cal.App.2d 6, 12, 104 P.2d 119, 122, in referring to the Lamson case and the very point raised in defendant's next contention, stated: "The evidence in that case was entirely circumstantial, and the court followed the general rule by holding that where circumstantial evidence is relied upon for a conviction, and where every circumstance relied upon as incriminating is equally compatible with innocence, there is a failure of proof necessary to sustain a conviction." In the instant case the evidence was not wholly circumstantial nor was it "equally compatible with innocence." "If the circumstances reasonably justify the verdict of the jury, the opinion of the appellate court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not justify the appellate court in interfering with the determination of the jury." People v. Abrams, 58 Cal.App.2d 157, 159, 136 P.2d 46, 47.

[6-9] In view of all of the testimony shown by the record in the present case it is the conclusion of this court that the jury could validly infer therefrom [as it in fact did] that the defendant had accomplished sexual penetration of the girl. The consummation of such an act may be shown by the circumstances and surroundings (People v. Mayes, 66 Cal. 597, 6 P. 691, 56 Am.Rep. 126), and may be proved by circumstantial as well as direct evidence. People v. Preston, 19 Cal.App. 675, 127 P. 660. The right to draw proper inferences from the evidence is a function of the jury; and as long as its conclusions do not do violence to reason, an appellate court is not permitted to substitute its findings of the ultimate fact for that reached by the jury (People v. Kneiling, 127 Cal.App. 151, 15 P.2d 561), and inasmuch as we cannot say that the conclusion reached by the jury does violence to reason we likewise cannot say that such conclusion was erroneous.

[10] Defendant's final contention is directed at the alleged error of the court in overruling his objection to testimony of the prosecutrix concerning similar prior acts on the part of the defendant, upon the ground that such evidence was only corroborative, and as the prosecution had failed to prove any sexual penetration, i.e., the corpus delicti, the testimony was inadmissible.

[11-13] We have already indicated that the evidence of penetration, irrespective of the boy's testimony, was sufficient to warrant the finding of the jury. It has been stated that, although the corpus delicti must be proven outside of the declarations or admissions of the defendant, "it is well settled that the prosecution is not required to establish it by proof to the same degree of certainty as is required to establish the fact of guilt. Slight or prima facie proof is all that is necessary; it may be proved by circumstances shown in evidence, or by inferences reasonably drawn therefrom; direct or positive evidence is not essential; nor is it necessary that such evidence in itself connect the defendant with the perpetration of the offense." People v. Wiezel, 39 Cal.App.2d 657, 664, 104 P.2d 70, 74, citing People v. Hudson, 139 Cal.App. 543, 34 P.2d 741.

[14] Finally it may be said that, while ordinarily the corpus delicti should be established as early in the trial proceedings as is practicable, "the order of proof is a matter within the discretion of the trial court, and that its rulings thereon will not

be disturbed except upon clear proof of an abuse of that discretion." People v. Watters, 202 Cal. 154, 157, 259 P. 442, 443.

The facts and circumstances as disclosed by the record herein are sufficient to meet the requirements of the foregoing rules.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

71 Cal.App.2d 312

PEOPLE v. ONE 1941 CHRYSLER TUDOR ENGINE NO. C 30 8808 (GIBSON, Intervener).

Civ. 12916.

District Court of Appeal, First District, Division 1, California.

Oct. 25, 1945.

1. Appeal and error 🔑756

An appellant's brief which did not contain a topical index and a table of authorities failed to comply with the rules of appeal. Rules of Appeal, rule 15a.

2. Forfeitures 🔑5

In a proceeding to forfeit an owner's interest in an automobile on ground it was used unlawfully to transport marihuana, trial court was not required to believe uncontradicted testimony of owner and automobile driver who had the marihuana, relating to time limit on owner's consent to driver's use of automobile. St.1939, p. 767 et seq., § 11610 et seq.; Code Civ.Proc. § 1847.

3. Trial 🔑140(1)

The trier of facts is exclusive judge of credibility of witnesses. Code Civ.Proc. § 1847.

4. Evidence 🔑60, 89

A witness is presumed to speak the truth, but the presumption may be overcome by manner in which he testifies, character of his testimony, or his motives or interest. Code Civ.Proc. § 1847.

5. Evidence 🔑594

The trier of facts, provided he does not act arbitrarily, may reject in toto a witness' testimony, even though the witness is uncontradicted. Code Civ.Proc. § 1847.

6. Forfeitures 🔑3

In proceeding to forfeit an owner's interest in an automobile on ground automobile was used unlawfully to transport marihuana, owner may defend on ground automobile was taken without owner's consent, as where an automobile is stolen. St. 1939, p. 767 et seq., § 11610 et seq.

7. Forfeitures 🔑3

Under statute providing for forfeiture of an owner's interest in an automobile used unlawfully to transport marihuana, owner's interest cannot be forfeited where automobile has been taken without owner's consent, but, where consent is given, the fact the bailee in operating automobile to transport marihuana violates owner's restrictions as to either method, time, or place of use of automobile, or uses automobile after expiration of owner's time limit on its use, will not relieve owner of forfeiture. St.1939, p. 767 et seq., § 11610 et seq.

8. Forfeitures 🔑2

Constitutional guaranties are not invaded by confiscating automobiles used to transport marihuana, even though loss may be suffered by those whose confidence in others proves to be misplaced, and although, in some cases, hardship may result. St.1939, p. 767 et seq., § 11610 et seq.

9. Forfeitures 🔑3

Where operator had marihuana in automobile, owner's interest in automobile was subject to forfeiture regardless whether owner had consented to operator's possession of automobile on operator's express promise to take automobile to a designated garage on a day prior to operator's arrest, to have automobile repaired, and owner did not have knowledge of, and did not consent to, operator's transportation of the marihuana. St.1939, p. 767 et seq., § 11610 et seq.

10. Forfeitures 🔑3

Where any quantity of marihuana is transported by or concealed in an automobile, owner's interest in automobile may be forfeited, and, where automobile operator had one marihuana cigarette hidden in his sock, owner's interest in automobile was forfeited. St.1939, p. 767 et seq., § 11610 et seq.

◆

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy Judge.

Proceeding by the People of the State of California against One 1941 Chrysler Tudor Engine No. C 30 8808, to forfeit the interests of Christine Gibson, the registered owner, and the Pacific Finance Corporation, the legal owner, in a certain 1941 Chrysler Tudor Sedan, wherein Christine Gibson defended the proceeding as claimant and intervener, and a default was entered against the finance company. From a judgment forfeiting her interest, claimant appeals.

Judgment affirmed.

Stern & Grupp and Morris M. Grupp, all of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., and Ralph W. Scott, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

This proceeding was instituted by the state under § 11610 et seq. of the Health and Safety Code, St.1939, p. 767 et seq., to forfeit the interests of Christine Gibson, the registered owner, and the Pacific Finance Corporation, the legal owner, of a certain 1941 Chrysler Tudor Sedan, on the ground that such vehicle was used unlawfully to conceal, convey, carry or transport marihuana in violation of the provisions of the Health and Safety Code. The finance company did not appear, and its default was duly entered. Christine Gibson defended the action, contending that she had no knowledge of the illegal use and that on the date of the seizure, June 3, 1944, the car was being used without her knowledge and consent. From a judgment forfeiting her interest, Christine Gibson appeals.

The automobile was seized on the evening of June 3, 1944. It was then in the possession of Dominic Germano, to whom Christine Gibson was engaged to be married. The arresting officer testified that he and his fellow officer saw the car being driven north on Mason Street, in San Francisco, by Germano; that Germano parked the car, alighted and entered a hotel lobby; that he was in the hotel "just an instant; just in and right out again"; that Germano then re-entered the car and started the motor, when the witness and his fellow officer arrested him. When Germano was searched, one marihuana cigarette was discovered hidden in one of his socks. Germano told the officers that he had picked up the cigarette from a hiding place shortly after he left the bar he operated; that the car was not his but belonged to his girl friend, Miss Gibson; that Miss Gibson had found it necessary to go to Los Angeles, and, because his car was in better mechanical condition, he had allowed her to take his car while he drove hers. The police officer, in response to a question by the court, stated that Germano had the cigarette in his sock before he drove up to the hotel.

Miss Gibson filed an answer in which she alleged that she loaned the vehicle to Germano on June 3, 1944 "without knowledge and without any reason to suppose that said vehicle was to be used in any manner not legal," and that she did not know that Germano used marihuana. Several months later she filed an amended answer in which she alleged that she had not loaned the car to Germano on June 3rd, but that on the 31st day of May she turned her car over to him on his express promise to take it to a designated garage on June 1st to have it repaired. No explanation of this complete change in theory appears in the record. In support of the defense set forth in the amended answer she testified that she had purchased the car in question sometime in May, 1944; that on May 31st she found it necessary to go to Los Angeles to visit a sick cousin; that her car had a defective seat control and that the clutch stuck; that she telephoned the Mill Valley company that had sold her the car; that she was informed that it would take several days to make the repairs and that such work could start on June 1st; that Germano agreed to allow her to use his car to drive to Los Angeles and agreed to drive her car to the garage on June 1st; that she was in Los Angeles on June 3rd and believed at that time the car was at the garage. Germano testified that Miss Gibson made an appointment for him to take the car to the garage on June 1st; that he promised to take the car there on that date, but that he had not done so. The garage employees were not produced as witnesses.

[1-5] On this evidence the trial court found that on May 31st Miss Gibson loaned and entrusted the vehicle to Germano who had the use and possession of the vehicle

on June 3, 1944. It is the theory of appellant (whose brief, incidentally, fails to comply with Rule 15a of the Rules of Appeal in that it does not contain the required topical index and table of authorities) that since, according to Germano's and her testimony, the car was entrusted to Germano for the sole purpose of driving it to the garage, and since, according to such testimony, the time for which the car was entrusted expired on June 1st, on June 3rd Germano was driving the car without her knowledge and consent. It is her theory that it is a defense to an action for forfeiture under § 11610 et seq. of the Health and Safety Code that, when arrested, the bailee is using the car beyond the time limit the owner has fixed for its use. The contention cannot be sustained for at least two reasons. In the first place, the trial court was not bound to believe these two witnesses. The trier of the facts is the exclusive judge of the credibility of the witnesses, and while a witness is presumed to speak the truth, this presumption may be repelled by the manner in which he testifies, by the character of his testimony, or by his motives or obvious interest. § 1847, Code of Civ.Proc.; see cases collected 27 Cal.Jur., p. 179, § 154. Provided the trier of the facts does not act arbitrarily, he may reject in toto the testimony of a witness, even though the witness is uncontradicted. Hicks v. Reis, 21 Cal.2d 654, 134 P.2d 788; Blank v. Coffin, 20 Cal.2d 457, 126 P.2d 868; Hinkle v. Southern Pac. Co., 12 Cal.2d 691, 87 P.2d 349; Barsha v. Metro-Goldwyn-Mayer, 32 Cal.App.2d 556, 90 P.2d 371; Burke v. Bank of America, etc., Ass'n, 34 Cal.App.2d 594, 94 P.2d 58; People v. La Fleur, 42 Cal.App.2d 50, 108 P.2d 99. In this case the fact that Germano got possession and control of the automobile with the consent of the owner is an admitted fact. The trial court, particularly in view of the obvious interest of the witnesses and in view of the direct change in the nature of the defense set forth in the amended answer, was free to disbelieve the testimony that a time limit on the permission had been set by the owner.

[6] In the second place, even if it be assumed that such a time limit was set by the owner, the expiration of that time limit would not relieve the owner of the penalty of forfeiture. It is true, of course, that when an automobile is taken without the consent of the owner, i.e., is stolen, that the owner may defend an action for forfeiture on that ground. People v. One 1937 Plymouth 6, etc., 37 Cal.App.2d 65, 98 P.2d 750, and cases there cited. But it must be remembered that even that defense is not contained in the statute, having been implied by the courts to save the constitutionality of the statute. People v. One 1941 Ford 8 Stake Truck, 26 Cal.2d 503, 159 P.2d 641. Certainly such defense cannot and should not be extended beyond the point necessary to save the constitutionality of the statute.

A somewhat similar problem has recently been determined by the Supreme Court in People v. One 1941 Ford 8 Stake Truck case, supra. In that case the owner's interest was forfeited although the illegal use was by an employee in direct violation of specific restrictions as to the place of operation. In this connection the court stated, 159 P.2d at page 642: "But there are no constitutional impediments to a forfeiture where the owner entrusts his vehicle to another who uses it illegally, even though the owner does not know of or acquiesce in such use. The distinction between such a situation and the plight of an automobile owner who failed to give possession of his car or consent to its operation is based upon the means by which the one found transporting the contraband obtained the vehicle. An owner who entrusts the possession of his vehicle to another thereby accepts the risk that it will be used contrary to law, but, in the operation of an automobile without the owner's consent to do so in any manner or at all, there is no element of choice or volition and a complete lack of permission, express or implied, on the part of the owner." That reasoning is directly applicable here. The extent of the implied limitation on the operation of the statute is that an owner's interest cannot be forfeited if the car has been taken without the owner's consent, but if that consent is given the fact that the bailee violates restrictions as to either time or place of use is an immaterial factor.

[7-9] Although not cited by appellant some mention should be made of Vehicle Code, § 402, St.1943, p. 2808, and the cases decided thereunder. That section imposes a civil liability on the owner of a vehicle for the negligence of any person in operating the car when such person is "using or operating the same with the permission, express or implied, of such owner." In Hen

rietta v. Evans, 10 Cal.2d 526, 75 P.2d 1051, and Engstrom v. Auburn Automobile Sales Corporation, 11 Cal.2d 64, 77 P.2d 1059, it was held that use beyond the time for which permission was granted did not fall within the section. These cases are not in point here for the reason that they involved the interpretation of the word "permission" as used in a statute. It must not be overlooked that the consent of the owner that we are here discussing is not a consent or permission as set forth in a statutory provision at all, but a consent read into the statute to save its constitutionality. As already pointed out, that consent does not refer to the method, or place or time of use but refers to consent to possession in the first instance. If that exists, violation of the terms of that consent by the bailee, either as to time or place of use, does not constitute a defense for the owner. This may be and is a harsh rule, but, as was said in People v. One 1941 8 Stake Truck, 26 Cal.2d 507, 159 P.2d 641, 643: "Clearly shown by the terms of section 11610 et seq. is a legislative policy that the vicious traffic in narcotics, with its disastrous effect upon the unfortunate members of society, is so great an evil as to justify the drastic penalty of confiscation of vehicles used to transport the contraband. The public interest to be protected against the drug and its victims outweighs the loss suffered by those whose confidence in others proves to be misplaced, and although, in some cases, hardship may result from the enforcement of the statute, no constitutional guarantees are invaded."

[10] Appellant also urges that the finding of one marihuana cigarette in a vehicle does not constitute a violation of the forfeiture sections of the Health and Safety Code. This contention is based upon certain dicta found in People v. One 1941 Cadillac Club Coupe, 63 Cal.App.2d 418, 147 P.2d 49. In that case it was stated that the discovery of a single marihuana cigarette in an automobile does not prove transportation of narcotics, and unless transportation is proved, the owner's interest cannot be forfeited unless he was an aider or abettor in the unlawful conduct. This identical contention has recently been passed upon by this court in People v. One 1940 Buick 8 Sedan, 70 Cal.App.2d 542, 161 P.2d 264. It was there held that the quantity involved in the unlawful transportation is a false factor; that if any quantity is transported by or concealed in the automobile the forfeiture provisions of the statute are applicable, and that the interest of the owner may be forfeited whether or not he has knowledge of the unlawful use or aids and abets the wrongdoer.

The judgment appealed from is affirmed.

WARD, J., and SCHOTTKY, Justice pro tem., concur.

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71 Cal.App.2d 323

CASTLE v. CASTLE.

Civ. 15053.

District Court of Appeal, Second District,
Division 2, California.
Oct. 25, 1945.

1. Divorce 🔑**263**

Execution may issue without notice to husband for monthly support payments accruing under judgment of divorce within five years before date of order for issuance of execution.

2. Divorce 🔑**263**

Monthly support payments which accrued under judgment of divorce more than five years before entry of order for issuance of execution were barred by limitations and divorce judgment so far as such payments were concerned, was unenforceable except that execution therefor might issue by leave of court, upon motion and after due notice to husband accompanied by affidavit setting forth reasons for failure to proceed in compliance with statute for collection of judgment. Code Civ.Proc. §§ 336, 681, 685.

3. Divorce 🔑**263**

Under 1933 amendment notice to judgment debtor is a condition precedent to the making of an order for issuance of execution more than five years after entry of judgment and such order made without notice is void and subject to collateral as well as direct attack. Code Civ.Proc. §§ 336, 681, 685.

4. Divorce 🔑**263**

Where order for issuance of execution for monthly support payments due under divorce judgment was made without notice to judgment debtor and included payments that had accrued more than five years before entry of such order, order was in excess of jurisdiction and void and execution and sale thereunder were likewise void. Code Civ.Proc. §§ 336, 681, 685.

◆

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action for divorce by Beatrice Castle against Paul Hobart Castle. From an order denying defendant's motion to set aside an order for issuance of an execution for monthly support payments due under judgment of divorce, to recall and quash the execution, to vacate the levy, and to vacate and set aside the sale of defendant's property, defendant appeals.

Order reversed with directions.

Halverson & Halverson, of Los Angeles, for appellant.

Barry Sullivan, of Los Angeles, for respondent.

WILSON, Justice.

An interlocutory judgment of divorce was entered in favor of respondent on July 1, 1936, whereby appellant was ordered to pay respondent the sum of $25 per month for the support of respondent and the minor child of the parties. Final judgment of divorce was entered on September 4, 1941. On September 17, 1942, respondent filed an affidavit setting forth that nothing had been paid to her on account of the judgment and that $1,875 was due, owing, and unpaid thereon, being the sum of $25 per month from July 1, 1936, to September 1, 1942. Pursuant to an order of the court therefor, made on September 17, 1942, without notice to appellant, the clerk issued execution for said amount and the sheriff levied upon and sold real property of appellant in partial satisfaction of the judgment. The sale was held on December 7, 1942. On March 10, 1945, appellant served and filed a notice of motion to set aside the order of September 17, 1942, directing the issuance of execution, to recall and quash the execution, to vacate the levy, and to vacate and set aside the sale of appellant's property, on the ground that the court was without jurisdiction to make or issue said order of September 17, 1942. Appellant's motion was denied and he appeals from the order denying his motion.

[1-3] Seventy-five monthly payments were unpaid at the date of the order for the issuance of the execution, sixty of which had accrued within five years prior to the date of the order. For these amounts execution could have been issued without notice to appellant. Code Civ.Proc. § 681. The fifteen payments that had accrued more than five years previously to the issuance of the order were barred by the statute of limitations. Code Civ.Proc. § 336. That portion of the judgment is unenforceable except that execution therefor may issue "by leave of the court, upon motion, and after due notice to the judgment debtor accompanied by an affidavit or affidavits setting forth the reasons for failure to proceed in compliance with the provisions of section 681 of this code." Code Civ. Proc. § 685 as amended by Stats. 1933, c. 971, p. 2499. Prior to this amendment the court was authorized to make an order for the issuance of an execution upon ex parte application without notice to the judgment debtor, but since the effective date of the amendment notice to the judgment debtor is a condition precedent to the making of such an order; and an order made without notice is void and is subject to collateral as well as to direct attack. Da Arauje v. Rodriques, 50 Cal.App.2d 425, 429, 123 P.2d 154.

The cases cited by respondent sustaining the issuance of executions without notice after a lapse of five years were all decided prior to the amendment of section 685 in 1933. They are inapplicable here and need not be noticed.

[4] The order for the issuance of the execution, having included an amount that had accrued more than five years previously, was in excess of the jurisdiction of the court and was void. It necessarily follows that the execution and the sale thereunder were likewise void.

The order appealed from is reversed with directions to grant the motion, but without prejudice to the issuance of another execution pursuant to the provisions of either section 681 or section 685 of the Code of Civil Procedure.

MOORE, P. J., and McCOMB, J., concur.

71 Cal.App.2d 235

WILSON et al. v. CITY OF LONG BEACH et al.

Civ. 14653.

District Court of Appeal, Second District, Division 1, California.

Oct. 22, 1945.

Rehearing Denied Nov. 15, 1945.

See 163 P.2d 501.

1. Negligence ⇨33(1)

No affirmative care is required to assure the safety of trespassers, and a trespasser can recover for injuries only when he proves that he was wilfully or wantonly injured, or that defendant failed to exercise reasonable care after he knew or should have known of trespasser's presence.

2. Automobiles ⇨162(1)

Where children were warned to stay away from city's tractor and road equipment and at time operator started tractor to move the equipment neither operator nor foreman was aware that a small child had crawled onto the rear of the grader, no negligence on part of operator or foreman was shown which would make city liable for injuries sustained by child in falling off grader. Vehicle Code, § 400, St.1935, p. 152.

3. Negligence ⇨33(3)

The tender age of a child, rendering it incapable of looking out for its own safety, does not raise a duty of exercising reasonable care where none otherwise exists.

4. Negligence ⇨33(3)

The responsibility for avoiding injury to a trespassing child from defective or dangerous premises lies with the parent or legal custodian of the child rather than with the proprietor of the premises.

5. Appeal and error ⇨977(2)
New trial ⇨9

The granting of a new trial on a single issue of damages is a matter of discretion with which the appellate court does not ordinarily interfere.

6. Appeal and error ⇨843(2)

A determination on appeal that city was not liable for injuries sustained by infant trespasser in a fall from city road grader rendered moot the question whether trial court abused its discretion in granting plaintiff a new trial on single issue of damages.

Appeal from Superior Court, Los Angeles County; John Gee Clark, Judge.

Action by Keith Lynn Wilson, a minor, by his guardian ad litem, Herbert E. Wilson, and by Herbert E. Wilson against City of Long Beach and another for injuries sustained by the minor as a result of the alleged negligent operation of a tractor owned by the city. The jury returned verdicts in favor of the minor for $2,000 and in favor of the father for $319.02, and from the order denying defendants' motion for judgment notwithstanding the verdict, from the judgment entered in favor of the minor, and from the order granting the minor a new trial on issue of damages alone, the defendants appeal.

Reversed.

Irving M. Smith, City Atty., Frank C. Charvat, Deputy City Atty., and Dewey L. Strickler, Deputy City Atty., all of Long Beach, for appellants.

Joseph A. Ball, of Long Beach, for respondents.

DORAN, Justice.

This action was brought to recover damages resulting from personal injuries to Keith Lynn Wilson, aged six years at the time of the accident. A jury returned verdicts in favor of the minor for $2,000, and in favor of the father, Herbert E. Wilson for $319.02. The defendants prosecute this appeal from, (1) the minute order denying defendants' motion for judgment notwithstanding the verdicts as to both plaintiffs, (2) the judgment entered in favor of the minor, and (3) the order granting the minor a new trial on the issue of damages alone. No appeal is taken from the judgment in favor of the minor's father.

The cause of action against the city of Long Beach is stated under the enabling provisions of Section 400, California Vehicle Code, St.1935, p. 152, it being alleged that the city owned a gasoline tractor used to propel road conditioning machinery, and employed the defendant Kimberling to drive it; that plaintiff's injury was the result of the negligent operation of such motor vehicle. The equipment in question consisted of a rooter or scarifier, a disc and a grader. In street work the tractor pulled only one machine at a time, the other pieces of equipment being parked at the side of the road during the day. The period of work was during school vacation time and the foreman testified that it was sometimes necessary to follow along with a stick to keep the neighborhood children out of the way. These children, some 10 to 20 in number and aged from about 5 to 13 years, including Keith Wilson, frequently played around and upon the idle pieces of equipment. The foreman had seen Keith nearly every day for about three weeks while the crew had been working in the neighborhood, and on more than one occasion had warned the boy to stay away from the equipment. On August 31, 1942, the crew of three men had been reconditioning Golden Avenue with the rooter, and children had played on the grader which was not in use. About 3:45 p. m. the street work was stopped for the day and the three pieces of equipment were assembled, trainlike, for removal to an overnight parking place. So connected, they were sixty or seventy feet long. The foreman testified that the rooter "was covered up with children. We had to get them off before we could couple on". At the time of attaching the grader to the train the foreman looked back and did not see any children on the grader but did see "children lined up on the parking on both sides of the street".

The foreman then walked ahead to remove a barricade, and told the tractor driver, Kimberling, also a defendant herein, to "come on". Kimberling looked back and saw "several children near the sidewalk line * * * and I noticed that they were very much in a line". No children were seen on the equipment at that time. However, the infant plaintiff had, at some time, climbed on the grader, and when the train started was either thrown off or jumped off. One wheel passed over the boy's pelvis resulting in a fracture of the right pubic bone involving the hip joint. The fracture healed well and the doctor's findings of impairment of use were negative.

The trial court, on its own motion, refused to permit the infant plaintiff, aged 7½ years at the time of trial, to testify because of his age and understanding. Edward Warrick, aged 11 years, testified that Keith Wilson had been playing around and upon the idle equipment since about noon; that a big boy came back and said they were going to start the tractor and for everybody to get off; that Keith stepped down on the axle of the grader and was going to jump, whereupon the tractor "started up with a jerk and threw him backwards * * * by the wheel and backed up on his hip and forward." Billy Lewiston, aged 15, testified that he told Keith Wilson to get off the grader, that Keith "started to get off and the thing jerked * * * and he got caught on the side of the wheel like, against the curbing * * * He got on that axle and then the thing jerked and he fell off." The record discloses no evidence showing the exact time that the infant plaintiff got on the grader.

In the language of respondents' brief, the issue of law presented on appeal is this: "What duty did Kimberling (the driver) owe to the minor plaintiff at the time and place of the accident?" It is the appellants' (defendants') contention that since the minor plaintiff was a trespasser, defendants were not under the duty of exercising ordinary care, but that the only duty was that of refraining from wilful or wanton conduct towards such trespasser; furthermore, that there was no negligence whatsoever. It is conceded by respondent that "neither the pleadings nor the proof sustain a finding that the injury was caused by the wilful or wanton misconduct of Kimberling". It is likewise admitted that this case is not governed by the attractive nuisance doctrine. The issue is further narrowed in respect to plaintiff's status, by the respondents' statement: "A more realistic approach to the question is to yield the point and admit that the child was a technical trespasser upon the City's grader."

[1, 2] As said in appellants' reply brief, "Any survey of the law in the field of negligence as applied to a trespasser discloses at once as an elementary principle that no affirmative care at all is required to assure the safety of the trespasser and that the trespasser can recover for his injuries only when he proves that he was wilfully or wantonly injured. Respondents now urge a departure from this rule on the ground that in a case of this character it is socially desirable and represents some sort of advanced humanitarian philosophy". In this connection the respondents have cited the case of Hamakawa v. Crescent Wharf & Warehouse Co., 4 Cal.2d 499, 501, 50 P.2d 803, 804, holding that where a person was on a pier or dock without consent of those in control, "the defendant owed the plaintiff no legal duty except to refrain from inflicting upon him any wilful or wanton injury * * *, and to conduct its activities with reasonable care for his safety only after it knew or from facts

within its knowledge should have known of the plaintiff's presence." It will be noted that, contrary to respondents' contention, the "wilful and wanton" rule was expressly approved, and since it was not shown that the defendant was aware of plaintiff's presence in fact, the court held that defendants' motion for judgment notwithstanding the verdict should have been granted.

The Hamakawa case, even in its most favorable aspect, does not support respondents' position since the evidence in the case at hand fails to show that the defendants knew of the infant's presence on the grader at the time the tractor was started, nor is it shown that there was any negligent act of any character.

More to the point is the case of Allred v. Pioneer Truck Co., 179 Cal. 315, 318, 176 P. 455, 456, where it was held that the owner of a horse drawn furniture van, on the end gate of which several boys were riding, unseen by the driver, is not liable for the death of a boy who attempted to climb on the vehicle, slipped and fell in front of the hind wheel. The court stated that it was not the duty of the defendant to place men in such positions as to be able to see and prevent boys from attempting to board the vehicle. "It is a matter of common knowledge that boys are prone to steal rides on all sorts of vehicles * * * but it would be an intolerable rule that imposed upon the owner of vehicles the duty of employing guards to keep boys so inclined to trespass, at a safe distance therefrom." Again, in Johnston v. Associated Terminals Co., 13 Cal.App.2d 121, 56 P.2d 259, it was held proper to direct a verdict for defendants in an action for the death of a 12 year old boy who, while skating on the street, took hold of a truck trailer despite warnings to keep off, fell and was crushed by the rear wheels. The language of the opinion at page 123 of 13 Cal.App.2d, at page 260 of 56 P.2d is applicable to the present case: "A reading of the record clearly shows that the death of the deceased was the tragic result of a boyish prank, but it fails to show that such death resulted from any act or omission on the part of respondents for which liability could be fastened upon [them]." In Norland v. Gould, 200 Cal. 706, 254 P. 560, recovery was denied for injury to a 10 year old boy, received when the boy attempted to climb upon defendant's automobile truck, the cause of action there being based upon the driver's alleged wilful and wanton negligence in omitting to use due care. The court observed that this case was analogous to the Allred case hereinbefore mentioned. In Giannini v. Campodonico, 176 Cal. 548, 550, 169 P. 80, 81, involving injury to a 14 year old boy, the court again announced the usual rule in respect to a trespasser, saying: "The only duty is to abstain from willful or wanton injury. In other respects one who thus enters upon the premises does so at his own risk and subject to all the ordinary risks which attach to such premises."

In seeking to avoid the effect of these and other similar California opinions, the respondent cites certain general statements contained in the Restatement of the Law of Torts which, counsel contends, "fails to recognize the wilful and wanton conduct rule quoted by appellants". It is unnecessary to observe that the Restatement does not purport to affect the existing California law. However, in the California Annotations to the Restatement of the Law of Torts, § 333, the California rule is stated as follows: "No duty is owed a trespasser except not to inflict wanton or wilful injury and to use ordinary care after he is seen", citing Toomey v. Southern Pacific R. Co., 86 Cal. 374, 24 P. 1074, 10 L.R.A. 139; Green v. South San Francisco R., etc., Co., 181 Cal. 392, 184 P. 669; Lambert v. Western Pacific R. Co., 135 Cal.App. 81, 26 P.2d 824.

Respondent has also cited Parra v. Cleaver, 110 Cal.App. 168, 294 P. 6, and Conroy v. Perez, 64 Cal.App.2d 217, 148 P.2d 680. In both of these cases infants, aged respectively 10 months, and 2 years, 8 months, were struck when defendant's truck was being backed up; the facts were in no way comparable to the present case, and the trespass theory was not discussed. These authorities are therefore not in point. Likewise, the case of Skinner v. Knickrehm, 10 Cal.App. 596, 102 P. 947, while affirming judgment for injury to an infant sustained while playing on a wagon attached to a house which was being moved along a street is readily distinguishable on two grounds, (1) the minor in that case had been impliedly invited to ride; (2) the doctrine of attractive nuisance was applied, which latter doctrine is concededly not involved in the present case.

The respondents maintain that the driver was negligent because, "First of all, * * he was put on notice that children were probably on or so near the grader that to move it with his motor vehicle might cause them harm. He was unable to see the grader from his seat on the tractor, but he could have left his seat, stepped to the side and looked back * * * Secondly, he started the grader without giving any word of warning to the children. This combination of acts in disregard of the minor's safety is active negligence". The above argument appears to lose sight of the fact that the driver, Kimberling, was not in charge of operations but was complying with orders to "go on" given by the foreman Bolt. Moreover, both the driver and the foreman looked to see if there were any children on the equipment, and saw none, after which the tractor was started slowly. The children had been repeatedly warned, and Keith Wilson had been warned by the boy Billie Lewiston just previous to the accident. In short, the record fails to show any conduct which may be characterized as "active" negligence or any other type of carelessness on the part of the defendants.

As was said in Allred v. Pioneer Truck Co., 179 Cal. 315, 317, 176 P. 455, 456, "the proposition advanced, carried to its logical conclusion, would mean that the driver * * * whose duty requires him to observe the road along which he is traveling and attend to his motor power must be Argus-eyed or accompanied by outriders charged with the duty of seeing that small boys do not find lodgment upon the running boards or other parts of the vehicle, or approach a position of danger where they may, as in this case, fall under a wheel. The law does not impose such duty on one lawfully operating a vehicle along a public street." In the instant case, even assuming that a duty of reasonable care was owing to the infant, it is impossible to see where there has been a breach of that or any duty upon which liability can be predicated.

[3, 4] The following from 38 Am.Jur. 779, is applicable: "The accepted view is that the tender age of a child, rendering it incapable of looking out for its own safety, does not raise a duty where none otherwise exists. * * * It is said that the responsibility for avoiding injury to a trespassing child from defective or dangerous premises lies with the parent or legal custodian of the child rather than with the proprietor of the premises". In 19 Cal. Jur. 624, a similar statement occurs: "In the absence of circumstances which bring a case under the attractive nuisance doctrine, it is said that an owner of land owes no other duty to a child who is trespassing than he owes to an adult trespasser". As before mentioned, the attractive nuisance doctrine is not involved in the present litigation.

The defendants in this case were not only engaged in a legitimate undertaking, that of improving the city streets, but actually were administering a municipal duty highly beneficial to public safety and welfare. To adopt the respondents' view of the law would amount to making a municipality practically an insurer as to the safety of trespassing children, and set up an entirely new rule of liability. It would, for example, render the improvement of city streets during a period of school vacation, such a hazardous undertaking as might well deter a city from attempting to make such necessary improvements as were involved in the present case. The use of modern motorized equipment would then entail, as seems to be suggested by respondent, the marshalling of a small army of guards, outriders and footmen to control the unpredictable activities of trespassing children. Neither an advanced humanitarian philosophy, nor any other doctrine urged by respondent, can justify such a departure from the long established rules hereinbefore mentioned.

[5, 6] Appellants argue that there was an abuse of discretion in granting plaintiff's motion for a new trial on the issue of damages alone. However, there was no motion for a new trial filed by the defendant, and the granting of a new trial on the single issue of damages is a matter of discretion with which the appellant court does not ordinarily interfere. Quevedo v. Superior Court, 131 Cal.App. 698, 21 P.2d 998; Adams v. Hildebrand, 51 Cal.App.2d 117. Appellants contend that since the proof of negligence was not "overwhelming" the motion should have been denied under the implied authority of Crandall v. McGrath, 51 Cal.App.2d 438, 440, 124 P.2d 858, 859, which says: "where the proof of defendant's negligence and * * * proximate cause * * * is overwhelming, then the decision of the trial judge in confining the new trial to the issue of damages only should not be disturbed on appeal." However, this latter question has become moot in the instant case in view of the determi-

nation that, as a matter of law, there is no liability whatsoever for injuries sustained by the infant trespasser.

Throughout the trial defendants consistently presented the issue of law that no liability existed for the reason that plaintiff was a trespasser, by way of an objection to evidence at the beginning of the trial; again by motions for nonsuit, directed verdict, and for judgment notwithstanding the verdict, all of which were decided adversely to appellants. Whatever determination of the earlier motions may have been proper, it seems clear that defendants' motion for judgment notwithstanding the verdict should have been granted. The facts are not in dispute; plaintiff's status as a trespasser is clear; it is admitted that the defendants were innocent of any wilful or wanton act. It is likewise clear that the presence of any child on the equipment when the tractor was started was unknown to the defendants and that there was reasonable ground to believe that no child was in danger. It is particularly significant, as pointed out by appellants, that the driver "saw the children lined up along the sidewalk and hence reasonably assumed that they were all there". Under the circumstances here existent, a decision in favor of the infant plaintiff is contrary to both law and evidence.

For the foregoing reasons the judgment is therefore reversed.

YORK, P. J., and WHITE, J., concur.

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71 Cal.App.2d 250

SMITH v. BEAUCHAMP et al.

Civ. 14865.

District Court of Appeal, Second District, Division 1, California.

Oct. 23, 1945.

1. Appeal and error 🔑863

In reviewing a judgment for defendant on pleadings, it is necessary to determine the sufficiency of complaint on same principle as though it had been attacked by general demurrer, since only where there is an entire absence of some essential allegation may a motion for judgment on pleadings be properly granted.

2. Pleading 🔑8(17)

Generally, in a negligence action it is sufficient to allege that an act was negligently done by defendant and that it caused damage to plaintiff without stating facts constituting such negligence.

3. Pleading 🔑8(17)

The rule permitting the pleading of negligence in general terms is applicable in malpractice cases.

4. Physicians and surgeons 🔑18(4)
Pleading 🔑8(17)

In a malpractice action, in addition to general allegations of negligence, complaint may include a recital of related particulars, but such inclusion does not deflect from force of general rule that it is sufficient in such cases to plead that act complained of was negligently done.

5. Pleading 🔑205(5), 347, 406(7), 428(3)

Where malpractice complaint alleges negligence in general terms, defendants waive right to have alleged negligence stated with greater certainty by failure to interpose a special demurrer and complaint is sufficient against general demurrer, objection to introduction of any evidence, or motion for judgment on the pleadings.

6. Pleading 🔑18, 207

All that is required of a plaintiff, as a matter of pleading, even as against a special demurrer, is that complaint set forth essential facts with reasonable precision and with sufficient particularity to acquaint defendant with nature, force, and extent of plaintiff's cause of action.

7. Pleading 🔑11

In a malpractice action against physician and dentists, based upon a general charge of negligence in diagnosis, operation and subsequent treatment of plaintiff, specific acts or omissions relied upon are matters of evidence which are not required to be alleged.

8. Pleading 🔑350(1, 3)

A motion for judgment on the pleadings being in the nature of a general demurrer, the trial court in ruling thereon must treat allegations of complaint as true.

9. Physicians and surgeons ⟹18(4)

Complaint against physician and dentists, alleging defendants' agreement to examine, treat and care for plaintiff's teeth with due professional care and skill, the furnishing of medicine which caused plaintiff to become ill and the negligent, unskillful and wrongful extraction of plaintiff's teeth and injury as a proximate result of such negligent acts, stated a cause of action for malpractice.

◆

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Tressie Smith against R. F. Beauchamp and others and Maywood Hospital & Clinic, to recover for malpractice. From a judgment on the pleadings in favor of individual defendant, plaintiff appeals.

Reversed.

Henry C. Rohr, of Los Angeles, for appellants.

Sidney Snyder, of Los Angeles, for respondents.

YORK, Presiding Justice.

Plaintiff appeals from a judgment on the pleadings rendered in response to a motion therefor made by respondents.

[1] "In considering whether the judgment on the pleadings was properly granted, it is but necessary to determine the sufficiency of the complaint upon the same principle as though it had been attacked by general demurrer. In other words, it is only where there is an entire absence of some essential allegation that a motion for judgment on the pleadings may be properly granted." Rannard v. Lockheed Aircraft Corp., 26 Cal.2d 151, 157 P.2d 1, 2, citing authorities.

The action is one for the recovery of damages for alleged malpractice, it being alleged in the complaint that respondents Beauchamp, Richards, Dudley, Arnold and Jones were dentists regularly licensed to practice said profession; that respondent Siegel was a licensed physician; and that respondents Richards, Dudley, Arnold, Jones and Siegel were employed by respondent Beauchamp and were acting under his direction, as his servants, agents or employees to treat and care for appellant.

"That on or about the 18th day of June, 1942, plaintiff employed defendant, R. F. Beauchamp, to examine, treat and care for her teeth, and said defendant undertook and agreed to examine, treat and care for plaintiff's teeth with a due degree of professional care and skill * * *.

"That pursuant to said undertaking, defendant, R. F. Beauchamp, began examination, treatment and care of plaintiff on or about the 18th day of June, 1942; and that the care and treatment administered to plaintiff by said defendant and his said servants, agents and/or employees was grossly unskillful and negligent as follows:

"(a) On the morning of June 18, 1942, plaintiff went to the office of defendant R. F. Beauchamp * * * that said defendant then and there negligently, unskillfully and wrongfully gave plaintiff medicine which appeared to plaintiff to be a pink pill; that defendant then left the room in which plaintiff was seated; that plaintiff became ill and fainted and fell from the chair in which she was seated unto the floor; and thereafter defendant, R. F. Beauchamp, summoned defendant, Herman Siegel, to treat and attend plaintiff, and plaintiff was then taken by defendant, Herman Siegel, to the Maywood Hospital & Clinic, located at 4400 East Slauson Avenue, City of Maywood, California, and placed in the care of the said hospital staff.

"(b) On the morning of June 19, 1942, plaintiff was removed to the operating room of the said Maywood Hospital & Clinic under the direction of defendants, Herman Siegel and C. P. Richards; that said defendants negligently, unskillfully and wrongfully extracted eighteen (18) of plaintiff's teeth."

Then follow allegations to the effect that during the period from June 27, 1942, to and including July 29, 1942, plaintiff made various trips to the office of respondent Beauchamp and waited to see him, but was informed by attendants that he was not there; that impressions for upper and lower partial plates were made by respondents Jones and Dudley and that plaintiff was thereafter informed that said impressions had been lost; and that on July 29, 1942, plaintiff went to the office of defendant Beauchamp and requested that she be attended by said defendant Beauchamp, but she was informed that he was away for summer vacation and that "plaintiff was then and there negligently, unskillfully and wrongfully attended by defendant, Harold E. Arnold."

It is further alleged that "plaintiff is informed and believes, and upon such information and belief alleges that defendants, and each of them, negligently, unskillfully and wrongfully administered to plaintiff drugs which were injurious and harmful to plaintiff's health, as aforesaid; that defendants, and each of them, negligently, unskillfully and wrongfully extracted plaintiff's teeth, as aforesaid; and that defendants, and each of them, negligently, unskillfully and wrongfully made impressions which were lost or could not be used in making partial plates to replace plaintiff's teeth extracted as aforesaid; and that as a direct and proximate result of the said negligence, unskillfulness and wrongful acts of defendants, and each of them, plaintiff was injured in health, weakened in body and suffered great pain, all to plaintiff's damage in the sum of $10,000.00."

The complaint also contains allegations of special damages sustained by appellant "as a direct and proximate result of the negligence, unskillfulness and wrongful acts of defendants" (1) $200 because of inability to pursue her regular employment as a sales clerk from June 18, 1942, to August 29, 1942, in which she earned $20 per week; and (2) the sum of $45 of which the sum of $10 was paid to defendant Richards; $15 to defendant Siegel and $20 to Maywood Hospital & Clinic.

Thereafter, defendants Beauchamp, Richards, Dudley, Arnold and Jones answered denying generally and specifically the allegations of said complaint and set up two separate and affirmative defenses, to-wit: (1) that the purported injuries and damages resulted from circumstances over which they had no control and (2) contributory negligence of plaintiff in that she failed to cooperate with and follow said defendants' instructions.

Defendant Maywood Hospital & Clinic interposed a general and special demurrer to the complaint, but the same was ordered "off calendar" since said defendant made no appearance at the hearing thereon.

Defendant Siegel filed an answer in which he admitted that he was an osteopathic physician, that he was employed by plaintiff to administer an anesthetic and did administer an anesthetic to plaintiff at the Maywood Hospital & Clinic on or about June 19, 1942, for which he was paid $15. Otherwise, he denied generally and specifically the other allegations of plaintiff's complaint.

On August 31, 1944, a minute order granting "defendants' motion for a judgment on the pleadings" was duly entered. Thereafter, on October 27, 1944, plaintiff filed her notice of appeal from such judgment on the pleadings, and contemporaneously therewith filed a notice of motion to vacate said judgment and for leave to file her first amended complaint containing an allegation that the extraction of her teeth "was done without plaintiff's knowledge and consent and against her will". When said motion came on for hearing on November 2, 1944, objections of defendants to jurisdiction of the court to hear same were sustained, apparently because of the pending appeal from the judgment.

In support of her contention that her original complaint states a cause of action for malpractice, appellant cites the recent case of Rannard v. Lockheed Aircraft Corporation, supra, 26 Cal.2d 149, 157 P.2d 1, 2; an action for damages for alleged malpractice of a physician and surgeon employed by defendant corporation "for the purpose of giving physical examinations to persons who applied to said corporation for employment and of rendering certain other professional services."

[2-7] The cited case holds in 26 Cal.2d at page 154, 157 P.2d at page 4: "Under the authorities, it is sufficient to allege that an act was negligently done by defendant, and that it caused damage to plaintiff. (Citation of authorities.) The rule was early announced in this state in Stephenson v. Southern Pacific Co., 1894, 102 Cal. 143, 147, 148, 34 P. 618, 619, 36 P. 407, as follows: 'In adopting what is known as the "code system of pleading," courts in most of the states have excepted from the general rule, requiring a complaint to state the facts constituting the cause of action in ordinary and concise language, cases founded upon negligence; or, rather, they have so far modified the rule as to permit the plaintiff to state the negligence in general terms, without stating the facts constituting such negligence. This modification of a rule of code pleading is founded in wisdom, and grows out of a fundamental rule in common-law pleading, to the effect that "no greater particularity is required than the nature of the thing pleaded will conveniently admit." (Steph.Pl.*367;)

supported by that other rule that "less particularity is required when the facts lie more in the knowledge of the opposite party." (Id., *370.) In cases of negligence, the sufferer may only know the general, the immediate, cause of the injury, and may be entirely ignorant as to the specific acts or omissions which lead up to it. * * * The term "negligence," for the purpose of pleading, is a fact to be pleaded,—an ultimate fact, which qualifies an act otherwise not wrongful. Negligence is not the act itself, but the fact which defines the character of the act, and makes it a legal wrong. The absence of care in doing an act which produces injury to another, is actionable. The term "negligence" signifies and stands for the absence of care. * * * As a result of the application of these principles to code pleading in cases of negligence and to others of kindred character, it is held in this state, and in nearly all of the United States, that it is sufficient to allege the negligence in general terms, specifying, however, the particular act alleged to have been negligently done.'

"This elementary principle of negligence pleading has been followed in a variety of situations in this state. * * * The same rule permitting the pleading of negligence in general terms has been applied in malpractice cases. Dunn v. Dufficy, 194 Cal. 383, 228 P. 1029; Ragin v. Zimmerman, 206 Cal. 723, 276 P. 107; McGehee v. Schiffman, 4 Cal.App. 50, 87 P. 290. That in such instances, in addition to general allegations of negligence, the complaint may include a recital of certain related particulars does not deflect from the force of the general rule that 'it is sufficient in cases of this class to plead that the thing done was negligently done.' Ragin v. Zimmerman, supra, 206 Cal. at page 725, 276 P. [107]; cf. Blakeslee v. Tannlund, 25 Cal. App.2d 32, 76 P.2d 216. While the statement of other facts auxiliary to the main fact—'the fact which caused the injury' (McGehee v. Schiffman, supra, 4 Cal.App. at page 53, 87 P. [290])—might tend to provide a clearer conception of the principal act, it has been the settled rule in this state since the decision of Stephenson v. Southern Pacific Co., supra, that 'negligence and proximate cause may be simply set forth.' Roberts v. Griffith Co., 100 Cal.App. 456, 461, 280 P. 199, 201. The application of this rule to pleadings in malpractice cases is well stated in Abos v. Martyn, 31 Cal.App.2d 705, 707, 708, 88 P.2d 797, 798, as follows: 'It sufficiently appears from this complaint that what was done by this defendant was the administration of chiropractic treatments, which treatments, it was alleged, were negligently administered. Having alleged what was done and that the same was negligently done, the complaint was sufficient in the absence of a demurrer. While the defendant might have insisted upon greater certainty and particularity, he waives such defects by failure to interpose a special demurrer. As against a general demurrer, which is what an objection to the introduction of any evidence amounts to, the complaint is sufficient.'

"Tested by the requirements of the established rule for negligence pleading, the complaint in the present case must be held sufficient. * * * While the complaint is couched in very general language, 'All that is required of a plaintiff, as a matter of pleading, even as against a special demurrer, is that his complaint set forth the essential facts of the case with reasonable precision and with sufficient particularity to acquaint the defendant with the nature, source, and extent of his cause of action.' Dunn v. Dufficy, supra, 194 Cal. at page 391, 228 P. [1029]. This the complaint here does and it should be no more necessary, after the general charge of negligence in the diagnosis, the operation and the subsequent treatment, to detail the specific act or omission upon which plaintiffs rely than it is incumbent upon a plaintiff in an automobile collision case to specify the particular in which the vehicle was negligently operated, such as driving on the wrong side of the road, driving at an excessive speed, or failure to give proper traffic signals. These are matters of evidence which may be shown under the scope of the general negligence charge. Taylor v. Oakland Scavenger Co., 12 Cal.2d 310, 316, 317, 83 P.2d 948."

[8, 9] Since a motion for judgment on the pleadings is in the nature of a general demurrer, the trial court in ruling thereon must treat the allegations of the complaint as true. MacIsaac v. Pozzo, 26 Cal.2d 809, 161 P.2d 449. It was herein alleged that respondents agreed to examine, treat and care for appellant's teeth with due professional care and skill; that respondents negligently administered medicine to

appellant, which caused her to become ill, and apparently while unattended, to faint and to fall to the floor; that subsequently, respondents negligently, unskillfully and wrongfully extracted appellant's teeth; and that as a proximate result of such negligent acts on the part of respondents, appellant was injured in health, weakened in body and suffered great pain.

Under the principles enunciated in Rannard v. Lockheed Aircraft Corp., supra, and supporting authorities, the complaint in the instant cause appears sufficient in its statement of a cause of action for malpractice. It was therefore error to grant respondents' motion for judgment on the pleadings.

For the reasons stated, the judgment is reversed.

DORAN and WHITE, JJ., concur.

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71 Cal.App.2d 318

FRUNS v. ALBERTSWORTH et al.

Civ. 12911, 12893.

District Court of Appeal, First District,
Division 2, California.
Oct. 25, 1945.

Rehearing Denied Nov. 24, 1945.
Hearing Denied Dec. 20, 1945.

1. Contracts 🔑177

A provision in contract that before corporation was formed and before any profits accrued to corporation, plaintiff's brother should discharge to plaintiff an obligation of approximately $5,000 would not support an inference that defendants as parties to the contract undertook to discharge obligation of plaintiff's brother to plaintiff.

2. Contracts 🔑332(2)

Complaint seeking to recover under provision in contract requiring plaintiff's brother to discharge to plaintiff an obligation of approximately $5,000 before corporation was formed and before any profits accrued to corporation was insufficient to state a cause of action, in absence of allegation that corporation had been formed, or that any profits had accrued to corporation.

3. Contracts 🔑187(3)

Where defendants did not agree to discharge obligation of plaintiff's brother to plaintiff under written contract, but merely agreed that before corporation was formed and before they took any profits, plaintiff's brother himself should discharge that obligation, the contract was not made expressly for benefit of plaintiff so as to permit plaintiff to recover thereon. Civ.Code, § 1559.

4. Contracts 🔑187(1)

Under Arizona law, there must be a promise of contracting parties to pay before one who is not a party to the contract may sue to recover payments under it.

5. Contracts 🔑332(1)

Allegation in amended complaint that prior to execution of agreement the defendants "recognized" that plaintiff had advanced to them "respectively, jointly and severally" the sum of $5,000, was not an explicit pleading that plaintiff advanced to all the defendants jointly and severally the sum alleged.

6. Courts 🔑99(2)

Where written contract was basis of one count of complaint wherein all facts upon which demand for recovery were specially pleaded, and a demurrer was sustained to that count without leave to amend, sustaining a demurrer to a common count pleaded as a second cause of action which was based upon same set of facts pleaded in other count was not error.

7. Attachment 🔑249

Where defendant's motion to dissolve writ of attachment alleged that action was based upon a written contract which was neither made nor payable in state, and plaintiff filed a counter affidavit stating that though contract was originally drawn in Mexico, it was amended, accepted and affirmed in California, and on hearing both parties offered evidence in support of their statements, trial court could properly accept facts to be as alleged by defendant, and dissolve the writ. Code Civ.Proc. §§ 537, 538.

8. Appeal and error 🔑1011(1)

A reviewing court will not interfere with trial court's findings of fact upon conflicting evidence.

◆

Appeal from Superior Court, Santa Clara County; M. G. Del Mutolo, Judge.

Action by Jose Fruns against E. F. Albertsworth and others on a written contract. From a judgment following an order sustaining a demurrer to the second amended complaint without leave to amend, and from order dissolving an attachment in the cause, the plaintiff appeals.

Affirmed.

Francis Gill, of Palo Alto, for appellant.

J. M. Atkinson, of Mountain View, and E. F. Albertsworth, of Los Altos, for respondents.

NOURSE, Presiding Justice.

Two appeals have been consolidated for hearing, one taken from a judgment following an order sustaining a demurrer to the second amended complaint without leave to amend (No. 12911), the other from an order dissolving an attachment in the same cause (No. 12893).

The first cause of action is one on a written contract dated October 18, 1943, but the place of execution is left in confusion because of the record in the attachment proceedings, which will hereafter be noted. On the face of the agreement it is stated that it was executed at Nogales, Arizona. In the original complaint which appears in the record on the second appeal, and to which we may refer by the stipulation of consolidation, it is alleged that the agreement was executed at Hermosillo, Mexico, but was dated at Nogales, Arizona, for the express purpose of having the laws of the State of Arizona control its provisions. In the second amended complaint to which the demurrer preceding the judgment was sustained it is alleged that the agreement was executed at Palo Alto, California. Confining our discussion therefore to the order sustaining the demurrer to the second amended complaint we must assume that the cause of action is based upon an agreement executed in this state and therefore it is to be interpreted by the rules applicable in this state.

[1] Though a number of parties were made defendants the demurrer and judgment relates only to E. F. Albertsworth and his wife. They were sued on the theory that by the terms of the written contract they undertook to pay the plaintiff the sum of $5,000 which it is alleged the plaintiff advanced to them "respectively, jointly, and severally." The provisions of the contract upon which the action is founded read:

"Special provisions concerning Mr. Fruns' brother (Jose Fruns) and Mr. Fruns himself, (Pedro J. Fruns) before formation of proposed corporation.

"Before the corporation is formed, and before any profits accrue to the corporation, it is agreed between the parties that Mr. Fruns shall discharge to his brother an obligation of approximately $5,000.00—Five Thousand Dollars, U. S. Cy., equivalent to $25,000—twenty-five thousand pesos Mexican currency, from net profits of the sales of ore or concentrates."

It will be noted that the parties therein agreed to this and nothing more: that "before the corporation is formed and before any profits accrue to the corporation" Pedro J. Fruns shall discharge to the plaintiff an obligation apparently owed from brother to brother. There is no language in this or any other portion of the contract which would support an inference that the defendants Albertsworth undertook to discharge Pedro's obligation to his brother.

[2] Aside from this there is no allegation in the complaint that the corporation has been formed or that any profits have accrued to the corporation. It is alleged that defendants appropriated and expended some funds for their own benefit but whether this was in excess of the $2,000 which the parties agreed Pedro Fruns was entitled to retain does not appear.

[3, 4] Appellant relies on an assignment executed six months after the date of the original contract and executed by the two respondents stating that the laws of the State of Arizona were controlling and that such was the intention of the parties when the October agreement was made. The purpose of this reference is to draw the cause within the rule of authorities within the jurisdiction of Arizona relating to the right of a party to sue upon a contract made for his benefit. If this were such a contract the cited authorities might be applicable but it is not that kind of a contract. They did not agree to discharge Pedro Fruns' obligation. They merely agreed that before the corporation was formed and before they took any profits Pedro himself should discharge that obligation. Manifestly under the California law (sec. 1559, Civ.Code) the contract here in dispute was not "made expressly for the benefit of" the appellant. Even under the Arizona law (see Clack v. Rico Exploration Co., 23 Ariz. 385, 204 P. 137; and Duncan v. Nowell, 27 Ariz. 451,

233 P. 582) there must be a promise of the contracting parties to pay before one who is not a party to the contract may sue to recover payment under it. Here we may assume the contract binding upon Pedro Fruns to pay his brother. No such obligation rests upon these respondents. They promised to refrain from taking profits out of the venture until that obligation had been cancelled and the complaint does not allege that they breached that undertaking.

[5] Reference should be made to the allegations found in paragraph 7 of the amended complaint to the effect that prior to the execution of the agreement the defendants "recognized" that plaintiff had advanced to them "respectively, jointly, and severally" the sum of $5,000. If such were the fact we do not understand why it was not pleaded explicitly and fairly that plaintiff advanced to all the defendants jointly and severally the sum alleged. To state that they "recognized" such had been done is but an equivocal conclusion which is directly contrary to the express terms of the agreement upon which the appellant relies.

[6] There was no error in the judgment in so far as it related to the second cause of action. It pleaded a case on a common count based upon the written contract. Where a written contract is the basis of one count of a complaint wherein all the facts upon which the demand for recovery are specially pleaded, and a demurrer is sustained to that count without leave of amendment, it is not error to sustain a demurrer to a common count pleaded as a second cause of action which is obviously based upon the same set of facts pleaded in the other count. Harris v. Kessler, 124 Cal. App. 299, 303, 12 P.2d 467; Hays v. Temple, 23 Cal.App.2d 690, 695, 73 P.2d 1248; Rose v. Ames, 53 Cal.App.2d 583, 589, 128 P.2d 65; Orloff v. Metropolitan Trust Co., 17 Cal.2d 484, 489, 110 P.2d 396.

Appeal No. 12893

[7, 8] This is an appeal from an order dissolving an attachment. The notice of motion to dissolve was filed September 7, 1944. The grounds of the motion were that the action was based upon a written contract which was neither made nor payable in this state. Plaintiff filed a counter affidavit stating that though the contract was originally drawn in Hermosillo, Sonora, Mexico, it was amended, accepted and affirmed at Palo Alto, California. On the hearing plaintiff offered in evidence two telegrams. One was addressed to defendant Gibson of Palo Alto, California, calling his attention to a failure to comply with his obligations under the contract. The second telegram was addressed to defendant Albertsworth and signified Gibson's intention to comply with the contract. The trial court rejected the offer of both telegrams in evidence and this is assigned as error. On September 14, 1944, the order dissolving the attachment was entered and thereafter on September 20, 1944, the second amended complaint, which was considered on the first appeal herein, was filed.

The motion to dissolve the attachment was therefore heard upon the original complaint which alleged explicitly that the contract which was the foundation upon which the complaint was founded was "executed" at Hermosillo, Mexico, and that it was dated at Nogales, Arizona, for the "express purpose, intended by the parties thereto, defendants herein, of having the laws of the State of Arizona control the provisions thereof."

The proffered evidence of the telegrams dated January 19, 1944, would have shown nothing more than the parties were still acting under the written contract. When the appellant's affidavit for an attachment was filed on July 10, 1944, it was based upon this original complaint and the statement therein that the contract which was the basis of the suit was payable in this state was not a correct statement of the fact as disclosed by the verified pleadings as well as by the contract of the parties.

On this appeal the appellant does not rely upon this statement that the contract was "payable" in this state but he argues that if the proffered telegrams had been admitted in evidence they would have shown that the contract was "made" in this state. Section 538, C.C.P., provides that the affidavit shall state the facts specified in section 537 which entitle the plaintiff to the writ. Here the affidavit contained the conclusion of the affiant that the contract was payable in this state where all the conceded facts showed to the contrary. The affidavit of the defendant Albertsworth in support of his motion to dissolve the attachment expressly stated that the cause of action upon which appellant relied was based upon an express contract which was neither made nor payable in this state. The trial court believed the facts to be as so stated and rejected the claims of the appellant. This presents the simple question of the finality of the findings of the trial court upon conflicting evidence. It is needless to cite authorities holding that a reviewing court will not interfere under those circumstances.

The judgment in Civil No. 12911 is affirmed and the order dissolving the attachment in Civil No. 12893 is affirmed.

GOODELL, J. and DOOLING, J. pro tem., concur.

Hearing denied; CARTER, J., dissenting.

71 Cal.App.2d 366

JONES v. TIERNEY-SINCLAIR et al.
TIERNEY-SINCLAIR v. JONES et al.
Civ. 3276.

District Court of Appeal, Fourth District, California.
Oct. 26, 1945.

1. Easements 🔑8(2)

A right of way by prescription cannot be acquired by use which is either expressly or tacitly permissive and not adverse.

2. Easements 🔑9(1)

To acquire a right of way by prescription, the use must be not only open, notorious and continuous for full statutory period of five years, but it must be adverse and under claim of right expressly communicated or under such circumstances that knowledge of claim of right and that use was adverse must be imputed to owner of servient tenement.

3. Easements 🔑8(2)

Where use of a way by a neighbor is by express or implied permission of owner, the continued use is not adverse and cannot ripen into a prescriptive right.

4. Easements 🔑36(3)

In action to quiet title against claim of private prescriptive easement of way, evidence that for practically entire time of defendant's use of way, plaintiff and cross-defendants and their predecessors posted signs painted "Private Property. Permission to pass over revocable at any time", sustained finding that defendant's use of the way was permissive and not adverse.

5. Appeal and error 🔑854(2)

Though trial judge may erroneously state his reasons for his conclusions in an opinion, nevertheless, if evidence supports his findings and findings support judgment, it will be affirmed on appeal.

6. Evidence 🔑264

An allegation that highway had been so constructed that cross-complainant's property was thereby made inaccessible from the highway was not inconsistent with cross-complainant's allegation in a subsequent action, of a prescriptive right of way so as to be an admission against interest, where prescription could not have run at the time of the institution of the prior action.

7. Evidence 🔑264

An allegation that unless a claimed easement was valid defendant would have no means of access to his lot was inconsistent with defendant's allegation in a subsequent action of a right of way by prescription to the highway as respects claim of admission against interest, since if claim of prescription were true, means of access existed.

8. Pleading 🔑93(1)

A defendant may plead as many inconsistent defenses in answer as desired, and such defenses may not be considered as admissions against interest in action in which answer is filed.

9. Evidence 🔑208(3)

Where verified answer alleges facts in detail in defense to one action and such facts are inconsistent with position taken by same party in a subsequent action between such defendant and other parties, first verified pleading may be used against the pleader in the subsequent action as an admission against interest.

10. Evidence 🔑208(2), 265(18)

Objections to admissibility of pleadings in other actions as admissions against interest went more to weight than to admissibility of such pleadings as evidence, and it was for trier of facts to determine weight to be given such alleged admissions against interest.

11. Appeal and error 🔑1052(8)

Error in admitting in evidence pleadings in another action as an admission against interest, where there was no inconsistency between the pleadings in the two cases, was not sufficiently prejudicial to require reversal of judgment amply supported by other evidence.

◆

Appeal from Superior Court, Orange County; Franklin G. West, Judge.

Action to quiet title by Alice C. Jones against Carrie Tierney-Sinclair and others wherein Carrie Tierney-Sinclair filed cross-complaint against plaintiff and others. From a judgment quieting the titles of plaintiff Jones and cross-defendants Lucile L. and LeRoy F. Walden to certain realty as against the claim of Carrie Tierney-Sinclair to a private easement of way, the defendants and the cross-complainant appeal.

Affirmed.

Harvey, Rimel & Harvey and Sharpless Walker, all of Santa Ana, for appellants.

Hammack, McWilliams & Hammack, of Los Angeles, for respondents.

MARKS, Justice.

This is an appeal from a judgment which quieted the titles of plaintiff Jones and the cross-defendants Lucile L. and LeRoy F Walden to certain lots south of the city of Laguna Beach in Orange County against the claim of Carrie Tierney-Sinclair to a private easement of way over the Jones and Walden properties. We will hereafter refer to Alice C. Jones as plaintiff, to Carrie Tierney-Sinclair as defendant, and to Lucile L. and LeRoy F. Walden as cross-defendants.

Defendant owned portions of two lots which she acquired from her mother, Nettie K. Holcombe Pritchard, who purchased a portion or all of the property under an executory contract of sale in 1927. The property adjoining it to the south was owned by Willard I. Cain.

Plaintiff and her predecessors in interest owned portions of two lots adjoining defendant's property on the north during all times material here. Cross-defendants and their predecessors in interest owned the property adjoining plaintiff's property on the north for a like period of time.

In the following statement of facts we will not distinguish between acts done by the parties to this action and acts done by their predecessors in interest, it being understood that when we credit an act as done or a sign posted by a present owner, either may have been done by a predecessor in interest.

All of these properties except those of Mr. Cain and the southerly portion of defendant's land extended from the State Coast Highway to the Pacific Ocean. The Cain property is bounded on the east by a parcel of land designated on a map (Defendant's Exhibit A) as Lot A. It was Mr. Cain's contention in another action that this lot, appearing on a recorded map, was set aside and dedicated as a private way for the use of the abutting landowners in reaching the State Coast Highway from their respective properties. Mrs. Pritchard acquired a deed to a portion of Lot A adjoining her property on the east and probably passed over it in traveling to and from the balance of her property until some time in 1932 or 1933.

The State Highway Department widened and relocated the grade of the State Coast Highway. The work was started in 1932 and completed in 1933. The new grade left defendant's property some 14 feet below the finished grade of the highway. To secure easy ingress to and egress from her property defendant graded a right of way 12 feet wide from the northeasterly portion of her property over easterly portions of plaintiff's and also cross-defendants' properties, and thereafter maintained and used the way. This use probably started in 1933 and was continued without formal objection until about August 27, 1941, when plaintiff served a written notice on defendant that she was trespassing and requiring her to discontinue the use of the roadway. The use of the way by defendant, her tenants, relatives, guests and friends was open, notorious and continued from about 1933 to August 27, 1941. Whether it was adverse and under claim of right is the question determinative of this appeal. The trial court found that "the defendant Carrie Tierney-Sinclair, her tenants, guests, and persons claiming under her, have not, prior to the filing of this suit, claimed this use or used this road adjacent (adversely?) to either plaintiff Alice C. Jones or Cross-defendants Lucile L. Walden and LeRoy F. Walden, and such use has been without a claim of right to use such road; that all of the use of this road has been with permission of the owners of the respective parcels of real property over which it passed."

[1, 2] If the quoted portion of the findings is supported by the evidence the judgment against defendant must be affirmed

for it is well settled that a right of way by prescription cannot be acquired by use which is either expressly or tacitly permissive and is not adverse. Such use must be not only open, notorious and continuous for the full statutory period of five years, but must be adverse and under a claim of right expressly communicated, or under such circumstances that knowledge of the claim of right, and that the use was adverse, must be imputed to the owner of the servient tenement. In Clarke v. Clarke, 133 Cal. 667, 668, 66 P. 10, at page 11, it was said:

> "The burden is upon the party who claims title by prescription to clearly prove by competent evidence all the elements essential to such title. The user must have been adverse to the true owner, and hostile to his title. It must have been actual, continued, open, and under a claim of right. It must have all the elements necessary to acquire title by adverse possession. Thomas v. England, 71 Cal. [456], 459, 12 P. 491. * * *
>
> "It (the adverse claim) must in some way be asserted in such manner that the owner may know of the claim. The fact that the owner knew of the travel and occasional use of the property does not even raise a presumption that such use was hostile or under claim of right. If any party who is allowed by silent permission to pass over the lands of another, nothing being said as to any right being claimed, after five years, without showing that he ever communicated such claim in any way to the owner, can thus gain title by prescription, it would be a blot upon the law. An owner could not allow his neighbor to pass and repass over a trail, upon his open, uninclosed land, without danger of having an adverse title successfully set up against him. * * * But it by no means follows that the owner is negligent because he does acts of kindness. Because he allows others to use and to travel over a vacant lot without objection, the law does not presume that he intended to give it to them."

[3] It is thoroughly established that where the use of a way by a neighbor is by the express or implied permission of the owner, the continued use is not adverse and cannot ripen into a prescriptive right. Pacific Gas & Elec. Co. v. Crockett, etc., Co., 70 Cal.App. 283, 233 P. 370; Nay v. Bernard, 40 Cal.App. 364, 180 P. 827; Irvin v. Petitfils, 44 Cal.App.2d 496, 112 P.2d 688.

[4] Plaintiff and her precedessors in interest, and cross-defendants and their predecessors in interest, posted along the way used and claimed by defendant, signs upon which the following was painted: "Private Property. Permission to pass over revocable at any time", followed by the name of the then owner. While defendant and some of her witnesses denied seeing these signs there is ample evidence in the record to support the conclusion that they were first posted in February, 1934, or before, and were kept posted continuously along the way until just before the trial of this action.

The case of Tarpey v. Veith, 22 Cal.App. 289, 134 P. 367, 369, is factually similar to the instant case in that the landowner maintained signs along the claimed right of way bearing the inscription, "Private Property." In speaking of the legal effect of the signs, the court remarked: "This in itself tended strongly to negative any possible presumption that the user by the defendant and the public generally was adverse to the plaintiff and under a communicated claim of right. Jones on Easements, § 196; Andries v. Detroit, [G. H. & M. Ry. Co.], 105 Mich. 557, 63 N.W. 526. Obviously when measured by the rule enunciated in Clarke v. Clarke [133 Cal. 667, 66 P. 10], the evidence upon the whole case sufficiently supports the finding that the defendant's user of the strip of land in question was with the permission and by the sufferance of the plaintiff."

In the case before us, in addition to the words "Private Property", the respective owners added the quoted words which clearly import permission to use the roadway subject to the right to revoke the permission at any time. Where the use of a way is by permission of the owner of the property, there could be no adverse use hostile to his title. As there is much evidence in the record indicating that these signs remained posted along the way for practically the entire time of its use by defendant, the finding that her use was permissive and not adverse has sufficient evidentiary support and defeats defendant's claim of a prescriptive right to the way. This conclusion finds further support in the case of City of Laguna Beach v. Consolidated Mortgage Co., 68 Cal.App.2d 38, 155 P.2d 844, where the posted signs in legal effect were similar to those posted in the case before us.

Defendant argues that the judgment should be reversed because the trial judge said in a written opinion that:

"With regard to the signs, it is undoubtedly true as pointed out in Jones on Easements, Section 196, and in the California case of Harpey v. Veith, 22 Cal.App. 289, 134 P. 367, that where there is continuous occupancy by the servient tenant and signs are maintained, that the property is private, these facts tend to negative the idea that the user is adverse. However, this would seem to contemplate a joint user by the owners of the dominant and servient tenaments, while in the present case, the road was laid out by the defendant, was until recently maintained and repaired by her and little or no use was had by anyone but her and her tenants. It is my opinion that while the maintenance of signs declaring that the property is private may be of considerable importance in determining the intention of the owner of property when there is a claim of constructive dedication to public use, that an absent owner can not avoid adverse possession by the simple expedient of erecting a sign which is self-serving in its nature, and it can have no bearing on determining the hostility, notoriety or adversity of the use made by the one claiming an easement. * * *

"I am of the opinion that the case turns on the admissions against interest contained in the pleadings to which I have heretofore referred. Were it not for these, I would conclude that defendant should prevail, * * *."

It was also remarked by the trial judge in the same opinion that the way was used by defendant "without any notification to anyone by defendant of such alleged adverse user."

[5] It has been repeatedly held that although the trial judge may erroneously state his reasons for his conclusions in an opinion, if the evidence supports the findings and the findings support the judgment it will be affirmed on appeal. In DeCou v. Howell, 190 Cal. 741, 214 P. 444, 448, it is said:

"The deliberations of the court are conclusively merged in the judgment. The findings of fact and conclusions of law constitute the decision which is the final, deliberate expression of the court. To hold that oral or written opinions or expression of judges of trial courts may be resorted to to overturn judgments would be [to open] the door to mischievous and vexatious practices. Neither a juror nor a judge is permitted to impeach his verdict or judgment.

"We have, however, given full consideration to the evidence which appellant insists was disregarded or minimized in the opinion of the court, and we are satisfied, after giving such evidence full consideration, that the conclusion reached by the court below is sustained by the evidence." See also, Southern Cal. Freight Lines v. San Diego, etc., Co., 66 Cal.App.2d 672, 152 P.2d 470; Broadfoot v. Leather Supply Co., 69 Cal. App.2d 729, 160 P.2d 59.

Defendant argues that the trial court committed prejudicial error in admitting in evidence, over her objections, pleadings in other actions which, it was argued, contained admissions against interest. The objections, while made, were not seriously urged in the trial court as counsel who tried the case for defendant stated several times that he thought the objections went more to the weight of the evidence than to its admissibility.

[6] The first pleading in point of time relied on by plaintiff was filed in an action brought to quiet title by Bank of America National Trust and Savings Association against Mrs. Nettie K. Holcombe Pritchard on April 20, 1932. An answer and cross-complaint were filed by Mrs. Pritchard on February 8, 1933. By the cross-complaint she sought rescission of her executory contract of purchase because of alleged fraud, and also damages because of alleged fraud. In the cross-complaint it was alleged that the State Coast Highway had been so constructed that it was 14 feet above Mrs. Pritchard's property and "that said property is thereby made inaccessible from said highway."

Plaintiff argues that this allegation is inconsistent with the present claim of a prescriptive legal right to the way across her properties and those of the cross-defendants. We fail to be able to follow this argument. If we understand the evidence correctly the use of the way in question here commenced in 1932 or early in 1933. The use, assuming it was adverse in all particulars, could not ripen into a right for five years, or some time in 1937. As defendant could not have acquired a prescriptive right to the use of the way on February 8, 1933, we see nothing inconsistent in the allegations of the cross-complaint with the present claims of defendant that she had acquired a legal right to the use of the way by prescription.

[7] The other action in which the pleadings were introduced in evidence was filed

by W. I. Cain against Carrie Tierney-Sinclair and others on March 12, 1937. It was an action in declaratory relief to settle a controversy between Cain and other parties to the right to use Lot A, already mentioned, as a way from the respective properties of the parties to the State Coast Highway. Defendants' answer was filed on September 10, 1938. In a fourth separate defense she alleged "that unless the deed and the easement and right of way as to said portions of Lot A referred to in plaintiff's complaint are found to be valid, legal and subsisting, this Defendant will have no means of ingress, egress or regress to and from those portions of Lots 38 and 39 owned by this Defendant."

This allegation is inconsistent with defendant's present claim to a legal right to the use of the way in question here, for, if her use of the way had ripened into a prescriptive right she had means of ingress to and egress from her property to the State Coast Highway.

[8] It is well settled in California that a defendant may plead as many inconsistent defenses in an answer as she may desire and that such defenses may not be considered as admissions against interest in the action in which the answer was filed. L. Mini Estate Co. v. Walsh, 4 Cal.2d 249, 48 P.2d 666; Burrow v. Carley, 210 Cal. 95, 290 P. 577; Edger v. Foster, 48 Cal.App.2d 580, 120 P.2d 134; People v. Tulare Packing Co., 25 Cal.App.2d 717, 78 P.2d 763.

[9, 10] Counsel admit they have found no case directly deciding the question of the admissibility in evidence of a pleading filed in another case, as an admission against interest in a subsequent case where the admission against interest is contained in an inconsistent defense in the earlier proceeding. Counsel for defendant argue that if such an admission against interest cannot be considered against the pleader in the action in which it was filed, it should not be considered as an admission against interest in another action. He uses the extreme illustration that where several persons are injured in a motor vehicle accident and sue separately to recover damages the defendant could not safely plead contributory negligence in any of the actions because that plea imports the negligence of the pleader which might be considered an admission against interest in one of the other actions.

The illustration does not exactly fit the circumstances presented here for it is the law that implies negligence of the party pleading contributory negligence. If the pleader alleged facts in his verified answer showing that he himself was negligent the situation would be parallel with the one before us.

In this case defendant, in her verified answer, alleged facts indicating that she was not then, on September 10, 1938, claiming a legal prescriptive right to use the way over plaintiff's and cross-defendants' properties. This is certainly an admission against interest for under her present claim she had a legal prescriptive right to use the way in question here at the time that answer was filed.

We have reached the conclusion that where, as here, a defendant alleges facts in detail in an inconsistent defense in one action and those facts are inconsistent with a position taken by the same party in a subsequent action between such defendant and other parties, the first verified pleading may be used as evidence against the pleader in the subsequent action as an admission against interest. We agree with the opinion of the then counsel for defendant when he stated during the trial that the objection went more to the weight than to the admissibility of the evidence. The complaint of the plaintiff and the answer of defendant were before the trier of fact and it was his province and duty to consider all of the denials and allegations of the verified complaint and answer and to determine the weight to be given the admissions against interest contained in the pleading of the defendant.

[11] We do not regard the error in admitting in evidence the pleadings in the case of Bank of America National Trust and Savings Association against defendant's predecessor in interest as important or sufficiently prejudicial to require a reversal of a judgment which is amply supported by other evidence.

The finding that defendant's use of the way was permissive and not adverse is sufficiently supported by the evidence that the signs were posted along the way by the various owners during practically all of the time defendant was using it. The finding that the use of the way was permissive and not adverse is sufficient to support the judgment against defendant.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

71 Cal.App.2d 351

SMITH v. SKRBEK et al.

Civ. 7196; Sac. 5742.

District Court of Appeal, Third District, California.

Oct. 26, 1945.

1. **Easements** ⚿36(3)

In action to establish an easement of right of way allegedly acquired by prescription, evidence, although conflicting, sustained findings and judgment for defendants.

2. **Easements** ⚿36(3)

Evidence that one claiming an easement of right of way over another's land used way whenever he had occasion is insufficient to establish a prescriptive title unless there is evidence that such use was made for prescriptive period under claim of right made known to or asserted in such a manner as to make known to the titular owner a knowledge of the asserted claim.

3. **Easements** ⚿10(1), 12(1)

The right to the use of a roadway over another's land may be acquired by grant or by prescription.

4. **Easements** ⚿5

A prescriptive right to a roadway may be secured only by clear evidence of adverse use, openly, notoriously and continuously asserted for a period of five years or more and the claim of right must be communicated to owner of land or use of roadway must be so obvious as to constitute implied notice of the adverse claim.

5. **Easements** ⚿36(1)

One who claims a prescriptive right to use a private roadway on another's land has the burden to affirmatively prove the essential elements thereof.

6. **Easements** ⚿36(1)

Evidence of obvious, open, notorious and continuous use of a roadway over another's land for more than five years may constitute prima facie evidence of constructive notice of claim of prescriptive right thereto which will require owner to rebut presumption by showing either that road was not so used or that it was traveled by permission of owner.

7. **Appeal and error** ⚿1011(1)

When evidence of prescriptive use of roadway over another's land or notice of its use is conflicting, it is sole province of trial judge to determine from all facts whether a prescriptive title thereto has been established.

8. **Appeal and error** ⚿931(3)

Where trial court found that plaintiff did not acquire a right to use roadway by prescription or otherwise, District Court of Appeal, in support of the conclusion, would assume that trial court found either that plaintiff did not make a prima facie case or that, if he did so, it was overcome by testimony of defendants.

9. **Easements** ⚿36(1)

Where defendants' predecessor in title constructed roadway upon his own land for his personal benefit as a means of access from public highway to his dwelling house and farm buildings, it could reasonably be presumed that plaintiff's use of road was merely permissive rather than under an adverse claim which would ripen into a prescriptive easement.

10. **Easements** ⚿9(1)

Where a landowner opens up a road on his land for his own use, mere use thereof by another, under circumstances which do not injure the road or interfere with owner's use of it, in absence of circumstances indicating a claim of right, will not be considered as adverse and will not ripen into a prescriptive right no matter how long continued.

11. **Easements** ⚿9(1)

A claim of a way of necessity is ordinarily inconsistent with a claim of prescriptive right to use a private roadway, and use of a roadway from necessity, no matter how long continued, will not ripen into a prescriptive right since way of necessity is deemed to be appurtenant to grant of title and cannot be converted into prescriptive right so long as necessity continues to exist.

12. **Easements** ⚿18(1), 26(3)

A way of necessity arises from the necessity alone and continues only so long as necessity exists.

13. **Easements** ⚿5, 18(1)

The convenience of use of roadway over another's land is immaterial as respects determination of existence of a way of necessity or of a prescriptive right over such roadway.

◆

Appeal from Superior Court, Mendocino County; W. D. L. Held, Judge.

Action by Julia Smith against Fred Skrbek and Elsie Skrbek to establish a right of way by prescription wherein defendants cross-complained to quiet title to their property free and clear of the alleged right of way. From a judgment for defendants, plaintiff appeals.

Affirmed.

Charles Kasch, of Ukiah, for appellant.

Burke & Rawles, of Ukiah, for respondents.

THOMPSON, Justice.

The plaintiff and cross-defendant has appealed from a judgment denying her a right of way claimed to have been acquired by prescription over the land of the defendants and cross-complainants.

The important question is whether the evidence is sufficient to sustain the implied finding of the trial court that plaintiff never acquired a prescriptive right to the use of the roadway over defendants' land.

The plaintiff and J. P. Smith are husband and wife. In March, 1936, the plaintiff bought her ranch consisting of 7.75 acres of land in Mendocino County adjacent to the public highway between Booneville and Navarro. It contained a house, garage, shed and a small orchard and vineyard. The dwelling house was subsequently destroyed by fire. For a period of about five years and eight months after purchasing her ranch, before the defendants bought their adjoining property over which the road in question extended, the plaintiff traveled the roadway occasionally in going to and coming from her property to cultivate her orchard and garden. The question is whether that use of the road by the plaintiff over the defendants' tract was permissive on the part of the owners of the dominant tract as a mere neighborly accommodation, or whether it ripened into a prescriptive right. The defendants bought their 160 acre tract of land in November, 1941, from a man by the name of Duncan. Both parties to this action acquired their land from a common grantor. The roadway was originally constructed by the owner of the dominant tract, as a means of access from the public highway, upon which both ranches are contiguous, to his dwelling house. The two ranches were separated by a line fence. We may assume the roadway was not a way of necessity for the planitiff because her property also borders on the public highway, although it was undoubtedly more convenient for her to travel that way.

The roadway crossed a bridge over a small creek from the public highway and extended southerly on defendants' land close to plaintiff's northerly fenced line for a distance of less than 100 feet past her garage and a gate into her premises, thence onward to the defendants' dwelling house and farm buildings. It was built and kept in repair by defendants' predecessor in title. It was a graveled road. The plaintiff's garage and gate were at her northern property line and opened onto the roadway. The plaintiff's husband held a mortgage on defendants' land. Before purchasing their ranch in November, 1941, the defendants talked with Mr. Duncan, their grantor, and with Mr. and Mrs. Smith about the title to their property and they were then given no notice whatever of plaintiff's claim of prescriptive right to use the roadway. Defendants claim to have had no knowledge or information whatever regarding that claim of easement until January, 1944, a little over one year before this action was commenced.

In November, 1941, the defendants bought the Duncan property, subject to the Smith mortgage. The defendants had lived in Sonoma County and they were not previously familiar with the land in question. Before purchasing the Duncan ranch they visited the property and observed the old roadway across the southerly portion of their premises and saw the garage, and gate into plaintiff's property. They testified, however, that the road into plaintiff's garage and property did not appear to have been traveled; that there was an intervening ditch 12 to 18 inches deep, which had been washed out, and that there was no culvert crossing it; that the roadway in that vicinity was overgrown with grass, and they had no knowledge of the use of that roadway into plaintiff's property. About one year after the defendants bought and took possession of their farm they changed the course of the road to their buildings by constructing it in a more direct line from the highway to their dwelling house, and thereafter abandoned the circuitous way along the southern border of their land past the plaintiff's garage. At the time this change in the road was made, Mr. and Mrs. Smith talked with the defendants but made no objection to the alteration and failed to suggest that plaintiff claimed an easement over defendants' land. The defendants testified that the first time they learned of plaintiff's claim to the right of way was in January, 1944.

The plaintiff brought this suit October 13, 1944. The defendants denied the material allegations of the complaint and filed a cross-complaint to quiet title to their ranch free and clear of the alleged right of way. At the trial the plaintiff stipulated that "We are not claiming any right of way of record, we are claiming a right of way by prescription." We assume there is no issue as to a right of way by necessity. Both ranches border on the highway. It does not satisfactorily appear that the plaintiff may not have access to her property from the highway over her own land. That right of way by necessity is only incidentally referred to in the evidence. The court adopted findings favorable to the defendants in every essential respect. It was determined that the plaintiff did not acquire a right of way by prescription, or otherwise, to the roadway over the defendants' land. Judgment was accordingly rendered in favor of the defendants, from which this appeal was perfected.

[1] The evidence is conflicting, but we may not hold as a matter of law there is not adequate proof to support the findings of the court that the plaintiff did not acquire the right of way by prescription.

It is true that the plaintiff and her husband testified that they traveled over the graveled roadway, without objection, from the highway across defendants' land to their garage and through the gate in the division fence from the time they purchased their adjoining ranch in March, 1936, whenever they wanted to use it, which was, as the plaintiff stated, "sometimes probably two or three times a month, and again we would skip a month." She said that the "road was there when we took the ranch over"; that it was the only road by means of which they could reach their orchard from the highway, and that they drove in that way to cultivate their orchard and their garden. The plaintiff said, "I, myself, have gone up over this road perhaps two or three times a year." She however said that she never told either Mr. or Mrs. Skrbek that she claimed a right of way over their land "prior to the time they built the new road up to their own property." Mr. Smith admitted that he talked with the defendants before they bought their adjoining land, but said, "I don't recall anything having been said about a right-of-way." He admitted that the culvert across the road in front of his garage had been washed out, and said, "I put in a new culvert probably a year ago." The replacing of the culvert would therefore have been about December, 1943, which was more than a year after the defendants changed the route and built the new road in August, 1942, from the highway northerly to their own buildings, after which they claimed to have first had notice of the alleged right to use the way. Mr. Smith did not claim to have acquired that roadway as a matter of necessity, although he did say, "It would be rather difficult to build a road over the Smith lands to go up there." He stated that there was a gate near the garage which was kept closed, but not locked. Several other neighbors also testified they had seen Mr. or Mrs. Smith use that roadway occasionally.

[2] We may assume from the testimony adduced by plaintiff that she and her husband used the roadway whenever they had occasion to travel that way; but such use is insufficient to establish a prescriptive title, unless there is evidence that such use was made for the prescriptive period, under claim of right made known to, or asserted in such a manner as to make known to, the titular owner a knowledge of the asserted claim. There is no evidence that plaintiff ever asserted any such claim to the previous owner, defendants' grantor, or that her occasional use of the road was not with his permission and as a neighborly accommodation. We cannot assume, in the absence of evidence, that the prior owner had knowledge, either actual or constructive, that plaintiff's use was hostile or adverse.

The defendants testified that they had no notice or knowledge that plaintiff claimed an easement over the roadway; that they never saw the plaintiff or any member of her family travel that way; that while they saw the garage and gate there was no evidence that the roadway had been traveled for a long period of time; that there was a ditch intervening between the plaintiff's property and the roadway which would prevent crossing it with a vehicle, and that a culvert over that ditch had been washed away and was not replaced until the plaintiff constructed it about one year before this action was commenced, after the defendants had changed the course of the roadway to their dwelling house and farm buildings. The defendants also testified that the roadway to the garage and through the gate had evidently not been traveled for a long time because it was overgrown with grass. Mr. Skrbek testified there was no evidence of the roadway having been traveled for a long time, and declared he had no notice of plaintiff's claim to a right of way "until last year." He said:

"I became the owner of this property in November, 1941. * * * I was not familiar with the ranch before I bought it, and never lived in that community. * * * For the first year I had a hired man on the place. * * * I began building the new road in the fall of 1942. * * * There was a road there but it wasn't traveled. It was a road, but no indication of travelling at the time I looked. * * * When I bought my place there was no one living up at the Smith place. There was a little garden up there. * * *

"During the time I was up there I never saw either Mrs. Smith or her husband or her son using the road. I saw tracks, but I never saw who made them. * * * I have never seen either Mr. or Mrs. Smith keep the car they use up in the garage. * * * There is an old Ford in that garage but [it] has never been out. Smith at no time ever said anything to me about using the road.

"* * * Before I bought this property I went to see Mr. Duncan who owned it. I made several trips up there. * * * I saw a ditch [across the old road] about eighteen inches deep, and there wasn't a track of any kind that showed that the road was travelled. The grass was green. If a car had travelled it, it would have been mashed down, and it was standing up. There was nothing to indicate that the road was in use, and at the time I looked there was no culvert. There was a ditch there, and I would say twelve to fourteen inches wide. In front of the garage there was no indication of any body entering the garage. * * * Before I bought the property I stopped and asked Mrs. Smith if she could give me any information about the place, and she said nothing whatsoever except that her husband was holding a mortgage on it.

"The first time I knew Mrs. Smith claimed a right-of-way across the property was about a year ago, and in January, 1944, they claimed that I had changed a culvert and turned the course of the water over their right-of-way. * * * I made the change in the road in the fall of 1942. Mrs. Smith was present when this new road was being built but she did not make any statement that she claimed a right-of-way.

"* * * There was a roadway, a graded roadway going up to my ranch, and over toward the Smiths there was a ditch. A culvert was put in last fall, and before the culvert was built it was impossible to drive a truck or tractor across the ditch. At the time I took possession in 1941 up to the time the culvert was built it was impossible to take a truck, tractor or automobile up the road to the Smiths place. * * * I didn't look around to see if that was the only way Smith had of getting to his upper place, I never knew they went up there, * * *. I didn't think there was anybody going through there. * * * There was nothing about a right-of-way discussed between us at all."

Mrs. Skrbek testified to substantially the same facts related by her husband.

[3-7] The right to the use of a roadway over another man's land may be acquired by grant or by prescription. A prescriptive right to a roadway may be secured only by clear evidence of adverse use, openly, notoriously and continuously asserted for a period of five years or more. The claim of right must be communicated to the owner of the land, or the use of the roadway must be so obvious as to constitute implied notice of the adverse claim. The burden is on one who claims a prescriptive right to use a private roadway to affirmatively prove the essential elements thereof. Clarke v. Clarke, 133 Cal. 667, 66 P. 10; Grimmesey v. Kirtlan, 93 Cal.App. 658, 270 P. 243; 1 Cal. Jur. 608, sec. 81; 2 C.J.S., Adverse Possession, p. 558, § 45. It is true that evidence of obvious, open, notorious and continuous use of a roadway for more than five years may constitute prima facie evidence of constructive notice of a claim of prescriptive right thereto which will require the owner to rebut the presumption by showing either that the road was not so used or that it was traveled by permission of the owner. Fleming v. Howard, 150 Cal. 28, 87 P. 908; Shonafelt v. Busath, 66 Cal.App.2d 5, 151 P.2d

873; Wallace v. Whitmore, 47 Cal.App.2d 369, 117 P.2d 926. But, when the evidence of prescriptive use of the road or notice of its use is conflicting, it is the sole province of the trial judge to determine from all the facts and circumstances of the case whether a prescriptive title thereto has been established. Conaway v. Toogood, 172 Cal. 706, 709, 158 P. 200; McMorris v. Pagano, 63 Cal.App.2d 446, 450, 146 P.2d 944. In the Shonafelt case, supra, 66 Cal.App.2d at page 8, 151 P.2d at page 875, the court says in that regard: "* * * Upon a prima facie showing of title by the plaintiff, it is solely the province of the trial court to determine whether the same has or has not been overcome or dispelled by evidence presented by the defendant."

[8] In the present case the trial court found that plaintiff did not acquire a right to use the roadway by prescription or otherwise, and in support of its conclusion we may assume that it found either that plaintiff did not make a prima facie case, or that if she did so it was overcome by the testimony of defendants.

In the case of Pollard v. Rebman, 162 Cal. 633 at page 636, 124 P. 235, 237, it is said that the mere presence of a gate opening upon the property of another owner is not sufficient to constitute notice of a prescriptive right to use the property as a way to a public street. The court said: "It cannot be said as matter of law that this gate alone was sufficient to give notice to any one that Rebman owned or claimed an easement across the intervening land from his gate to the public street for access to and from the street from his lot, or that it was sufficient to put an intending purchaser on inquiry as to such easement."

Moreover, in the present case, the approaches to the defendants' roadway from the gate and the garage were overgrown with grass. An open ditch intervened between them. The culvert had been washed out, and was not replaced until a short time before this suit was commenced. Mr. Skrbek testified there was no evidence of the use of that road into the garage or through the gate.

[9, 10] It is a reasonable presumption that since the roadway was constructed by the defendants' predecessor in title, upon his own land, for his personal benefit, as means of access from the public highway to his dwelling house and farm buildings, that the plaintiff's use of the road was merely permissive, as a neighborly convenience. Jensen v. Gerrard, 85 Utah 481, 39 P.2d 1070; 28 C.J.S., Easements, p. 668, § 18(2). In the text last cited it is said: "Where a landowner opens up a way on his own land for his own use and convenience, the mere use thereof by another, under circumstances which do not injure the road nor interfere with the owner's use of it, will not in the absence of circumstances indicating a claim of right be considered as adverse, and will not ripen into a prescriptive right no matter how long continued."

In this case there is no evidence that the plaintiff or her predecessor in title helped to construct or keep in repair the roadway over defendants' land. No actual notice of her claim of prescriptive right to travel the road was ever given. Although the defendants talked with her about their title to the land before they purchased the ranch in November, 1941, and again while they were changing the course of the road in Angust, 1942, she failed to mention her claim to a right to use the road. Plaintiff's occasional use of the road for a short distance of less than a hundred feet from the highway to her garage and gate did not interfere in the least with defendants' use thereof. Since plaintiff's land also bordered on the highway there appears to be no satisfactory reason why she could not construct a road to her farm buildings and orchard upon her own land. Defendants' roadway was therefore not a way of necessity. There is substantial evidence, under the circumstances of this case, that plaintiff's use of the roadway was merely permissive. That must have been the theory upon which the trial judge determined that issue against the plaintiff.

[11-13] A claim of easement by necessity is ordinarily inconsistent with a claim of prescriptive right to use a private roadway. It has been held the use of a roadway from necessity, no matter how long it may have been so used, will never ripen into a prescriptive right for the reason that a way of necessity is deemed to be appurtenant to a grant of title and it cannot be converted into a prescriptive right so long as the necessity continues to exist. Martinelli v. Luis, 213 Cal. 183, 1 P.2d 980; 28 C.J.S., Easements, p. 674, § 18 k. A way of necessity arises from the necessity alone and continues only so long as the necessity exists. Cassin v. Cole, 153 Cal. 677, 96 P. 277; Irvine v. Petitfils, 44 Cal.App.2d

496, 112 P.2d 688; 28 C.J.S., Easements, p. 718, § 54, subsec. b. It is immaterial that the roadway may have been a more convenient way for the plaintiff to secure access to her property.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

71 Cal.App.2d 301

HAYS v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.

PORTEOUS v. SAME.

Civ. 7164, 7165.

District Court of Appeal, Third District, California.
Oct. 24, 1945.

Hearing Denied Dec. 20, 1945.

1. Executors and administrators 🔑224

Claims against employer's administrator for unpaid overtime wages, liquidated damages, and attorney's fees under Fair Labor Standards Act were based on contracts of employment, or at least were contingent thereto, within California statute requiring claims arising upon contract or contingent thereto to be filed against estate to authorize action thereon, and hence complaints based upon such claims, which failed to allege that claims had been presented to the estate, and which showed that time for such presentation had lapsed, were demurrable. Fair Labor Standards Act §§ 7(a) (3), 16(b), 29 U.S.C.A. § 207(a) (3), 216(b); Probate Code, §§ 707, 716.

2. Executors and administrators 🔑443(7)

A complaint filed against estate which is based upon contract or contingent thereon, fails to state a valid cause of action unless it alleges presenting of claim within time allowed by probate code. Probate Code §§ 702, 707, 716.

3. Evidence 🔑65

In determining whether claims for unpaid overtime wages and liquidated damages and attorney's fees under Fair Labor Standards Act were based on contracts or were contingent thereto within Probate Code provision requiring claims arising upon contract or contingent thereon to be filed against estate to authorize action thereon, it would be assumed that parties to contract of employment knew of existence of the act and took into consideration its provisions applicable to hours of work and compensation for overtime service. Fair Labor Standards Act §§ 7(a)(3), 16(b), 29 U.S.C.A. § 207(a)(3), 216(b); Probate Code, §§ 707, 716; Civ.Code § 1656.

4. Master and servant 🔑69

The provision of Fair Labor Standards Act for overtime wages and liquidated damages are compensatory and not penal in their nature. Fair Labor Standards Act §§ 7(a)(3), 16(b), 29 U.S.C.A. §§ 207(a)(3), 216(b).

5. Executors and administrators 🔑224

Under statute requiring all claims "arising" upon contract to be filed against estate to authorize action thereon, the word "arise" means spring, originate, flow, issue, emanate, proceed, stem. Probate Code, §§ 707, 716.

See Words and Phrases, Permanent Edition, for all other definitions of "Arise".

6. Executors and administrators 🔑224

Under statute requiring all claims arising upon contract or "contingent" thereon to be filed against estate to authorize action thereon, use of quoted word indicates that claims must be presented even when liability is merely incidental to contract and not specifically included therein. Probate Code, §§ 707, 716.

See Words and Phrases, Permanent Edition, for all other definitions of "Contingent".

7. Executors and administrators 🔑224

The California statute requiring all claims arising upon contract or contingent thereon to be filed against estate to authorize action thereon is in the nature of a statute of limitations, and hence governs actions for unpaid overtime wages, liquidated damages, and attorney's fees under Fair Labor Standards Act, which contains no provision with respect to limitation of actions or necessity of filing claims against estates of deceased persons. Fair Labor

Standards Act §§ 7(a)(3), 16(b), 29 U.S.C.A. § 207(a)(3), 216(b); Probate Code, §§ 707, 716.

8. Executors and administrators ⚿224

Claims for unpaid overtime wages, liquidated damages, and attorney's fees under Fair Labor Standards Act are "quasi ex contractu", and hence are covered by California Probate Code requiring claims arising on contract or contingent thereon to be presented to the estate to authorize action thereon, since claims may be statutory and still be founded upon contract so as to come within provisions of the Probate Code. Fair Labor Standards Act §§ 7(a)(3), 16(b), 29 U.S.C.A. § 207(a)(3), 216(b); Probate Code, §§ 707, 716.

◆

Appeal from Superior Court, Siskiyou County; James M. Allen, Judge.

Actions by Lewis Hays and by F. Porteous individually and F. Porteous as agent, against Bank of America National Trust & Savings Association, as administrator with the will annexed of the estate of Walter G. Robinson, also known as W. G. Robinson, deceased, to recover unpaid overtime wages for services performed by plaintiffs under contracts of employment with decedent and a similar amount as liquidated damages and also attorney's fees, wherein defendant filed demurrers. From judgments entered pursuant to orders sustaining the demurrers to the complaints without leave to amend, plaintiffs appeal.

Affirmed.

Johnson & Brawman, of Yreka, for appellants.

Roy A. Weaver, of Dunsmuir, for respondent.

THOMPSON, Justice.

The above entitled actions were consolidated for the purpose of trial. From judgments rendered pursuant to orders sustaining demurrers to the complaints without leave to amend the pleadings the plaintiffs have appealed. The complaints attempted to allege causes of action for unpaid, overtime wages for services performed by plaintiffs under contracts of employment to cut timber for Walter G. Robinson, who subsequently died. The overtime wages and a similar amount as liquidated damages are claimed under the provisions of the Federal Fair Labor Standards Act. 29 U.S.C.A. §§ 201–218. The complaints fail to allege the presenting of claims to the estate of said deceased employer as required by sections 707 and 716 of the Probate Code. It is conceded the time for filing such claims had elapsed. It is contended the claims for overtime services and liquidated damages are statutory liabilities which do not arise from the contracts of employment and which therefore do not require the presenting of claims to the estate as prerequisite to the maintenance of the actions.

The complaints allege that W. G. Robinson was engaged in cutting timber for commercial purpose under contract with Mount Shasta Pine Manufacturing Company, prior to his death; that plaintiffs were employed and worked for Robinson in that logging industry in and subsequent to October, 1941, during specified hours in excess of forty hours per week, for which overtime they were paid only their regular wages, and that they were thereby damaged in stated amounts, being one-half of the wages for overtime service to which they were entitled (Fair Labor Standards Act, § 207(a)(3), and for further specified sums as "liquidated damages" and attorney's fees as provided by section 216(b) of that act. The complaints allege the death of Robinson and the appointment and qualification of the defendant Bank of America as administrator of his estate. Neither complaint alleges the presenting of a claim against the estate. It is conceded the time for filing claims had expired. Separate demurrers to the complaints on the ground of failure to file the claims pursuant to section 707 of the Probate Code were sustained without leave to amend the pleadings.

[1, 2] We are of the opinion the claims for unpaid overtime wages and for liquidated damages and attorney's fees are based on the contracts of employment of the workmen, or at least contingent thereto, and the trial court therefore properly sustained demurrers to the complaints. The Probate Code provides that all claims arising upon contract or contingent thereon shall be presented against an estate within six months after the first publication of notice to creditors, and that any claim not so filed shall be forever barred. It also provides that no action based upon such claims may be maintained without first filing the claim. Certainly the claims which are involved on this appeal are at

least contingent or incident to the contracts of employment. The complaints failed to allege that claims therefor had been presented to the estate as required by law. A complaint filed against an estate, which is based upon contract or contingent thereon, fails to state a valid cause of action unless it alleges the presenting of the claim within the time allowed in accordance with the provisions of the Probate Code. Burke v. Maguire, 154 Cal. 456, 462, 98 P. 21; Morse v. Steele, 149 Cal. 303, 86 P. 693; Washburn v. Keltz, 115 Cal.App. 252, 1 P.2d 45; 11A Cal.Jur. p. 734, sec. 521; Probate Code, secs. 702, 707 and 716.

[3, 4] The plaintiffs were employed by Robinson at stipulated wages to cut timber for commercial purpose. There was an implied promise to pay them the wages for overtime work prescribed by Section 207 of the Fair Labor Standards Act. For failure to pay the overtime compensation there is a further liability imposed by the statute to pay an amount equal to such unpaid overtime minimum wages as "liquidated damages," together with a "reasonable attorney's fee." Sec. 216(b). The Federal Fair Labor Standards Act was in effect at the time the plaintiffs were employed. Since they were hired to perform work in the production of timber for commercial purpose, the act directly affected the contracts with respect to legal hours of service, the pro rata increase of wages for overtime work and the amount of liquidated damages, and authorized reasonable attorney's fees in the event of nonpayment of overtime wages. We must assume the parties to the contracts of employment knew of the existence of the Fair Labor Standards Act and took into consideration its provisions applicable to hours of work and compensation for overtime service. Marshall v. Wentz, 28 Cal.App. 540, 542, 153 P. 244; 17 C.J.S., Contracts, § 330, p. 784; 6 Cal.Jur. p. 24, sec. 10, p. 310, sec. 186; Civil Code, sec. 1656. It has been determined that the provisions of the Fair Labor Standards Act for overtime wages and liquidated damages are compensatory and not penal in their nature. Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 62 S.Ct. 1216, 86 L.Ed. 1682, 1690; La Guardia v. Austin-Bliss Gen. Tire Co., D.C., 41 F.Supp. 678; Cannon v. Miller, Wash., 155 P.2d 500, 507. We conclude that although the statute provides for liability for overtime wages, liquidated damages and attorney's fees, they are merely supplemental and incidental to the contract of employment. Clearly the provision of the act for overtime wages is for compensation of services and not penal in nature. Likewise the cases last cited have determined that the provisions of the act with respect to liquidated damages and attorney's fees are also for compensation and not in punishment for failure to pay overtime wages when they are due. That construction of the Federal statute refutes appellant's contention that the claims for overtime wages, liquidated damages for nonpayment thereof and attorney's fees are founded upon torts which do not require the presenting of claims to the estate of the deceased employer as a prerequisite to the maintenance of the suits. In the Missel case, supra, the United States Supreme Court said in 316 U.S. 572, 62 S.Ct. at page 1222, 86 L.Ed. at page 1690, with relation to the nature of a similar liability, and the overtime wages and liquidated damages due an employee in a commercial enterprise where the contract of employment failed to specify the hours required to labor or the payment of increased wages for overtime work, that:

> "* * * Respondent was subject at all times since the effective date of the Fair Labor Standards Act to its provisions. * * *
>
> "* * * The wages [for overtime work] were specified for him by the statute, * * *. The liquidated damages for failure to pay the minimum wages under sections 6(a) and 7(a) *are compensation,* not a penalty or punishment by the Government. [Citing authorities.] The retention of a workman's pay may well result in damages too obscure and difficult of proof for estimate other than by liquidated damages."

The overtime wages are fixed by the Federal statute on the basis of a specified proportionate increase of the agreed wages for regular service stated in the contract. The overtime wages are necessarily dependent upon the contract of employment, fixing the per diem wages. These are primarily suits for the collection of wages, together with liquidated damages. Several Federal cases have definitely determined that claims for such overtime wages, together with liquidated damages for failure to pay the obligations when due, are not ex delicto or founded on tort, but on the contrary that they sound in contract. Except for the contracts in the present cases, either express or implied, fixing the per diem wages, there would be no liability on the part of the employer Robinson to pay any sum whatever.

The rule of construction of a complaint to determine the nature of a cause from the gravaman of the facts related, as to whether it is based on contract or tort, announced in Williamson v. Pacific Greyhound Lines, 67 Cal.App.2d 250, 153 P.2d 990, is not in conflict with what we have previously said regarding the application of Section 707 of the Probate Code. That was an appeal from an order granting a motion for change of venue. We recognized the right of a pleader, under proper circumstances, to elect whether he would bring his action upon contract or for tort. That was a damage case for personal injuries sustained while riding in a bus. We held that the action was founded on tort. In the present cases, if the plaintiffs had been personally injured by the negligent or wanton conduct of their employer and had brought suits for personal injuries thus sustained, the actions would have been founded on torts, and the claims would not have been required to be filed. But that is not the situation before this court. These suits were brought to collect wages.

[5-7] The liability for increased wages for overtime work is not specifically included in the original contracts, but it is included in those contracts as modified by the provisions of the Federal statute which became a part thereof. That liability does arise upon the contracts, or at least it is "contingent" thereon. Section 707 of the Probate Code does not limit the necessity of filing claims to those which are specifically and wholly covered by contract. It applies to "all claims *arising* upon contract." The word "arise" is defined to mean "Spring, originate, flow, issue, emanate, proceed, stem." Webster's Dictionary of Synonyms, p. 70. The Probate Code goes further in requiring the presenting of claims. It provides that they must be filed, not only if they arise upon contract, but also if they are "contingent" thereon. The use of the word "contingent" indicates that the claims are required to be presented when the liability is merely incidental to the contract and not specifically included therein. Section 707 of the Probate Code is in the nature of a statute of limitations. It is controlling upon all claims growing out of or incidental to the contracts. The Federal act contains no provision with respect to limitation of actions or the necessity of filing claims against the estates of deceased persons. The California statute is therefore controlling in that regard.

[8] We may assume the liability for overtime wages, liquidated damages and attorney's fees are statutory as distinguished from tortious. But they nevertheless grow out of the contracts and therefore come within Section 707 of the Probate Code. Strictly speaking, these claims are quasi-contractual. They are based on the contracts, but they were created by the statute which merely increased the contractual liability. The Supreme Court has appropriately called such claims "quasi ex contractu." Quong Ham Wah Co. v. Industrial Acc. Comm., 184 Cal. 26, 36, 192 P. 1021, 12 A.L.R. 1190; Bliss v. Sneath, 119 Cal. 526, 530, 51 P. 848. It is true that claims based on tort may not be reconciled with those which are contractual. But we see no reason why claims may not be statutory and still be founded upon contract so as to come within said provisions of the Probate Code.

The case of North Alaska Salmon Co. v. Pillsbury, 174 Cal. 1, 162 P. 93, 94, L.R.A. 1917E, 642, and other similar cases, relied upon by the appellants, are not in conflict with what we have said about the application of the Probate Code provision for filing claims. The only question involved in the last cited case was whether the Industrial Accident Commission had jurisdiction to award compensation for injuries sustained by a workman "beyond the * * * limits of the state." None of the industrial accident cases cited by the appellants involved the question of the filing of claims against the estates of deceased persons. The opinion in the case last cited did say that "Under a compulsory statute, however, the correlative rights and obligations are not founded upon contract." But that opinion further states that neither do "they correspond with the legal conception of a tort." The latter statement is absolutely correct. The language of the Workmen's Compensation Act, and numerous decisions, determine that compensation for injuries sustained in the course of employment under that statute may be awarded regardless of negligence or tort on the part of the employer. Such claims are not founded on tort. The opinion in the last cited case is of no assistance in determining the application of Section 707 of the Probate Code to the claims in these cases. Referring to the above quoted language relied upon by these appellants, the Supreme Court said in the later case of Quong Ham Wah Co. v. Industrial Acc. Comm., supra, that [184 Cal. 26, 192 P. 1025]:

"But the statute which is now before us assumes to extend its effect only to those cases where the contract of hire was made in this state. It is therefore not an attempt to create an obligation merely as an incident to a status, *but is, in form and substance, a genuine regulation of contracts subject to the sovereignty of the state. The liability which it imposes is, so to speak, in a class by itself, being neither strictly contractual nor delictual, and it may, for want of a better term, be described as quasi ex contractu.* [Citing authorities.] The contract creates a relationship under the sanction of the law and *the same law attaches as an incident thereto* an obligation to compensate for injuries sustained * * *." (Italics added.)

The foregoing case, and many others, recognize the existence of quasi contractual obligations provided for by statutes. There appears to be no good reason why such statutory obligations may not properly come within the requirement of Section 707 of the Probate Code.

Nor is the case of People v. Hochwender, 20 Cal.2d 181, 124 P.2d 823, 824, or the other cases involving suits for collection of sales taxes or property taxes levied pursuant to statutes, upon which the appellants rely, in conflict with what we have said regarding the application of Section 707 of the Probate Code. Suits for collection of taxes or for reimbursement for overpaid taxes belong to a different and distinct class. They are not founded on contract as the courts have uniformly held. They are entirely unlike suits for wages which are founded primarily on specific agreements for compensation for services. In the Hochwender case the court quotes with approval from Perry v. Washburn, 20 Cal. 318, 350, the following final determination in that regard: "Taxes are not debts * * * due by contract, express or implied." For that reason the court held in that case that it was not necessary to present a claim to the estate of the delinquent taxpayer as a prerequisite to the maintenance of the suit to collect retail sales taxes. There is good reason for that conclusion. Suits to collect taxes are ordinarily actions in rem against the property. 24 Cal.Jur. p. 22, sec. 5. The statutes make them a lien upon the land or property. They are obligations due to the state for the necessary maintenance of government. They are not mere debts due on the theory of the existence of a relationship of debtor and creditor. Nor are they dependent on the assent of the taxpayer. 24 Cal.Jur. p. 21, sec. 4.

The present suits are primarily for wages due to workmen pursuant to contracts modified by statute. Unlike the Fair Labor Standards Act, the Probate Code adopted Section 707 as a statute of limitations. The Federal act contains no provision for limitation of time within which to commence suit. Section 30 of the Retail Sales Tax Act specifically provides for a limitation of three years within which the board may bring an action for delinquent taxes. Stats.1939, ch. 679, p. 2184. Likewise, Section 23 of that act, Gen.Laws Supp. 1941, Act 8493, provides for a limitation of time within which to file a suit to recover overpaid taxes. The right to maintain the action depends upon filing the claim within three years.

We conclude that these actions for wages for overtime, together with liquidated damages and attorney's fees, are founded primarily upon contracts of employment as modified by the Federal statute, and that they are barred for failure to present claims therefor to the administrator of the estate of W. G. Robinson, deceased, as required by Section 707 of the Probate Code. The demurrers were properly sustained without leave to amend.

The judgments are affirmed.

ADAMS, P. J., and PEEK, J., concur.

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CITY OF SAN DIEGO v. CALIFORNIA WATER & TELEPHONE CO. et al.

Civ. 3371.

District Court of Appeal, Fourth District, California.

Oct. 23, 1945.

1. Judgment ⚖736

Where the issues in prior action were confined to existing water supply in a particular river basin, and no issue was sought to be raised as to the right to have the coming of waters into that basin permanently continued as against the rights of owners or users farther up on the river and its branches, judgment in such action was not res judicata as to the rights of owners on the upper branches of the river to there take and use water which otherwise naturally flowed into such basin. Code Civ. Proc. § 1911.

2. Judgment ⚖736

A determination as to whether there was a surplus of water in a particular river basin which was available to a water company as against prior rights of riparian owners in that basin did not so necessarily involve the rights of riparian owners on the upper branches of the river, which were not directly presented or passed upon in the action, as to render the judgment therein res judicata of the rights of the riparian owners on the upper branches of the river. Code Civ.Proc. § 1911.

3. Judgment ⚖735

The expression that a judgment is conclusive of every matter which the parties might have litigated in the action means that a judgment is conclusive upon the issues tendered by the complaint, and matters not tendered as issues in the action are not affected by the judgment. Code Civ.Proc. § 1911.

4. Judgment ⚖668(1)

Generally, a judgment operates as an estoppel among the parties only when they are adversary parties in the original action. Code Civ.Proc. § 1910.

5. Judgment ⚖437

The rule that a judgment may be set aside in an equitable action on ground of extrinsic fraud or mistake, where the unsuccessful party has been prevented from fully presenting his case by something done by the successful party, was not available to a party in a prior case seeking to set aside the judgment not because of the acts of one of the other parties but because of a supposed oversight on the part of one of its own counsel in failing to see something which no one else connected with the case had been able to see. Code Civ.Proc. §§ 1910, 1911.

◆

Appeal from Superior Court, San Diego County; Andrew W. Schottky, Judge.

Action by the City of San Diego against the California Water & Telephone Company and others to set aside, on ground of extrinsic fraud, a certain judgment. From a judgment dismissing the action upon sustaining a demurrer to its complaint, plaintiff appeals.

Affirmed.

J. F. DuPaul, City Atty., and Shelley J. Higgins, Sp. Atty., both of San Diego, for appellant.

Charles C. Crouch and Phil D. Swing, both of San Diego, Bacigalupi, Elkus & Salinger, of San Francisco, and Philip Storer Thacher, of San Diego, for respondents.

T. B. Cosgrove, of Los Angeles, amicus curiae in behalf of respondents.

BARNARD, Presiding Justice.

The plaintiff has appealed from a judgment dismissing the action following the sustaining of a demurrer to its complaint, and its refusal to amend.

The action, filed on November 19, 1943, was one in equity for the purpose of setting aside and vacating, on the ground of extrinsic fraud, a judgment rendered on December 1, 1942, in the case of Marvin L. Allen et al., Plaintiffs, v. California Water & Telephone Company, a Corporation et al., Defendants. An appeal in that case is now pending in the Supreme Court, a hearing having been granted after a decision in this court. — Cal.App.2d —, 157 P.2d 663. That case will be referred to as the Allen case.

So far as material here, the allegations of the complaint in this action may be briefly summarized. It is alleged that the tributary sources of the Tia Juana River rise in the eastern part of San Diego County in this state and in the Republic of Mexico; that the branches which rise in the United States converge into Pine Creek and Cottonwood River; that these two streams converge and under the names "Cottonwood" and "Tia Juana River" flow across the international boundary line at a point known as the "Marron Dam Site," located about twenty-four miles from the Pacific Ocean, and thereafter merge with the branches arising in Mexico; that the main stream of the Tia Juana River then flows westerly through Mexico to a point on the boundary line about six miles eastward from the Pacific Ocean, where it crosses from Mexico into the United States; that it then flows westerly through territory of the United States for about six miles and empties into the Pacific Ocean; and that for these six miles the valley of this river, which is referred to as the Tia Juana River Basin, has a considerable underground flow of water and constitutes a reservoir for large quantities of underground water. For convenience, this six miles of river valley will be referred to as the "basin."

It is alleged that since 1912 the city has owned and operated a water system for the benefit of its inhabitants; that among the properties thus owned are Moreno dam and reservoir on Pine Creek and Barrett dam and reservoir on Cottonwood River in San Diego County, and the Marron dam site, with the right to construct a dam on that site and to develop and impound waters there; also the right to construct other dams on Cottonwood River and Pine Creek for the purpose of developing and impounding waters, which said rights were secured from the owners of lands riparian to the Tia Juana River and located in the basin we have described; that all of the owners of the lands in said basin have heretofore released and waived their riparian rights in favor of the right of the city to construct dams at Marron dam site and on the Cottonwood River and Pine Creek, and to develop and impound waters thereby; and that since 1912 the city has been diligently engaged in carrying out a plan for the full development of the Cottonwood River and Pine Creek at and above Marron dam site, including activities through the State Department whereby the city has sought to obtain the right to construct a dam at the Marron dam site, partly within the United States and partly within Mexico.

It is then alleged that in 1936 the defendants other than the California Water & Telephone Company, which will be hereafter referred to as the water company, commenced the Allen case alleging that the water company was trespassing upon their rights as riparian land owners in the basin and asking that the water company be enjoined from pumping and diverting water from that basin; that on August 17, 1936, the water company filed an answer and on September 25, 1936, filed a cross-complaint naming the city as a cross-defendant; that the cross-complaint alleged the water company's right to divert water from the river and its tributaries, including this basin, and asked that the city be required to set up any rights it had which were adverse to or superior to the water company's rights; that the city filed an answer alleging that its only interest in the waters of the Tia Juana River and its tributaries was as a riparian owner of 105 acres of land located in the basin; that the water company's answer and cross-complaint both alleged that the plaintiffs and the city of San Diego had released and waived their riparian rights as owners of land in the basin; and that on December 4, 1940, the city filed an amended answer to the water company's cross-complaint denying, among other things, that the city had released any of its riparian rights affecting its 105 acres of land in this basin, but that the city failed to plead to the allegation that the plaintiffs in the Allen case had released and waived their riparian rights in connection with this basin, and failed to allege that the city was then the owner of all such released and waived rights.

It is then alleged that from 1936 to July 28, 1941, one Dayton L. Ault was the plaintiff's city attorney; that since October 1, 1939, Phil D. Swing has been employed by the city as a special water attorney for the purpose of aiding and assisting the city attorney in all matters involving litigation over the city's water rights; that during all the year 1939 and thereafter Mr. Ault was suffering from an incurable disease which incapacitated him from properly performing his duties and compelled him to rely on other attorneys employed by the city, including Mr. Swing; that Ault consulted with and relied upon Swing with reference to the defense to be interposed in the Allen case; that Swing advised Ault that the city's only interest in that litigation was by virtue of its ownership of 105 acres of land in the Tia Juana River Basin, that the city's interest was the same as that of other land owners in that basin, that it was not necessary in order to protect the city's rights to have a special water attorney in attendance at the trial of the action, that he, Swing, would as attorney for certain of the plaintiffs in that action be protecting not only the rights of the plaintiffs but also the rights of the city, and that it was to the interest of the city to have the water company enjoined from diverting water from the Tia Juana River and its watershed; that during the trial of the Allen case Ault consulted with Swing and depended upon his advice; that Swing had personal knowledge of the water rights and properties of the city and its efforts to secure the right to build the Marron dam; and that Swing knew that included in the city's water rights were the riparian releases waived and conveyed by the land owners in the basin in favor of the city.

It is then alleged, on information and belief, that Swing failed to advise Mr. Ault of the city's water rights and these riparian releases and of its efforts to obtain the right to construct the Marron dam; that he failed to advise Ault or any of his deputies or any other city officer that these rights were affected in the Allen action and should have been pleaded therein in answer to the cross-complaint of the water company; and that neither Ault nor any of his deputies nor any other city officer had any reason to know of the issues involved in the Allen case, nor that said action involved the city's rights on the upper waters of the Cottonwood River and Pine Creek.

It is then alleged that the trial of the Allen case began on November 25, 1941; that among the issues presented by the pleadings therein was whether or not the land owners in this basin had ever released or waived the riparian rights connected with their respective lands in that basin; that during the trial there was no evidence introduced relating to the release of those rights; that the only evidence introduced by the city related to its rights arising from its ownership of 105 acres in the basin, and no evidence was presented relating to its rights to build dams and reservoirs on the Cottonwood River and Pine Creek above Marron dam site; that during the trial the city was represented by an inexperienced deputy city attorney who prepared the city's amended answer to the water company's cross-complaint on the advice of Swing; that the deputy took no part in the trial except as he was directed or advised by Swing; and that this deputy had no knowledge of the city's rights in and to the waters of the Tia Juana River and its tributaries save and except its right as an owner of land in the basin.

It is then alleged that at the beginning of the trial Swing appeared as attorney for the plaintiffs in the Allen case; that during the trial of that case and on March 17, 1941, he stated in open court that he had been criticised for representing adverse interests and requested the court to advise him whether or not he was so doing and had better withdraw from the case; that at that time he stated that he was not representing the city in that litigation, that the city had no interest other than as set forth in its answer to the cross-complaint of the water company, and that it had no interest except as a riparian owner of land in the basin and therefore its interest was identical with that of the plaintiffs; that prior thereto Swing had been requested by Ault to protect the city's interest in this litigation and to advise and work with the deputy city attorney in this regard; that Swing then knew that one of the issues in the Allen case was as to whether the riparian owners of land in this basin had released and waived their riparian rights; that he knew these riparian rights had been waived and that the city of San Diego was the owner of them; that he should have known that a judgment on this issue in favor of the plaintiffs would be adverse to the city; that notwithstanding this knowledge he did not disclose the requisite facts to the court; and that the attorneys for the water company heard Mr. Swing's statement and failed to advise the court of the actual situation.

It is then alleged that the court made findings in the Allen case and on December 1, 1942, entered a judgment which failed to indicate that the city had the right to develop and impound waters on Pine Creek and Cottonwood River; and that this failure occurred because of excusable neglect and because of the fraud thus practiced on the city which prevented it from presenting and having passed upon, its rights to further impound and store water on Cottonwood River and Pine Creek.

It is further alleged that Dayton L. Ault died and another city attorney was appointed on August 19, 1941, who served until January 4, 1943; that another city attorney was then appointed and served to May 6, 1943, at which time the present city attorney took office; that neither of the two intervening city attorneys had any knowledge of the issues involved in the

Allen case; and that it was not until the present city attorney took office that the real facts were discovered.

The appellant city contends that the judgment in the Allen case is broad enough to require that it be considered res judicata upon the question of its right to further impound and use the waters of Cottonwood River and of Pine Creek above the Marron dam site. While it is conceded that the judgment does not expressly decide that the city has no right to impound such waters, it is argued that the issue as to its right to do so was necessarily involved in the issues actually litigated in the Allen case; that such issue could and should have been there litigated; that by the action of Mr. Swing the city was deprived of its day in court upon the issue of its right to take and use such waters; that "because of such conduct of said special water counsel, the court itself was prevented from trying any such an issue"; and that such conduct "is extrinsic fraud or mistake, sufficient in character" to justify an equity court in setting aside the judgment.

The main question here presented is as to whether the judgment entered in the Allen case is res judicata, as among the parties thereto, with respect to the city's rights to further impound and use water of the Cottonwood River and Pine Creek above Marron dam site. This requires an examination of the scope of the pleadings, findings and judgment in the Allen case, all of which were by reference and by stipulation considered by the trial court.

The complaint in the Allen case alleged that the numerous plaintiffs were the owners of lands overlying the underground waters of this basin; that the defendant water company owned one parcel similarly situated from which, by means of wells, pumps and a pipe line it has been exporting underground waters of the basin to distant points; that it proposed to increase its operations; and that the entire underground water supply of the basin was necessary for the present and future beneficial uses of the plaintiffs upon their overlying lands. The city of San Diego was not made a party, and the prayer was that the water company be enjoined from exporting any water from the basin, that the court ascertain the amounts of water reasonably required for the present and future use of each parcel owned by the plaintiffs, and that it enter a declaratory decree adjudging that such quantities of water so required by the plaintiffs are prior and paramount to any rights or claims of the water company. The water company filed an answer on August 17, 1936, alleging that there was a surplus of water in this basin after all the plaintiffs' requirements are met and after all rights acquired by appropriation or prescription are satisfied. It also alleged that the water company owned 200 acres of land overlying this basin, with other allegations as to the amounts of water in this basin, the annual net safe yield of the basin, and the amount reasonably required for all beneficial purposes on lands overlying the basin and on lands using water therefrom through prescriptive or appropriative claims. It is also alleged that the water level in the basin has not been, and will not be, lowered by its operations.

On September 25, 1936, the water company also filed a cross-complaint naming some 500 cross-defendants, including the City of San Diego. Only a few of these were served, and a dismissal was later entered as to the others. This cross-complaint described the course of the Tia Juana River generally, and particularly described the situation in this basin. It alleges the amount of water in this basin, the annual safe yield of the basin, the amount necessary for the reasonable and beneficial purposes of all lands having a right to take water from the basin, and the existence of a surplus which the water company may safely be permitted to take. It refers to the lis pendens which the water company also filed, in which it was stated that the relief sought by the cross-complaint was an adjudication of the rights of the cross-defendants in the waters of the Tia Juana river and this basin appurtenant to the particular lands in San Diego County described in connection with the name of each cross-defendant. In connection with the cross-defendant city of San Diego, the description given is that of the 105 acres of land within the basin area which is owned by the city. It is then alleged that all of the cross-defendants claim some right or interest in the waters of the Tia Juana River and/or its tributaries and/or the water underlying this valley or portions thereof, and that all of the cross-defendants or their predecessors "have released the riparian rights incident to the cross-defendants' lands, such releases being of record in the office of the county recorder of San Diego County." The prayer is that the cross-defendants be required to set forth their claim of right to water of the Tia Juana River and to water underlying this basin; that the court declare the right of the cross-complainant and each cross-defendant "in the water of the Tia Juana River and the water underlying the Tia Juana River valley"; and that the court make reasonable regulation for the use of this water by the respective parties.

Several of the plaintiffs and cross-defendants filed answers to the cross-complaint denying, in general, the existence of a surplus of water in this basin, alleging their own interests in the water underlying the basin, and denying that they had released the riparian rights incident to their lands. On July 28, 1937, the city of San Diego filed an answer to the cross-complaint admitting that it claimed rights in the waters of the river and its tributaries and the waters underlying this basin, and alleging that 105 acres of land owned by it in the basin are a part of the lands described in the cross-complaint, and that these lands were purchased for the purpose of developing water thereon. The allegations of the cross-complaint, with reference to the amount of water in the basin, the annual safe yield therefrom, the amounts necessary for the beneficial use on other lands, and the existence of a surplus which could be safely exported by the water company are then denied. It is alleged that the subterranean and surface waters now in the basin are required for those lands lying within the basin and that any increased exportation of water by the water company would cause a lowering of the water table and an infiltration of salt water from the ocean which would render the remaining water unfit for use. It is then alleged that the completion of the Rodriquez Dam in Mexico will further reduce the annual storage of water in the basin and cause a serious shortage, and that all waters in the basin, so far as they affect the lands of the city, are necessary for its use. The city also filed on July 28, 1937, a cross-complaint against the water company alleging its ownership of the 105 acres of land in the basin as described in the water company's pleadings and in its notice of lis pendens, that the water company claimed an interest in the waters of the river and/or its tributaries and/or the waters underlying this basin "all within the boundaries of the lands of the city above described," and that this claim was without right. The prayer was for a judgment against the water company quieting the city's title as to such waters.

An amended and supplemental complaint was filed on December 21, 1939, alleging ownership of land in this basin and uses of water therefrom by the various plaintiffs, the ownership of wells in the basin and the taking of water therefrom by the water company, and the resulting injury to the plaintiffs if an increased exportation of water were to be permitted. The prayer was that the water company be restrained from withdrawing underground waters from the basin for use upon outside lands, and that the court ascertain the requirements of each parcel of the plaintiffs' lands and enter a declaratory decree fixing such present and future needs and declaring the same paramount to the rights of the water company.

On June 20, 1940, the water company filed an answer to the amended and supplemental complaint. This raised no issues as to the city of San Diego and its allegations related to conditions in this basin, the water available therein, the existence of a surplus of water and the necessity of the water company's being allowed to take water therefrom if the waters of the river and the basin are to be put to their maximum reasonable and beneficial use.

On December 4, 1940, the city filed an amended answer to the water company's cross-complaint and an amended cross-complaint, in which the allegations are confined to the conditions in this basin, the water available therein, the requirements and uses of those having a right to take water from the basin, the existence of a surplus, and the danger of a depletion and of injury through the infiltration of salt water from the ocean if the water company be allowed to export water therefrom.

The court filed an exhaustive written opinion. After summarizing the allegations of the complaint, the court pointed out that the water company's cross-complaint brought in as a cross-defendant the city of San Diego "as an owner of land in the Tia Juana Valley," that it contained allegations with respect to the available water supply in this basin, and that it further alleged that riparian rights of the cross-defendants had been released. After stating that the water company was entitled to take for export from the surface and underground waters of this basin only the excess, if any, over the reasonable requirements of those having paramount rights, the court pointed out that not all the owners of lands overlying this basin or having riparian rights therein were before the court, that the rights of those not before the court must be considered in determining whether there was any excess which the water company might take from this basin, and that the problem of establishing the respective rights of all users and claimants of water from this basin is one problem which must be considered as a whole. The court then reviewed the evidence with respect to the amounts of water then in this basin and coming into it, the present and future needs of those entitled to take water from the basin as against the water company, the danger of infiltration of salt water from the ocean if the water level was lowered, the fluctuation in the water level, and similar matters. The court then considered the effect of the water company's operations on particular individuals, as distinguished from the general body of water consumers, and stated that the problem included not only the available water supply but the absorptive quality and capacity of this basin, its ability to yield up water impounded and the fluctuation to be expected in the water level under the rate of draft contemplated. The court then announced its conclusion that considering the basin as a whole, there is in most years an excess of water in the basin over the requirements of those having rights superior to the water company; that in most years, however, the amount intended to be withdrawn by the water company was more than could be extracted with due regard for local needs; that in dry periods any export of water would be hazardous to the needs of lands overlying the basin; and that any exportation of water by the water company from this basin, other than from the surface flow of the river which actually wasted in the ocean, is bound to be detrimental to some of the individual landowners. The opinion then states that no evidence whatever was introduced in support of the defense that the landowners had relinquished their riparian or overlying rights to water from the basin, that no reliance had been placed upon this in the argument, and that the court must therefore assume "that whatever relinquishments the defendants' answer may have alluded to, do not run in its favor or furnish any subject for the court's consideration in this case."

It was found in the Allen case, that the lands of the plaintiffs and cross-defendants are riparian to the Tia Juana River or that the owners thereof have rights to the underground waters of this basin similar to those of a riparian. The reasonable requirements of the plaintiffs and many of the cross-defendants were found in connection with their respective lands. It was found that the city of San Diego owned the 105-acre parcel within the basin and its present and future requirement of water was found. It was found that in ordinary years there would be no surplus of underground waters which the water company could safely be allowed to take, and that after considering the rights of all who had rights paramount to those of the water company the only surplus water is that part of the surface flow of the river which would reach the ocean if not diverted by the water company. Similar findings were made in connection with the issues raised by the cross-complaint of the water company and, in conformance with the absence of evidence on the subject, it was found that the plaintiffs and cross-defendants had not released their riparian rights but that they were the owners of such rights which are paramount to any rights of the water company. The conclusions of law are to the effect that the plaintiffs and cross-defendants have rights paramount to the water company in and to the waters of this basin, that the water company has correlative rights with respect to the parcel of land it owns in this basin, and that the water company is not entitled to export any water from this basin, except when the water is not reasonably required by the plaintiffs and cross-defendants, and with the exception of such surface flow of the river as would otherwise waste into the ocean. The judgment follows the findings and conclusions of law. There is no finding respecting the rights of the city in any waters above the Marron dam site, and there is neither any reference to such rights in the findings or judgment nor any provision purporting to affect or determine such rights.

[1] The appellant here contends that it had certain rights to impound water on the tributaries of the Tia Juana River at and above the Marron dam site, some 20 miles above the basin involved in the Allen case and before such waters should ever enter the Republic of Mexico; that these rights included and were largely based upon releases of riparian rights in connection with this basin which the city had obtained from the various parties in the

Allen case, and which were owned by the city; that the water company's cross-complaint in the Allen case raised an issue as to the existence of these releases and waivers; that the city failed to meet that issue by its pleading or evidence; that while this issue was not actually tried it could and should have been tried; and that it follows that the judgment in the Allen case is res judicata with respect to the city's rights on such an issue and constitutes an estoppel against the city, preventing it from hereafter asserting any such rights.

Not only was this issue not actually tried in the Allen case, but it was not necessarily there involved and was not sufficiently presented as an issue to bring the matter within the rule contended for by the appellant. The pleadings in the Allen case are clearly confined to the situation existing in the basin there in question, to the rights of the plaintiffs and cross-defendants growing out of and appurtenant to their ownership of particular lands overlying or adjacent to this basin, and to whether or not any surplus water exists in that basin which may be safely exported by the water company without injury to the rights of those landowners. The cross-complaint of the water company did not make the city of San Diego a defendant generally, or with respect to any rights it might claim on the upper reaches of the river, but the city was made a cross-defendant as the owner of a particular tract within the basin area. It was not alleged that any releases of water rights were in favor of the city, nor that the city was the owner of any such releases. The cross-complaint did not refer to any rights of the city in and to the waters of the Tia Juana River or any of its tributaries other than as a landowner in this basin, and the right of no party to the action to the use of any water of the Tia Juana River or any of its tributaries at any point other than within this basin and after the water has reached the same, is alleged or questioned. The entire controversy in the Allen case was as to whether there was a surplus of water in this basin which would be available to the water company for export after the requirements of those having rights paramount to the water company were satisfied. The issues were confined to, and the case was tried on the basis of, the existing water supply in that basin, and no issue was raised or sought to be raised as to the right of the parties to that action to have the coming of waters into that basin permanently continued as against the rights of other owners or users farther up on the river and its branches, either in Mexico or in the United States. The probability of some leakage from the Rodriquez dam in Mexico was incidentally considered, but no issue was in any way raised as to the rights of anyone on the upper branches of the river to there take and use water which would otherwise naturally flow into this basin.

Not only the pleadings but the opinion of the court and the findings and judgment in the Allen case confirm this view. The trial court pointed out that not all interested persons were parties to the action and his opinion and findings clearly show that he was considering the rights of all interested persons, as a class, as against the claims and demands of the water company; that any question of water on the upper reaches of the river or its branches were considered only incidentally for their probable effect on the amount of water to be expected to come into this basin; that the allegation in the water company's cross-complaint that riparian rights of the other parties had been released was regarded as intended to be an allegation that these rights had been released in favor of the water company; and that since this issue was not presented or pressed it was, in effect, found that there had been no such release insofar as the water company was concerned. This is the effect of the findings and it was not only not alleged in the water company's cross-complaint that there had been any release of riparian rights to and in favor of the city of San Diego, but no such issue was ever raised or even suggested by any of the pleadings in the Allen case.

While the present and future needs of landowners overlying this basin were considered, and to some extent individually fixed, to arrive at the total amount of expected consumption for the purpose of determining whether or not a surplus existed which would be available to the water company, the landowners, both those appearing and those not appearing, were treated as a class and as against the claims of the water company. No attempt was made to fix the rights of the members of this class as between themselves, or to determine whether any of them had any rights except as landowners within the basin area, or whether any of them had parted with their rights, or whether any of them had a right, as against any owners of rights on the upper river, to have the flow of water into the river continue unabated. Assuming that the city may not take water above the Marron dam site in derogation of vested rights which may exist in this basin area, a different situation exists if the city has acquired any such rights, but nothing in the Allen case has affected, or is determinative of, such a situation.

If one of the individual cross-defendants owning land in this basin had happened to own another parcel of land on Pine Creek, or one of the other upper tributaries of the river, with resulting rights to take water from the river, it would be a travesty on justice to hold that under the issues presented in the Allen case he was required to plead and defend his rights in connection with the upper reaches of the river. The city of San Diego is in no different position, and it would require a twisted and strained construction of the pleadings and issues presented to hold that its rights on the upper river were presented as an issue in the Allen case. It fully appears that this was the understanding of all parties throughout the trial of the Allen case, and that it was concurred in by the judge who tried that case and of this court when the appeal was pending here. In its decision in the Allen case, which has now been set aside, this court said: "The construction of the Marron Dam, as far as we are advised, was only mentioned incidentally in this action. Certainly its construction and impounding of waters behind it was not an issue presented to or decided by the trial court." Allen v. California W. & T. Co., —— Cal.App.2d ——, 157 P.2d 663, at page 678.

[2] The appellant contends that although its rights on the upper branches of the Tia Juana River arising in the United States and above the Marron dam site were not directly presented or passed upon in the Allen case, those rights were necessarily involved and are governed by the judgment rendered because, in order to determine whether or not there was a surplus of water in this basin which was available to the water company, the court was compelled to and did determine the requirements of the various plaintiffs and cross-defendants with respect to water needed on their respective lands overlying this basin. It is argued that this necessarily fixed and settled the rights of these various landowners as against any other party to that action, including the city, and that the matter therefore falls squarely within the principles laid down in the case of Tulare Irr. District v. Lindsay-Strathmore, Irr. Dist., 3 Cal.2d 489, 45 P.2d 972. In that case, the issues involved all or practically all of the waters of an entire river and the rights of all claimants to those waters, riparian and appropriative, including claims of rights to take waters at various points along the entire river. The various parties were not only united in their attack on a subsequent appropriator but the proceeding was a decidedly adversary one among the plaintiffs and interveners. The existence and extent of rights throughout the entire extent of the river was directly in issue and hotly contested and as the court pointed out the action was, in effect, one to quiet the title of the various parties. In the Allen case, with which we are here concerned, the various plaintiffs and cross-defendants while united as against the water company in order to prevent it from exporting water from this relatively small basin, and to that extent interested in showing a maximum total necessity and combined usage on their part, were in no sense adversary as between themselves, and the court was called upon simply to determine whether or not there was surplus water in this basin which could be exported by the water company without interfering with other parties whose rights, taken together, were superior to those of the water company. The court determined that issue and fixed the right of the various plaintiffs and cross-defendants as against the water company, in connection with the use of water from that basin, but no issues were tendered, no facts found and no rights were adjudicated with reference to the rights of the plaintiffs and cross-defendants as among themselves outside of this basin, or on any part of the stream or its tributaries other than within this basin and after the waters of the river had reached the same.

Moreover, no issue with respect to the rights of landowners in the basin to a continuance of the existing flow of water into the basin could well have been presented in the Allen case, since the water of the river flowed for many miles through Mexican territory before it entered the basin. That issue seems not only to have not been presented but to have been carefully avoided. At no time was any question ever raised in the Allen case with respect to the right of any landowner in the basin to have any particular amount of water come into the basin, or to have the existing flow into the basin maintained.

[3, 4] Section 1911, C.C.P., provides: "That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto." In Concannon v. Smith, 134 Cal. 14, 66 P. 40, 42, it is pointed out that what is really meant by the expression that a judgment is conclusive of every matter which the parties might have litigated in the action is "that a judgment is conclusive upon the issues tendered by the plaintiff's complaint. It may be that the plaintiff might have united other causes of action with that set out in his complaint, * * * but, as long as these several matters are not tendered as issues in the action, they are not affected by it." In Stark v. Coker, 20 Cal. 2d 839, 129 P.2d 390, 392, after stating the scope of the general rule, the court said: "It is also true that that only is adjudged in a former judgment which appears upon its face to have been adjudged or which was actually and necessarily included therein or necessary thereto. * * * And when it affirmatively appears that an issue was not determined by the judgment, it obviously is not res judicata upon that issue. A judgment is not an adjudication as to matters which the court expressly refrains from determining." In Title Guarantee & Trust Co. v. Monson, 11 Cal.2d 621, 81 P.2d 944, 949, it is said: "Nor is the rule applicable to rights, claims or demands, although growing out of the same subject matter, but which constitute separate or distinct causes of action, and which were not put in issue in the former action." A further general rule is that a judgment operates as an estoppel among the parties only when they are adversary parties in the original action. C.C.P., Sec. 1910; Pomona College v. Dunn, 7 Cal. App.2d 227, 46 P.2d 270; Standard Oil Co. v. John P. Mills Organization, 3 Cal.2d 128, 43 P.2d 797.

The question as to any rights of the city of San Diego in waters originating above the Marron dam site was not put in issue in the Allen case, the action was tried on an entirely different theory, and any such issue was rather clearly excluded from consideration by the court in deciding that case. The matter of the releases and waiver of riparian rights on the part of landowners overlying this basin, which is now particularly relied on by the appellant, and which releases and waivers are now stated to be in favor of the city and owned by the city, was not sufficiently raised as an issue in the Allen case, and was not considered and passed upon by the judge except to the extent of noting that such an issue has not been supported by evidence or argument and that the court would assume that whatever relinquishments had been alluded to did not run in favor of the water company "or furnish any subject for the court's consideration in this case." No issue as to the city's ownership of any such releases and waivers was ever raised in the Allen case, and no adversary issue relating to the existence of such releases or waivers was raised or presented as between the various plaintiffs and cross-defendants.

Under the rules of law to which we have referred, and which are now well established, we conclude that the judgment in the Allen case is not res judicata as between any of the parties to that action with respect to any rights of the city of San Diego in any of the waters of Cottonwood River or Pine Creek originating above the Marron dam site.

[5] It may be further observed that the appellant relies upon the general rule that a judgment may be set aside in an equitable action brought for that purpose, on the ground of extrinsic fraud or mistake, where the unsuccessful party has been prevented from fully presenting his case by something done by the successful party which amounts to extrinsic fraud and which had the effect of preventing an adversary trial or decision of the issues in the case. See, Bacon v. Bacon, 150 Cal. 477, 89 P. 317; Caldwell v. Taylor, 218 Cal. 471, 23 P.2d 758, 88 A.L.R. 1194; Sontag v. Denio, 23 Cal.App.2d 319, 73 P.2d 248. Not only was the appellant a successful party in the Allen case, but its complaint in the instant case seeks relief, not because of the acts of one of the other parties, but because of a supposed oversight on the part of one of its own counsel in failing to see something which no one else connected with the case has been able to see, and which this court is still unable to see. While not essential here, in view of our holding on the main point presented, it may be observed that for numerous reasons the charge of constructive fraud on the part of one of the city's counsel in the Al-

len case does not appear to be well founded, even if the allegations of the complaint be accepted as true.

For the reasons given the judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.

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HUBER v. HENRY J. KAISER CO. et al.

Civ. 12845.

District Court of Appeal, First District, Division 1, California.

Oct. 24, 1945.

Hearing Denied Dec. 20, 1945.

1. Workmen's compensation 🔑2180

An employee may maintain an action for damages proximately resulting from an injury against a person other than an employer, notwithstanding the payment of compensation by employer. St.1939, p. 2519, § 3852.

2. Workmen's compensation 🔑2195

An employer who is obligated to pay compensation may bring action against third party for the injuries suffered by employee, or, if employee brings such action, employer may make a claim against the third party and may recover in the same suit the total amount of compensation, etc., paid to employee or his dependents. St.1939, p. 2519, § 3852.

3. Workmen's compensation 🔑2243

That plaintiff is receiving workmen's compensation on account of injuries for which he seeks recovery in action at law against third person and that insurance carrier has filed in such action a lien for compensation benefits paid, should not be considered in determining amount of damages to be awarded. St.1937, p. 274, § 3855; St.1939, p. 2519, § 3852.

4. Workmen's compensation 🔑2234, 2237

Only where existence of compensation insurance is relevant to a material issue in action at law by injured employee against third person responsible for injury may it be considered by jury or discussed in argument. St.1937, p. 274, § 3855; St.1939, p. 2519, § 3852.

5. Workmen's compensation 🔑2242

Argument to jury by defense counsel that plaintiff would receive workmen's compensation on account of injuries for which he sought recovery in action at law against third persons was not prejudicial misconduct, where insurance carrier filed in the action its lien for compensation benefits paid, and trial court instructed jury not to consider compensation insurance in determining amount of damages to be awarded and overruled motion for new trial based on such alleged misconduct. St.1937, p. 274, § 3855; St.1939, p. 2519, § 3852.

6. Appeal and error 🔑978(2)

Where trial judge finds that alleged misconduct of counsel was not prejudicial and denies motion for new trial on such ground, judgment may not be reversed on account of such misconduct unless there is no reasonable basis for trial court's findings.

7. Appeal and error 🔑1064(1)
Trial 🔑296(3)

Instruction respecting driver's right to move truck at time and place of accident was not prejudically erroneous in view of lack of evidence that driver was confined by regulation to side of ramp plaintiff thought he would come down, length of ramp, and general instructions on contributory negligence.

8. Negligence 🔑10, 68

A person exercising ordinary care is entitled to assume that others will perform their duty under the law and to rely and act on such assumption and failure to anticipate injury from a violation of law or duty by another is not negligence, unless it reasonably appears or in the exercise of ordinary care would appear that another is not going to perform his duty.

9. Trial 🔑296(3)

Instruction that truck driver was entitled to assume, so long as he himself was using ordinary care, that all other persons would use same amount of care for their own safety until the contrary was made apparent to him, was not erroneous in view of other instructions restricting driver's right to indulge such assumptions by what he would have observed if he made reasonable use of his senses.

10. Negligence ⚿1

Intent to injure is not ordinarily an essential element of negligence.

11. Automobiles ⚿246(46)

In action for personal injuries sustained by pedestrian when struck by backing truck, refusal to give instruction embodying intent to injure pedestrian was not error, where complaint was based upon negligence alone without reference to gross negligence or willful misconduct.

12. Trial ⚿191(7)

Instruction on contributory negligence containing qualification "if you find that at and immediately before the accident, the plaintiff was in a position of danger", was not objectionable as assuming that plaintiff was in a position of danger.

13. Trial ⚿191(7)

Instruction on contributory negligence was not objectionable as assuming that plaintiff was engaged in a dangerous vocation and had voluntarily placed himself in a position of danger, where wording of instruction was qualified by statement "as may be known to him".

14. Trial ⚿194(16)

Instruction on contributory negligence was not objectionable as telling jury that momentary forgetfulness of a known danger would prevent recovery as matter of law, where the question was not taken from jury and jury was sufficiently instructed generally on ordinary care.

15. Negligence ⚿138(4), 141(3)

Instruction that a person who, with knowledge of the danger and the existence of a dangerous and a safe way of performing an act, voluntarily chooses the perilous way, is guilty of negligence, was warranted by evidence and instruction was not erroneous for failure to limit its application to case where existence of emergency, sudden peril, or other circumstance justifying such choice is not shown.

16. Trial ⚿260(8)

Requested instruction that contributory negligence is not based upon a possibility of avoiding an accident, was covered by instruction given.

17. Negligence ⚿138(4)

Refusal to give instruction on imminent peril requested by plaintiff was not error, where plaintiff knew of the presence of backing truck which struck him and contention as to his contributory negligence was based on failure to avoid such known peril by keeping to the walkway beside ramp on which truck was backing or by keeping a sufficient lookout.

18. Trial ⚿236(2)

Instructions covering statutory provisions that a witness false in one part of his testimony is to be distrusted in others, are to be given on all proper occasions. Code Civ.Proc. § 2061, subd. 3.

19. Appeal and error ⚿1067

Refusal to give requested instruction is not reversible error unless such refusal was prejudicial.

20. Appeal and error ⚿1067

Refusal to give instruction covering statutory provision that a witness false in one part of his testimony is to be distrusted in others, was not prejudicial where no claim of falsehood was made, though testimony was sharply in conflict on material issues. Code Civ.Proc. § 2061, subd. 3.

◆

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by J. S. Huber against Henry J. Kaiser Company and others for personal injuries suffered by plaintiff when struck by a truck. Verdict and judgment for defendants, and plaintiff appeals.

Judgment affirmed.

Robert G. Partridge and Remington Low, both of San Francisco, for appellant.

Bronson, Bronson & McKinnon, of San Francisco, for respondents.

WARD, Justice.

This action was brought to recover damages for injuries suffered by plaintiff, referred to in the transcript of evidence as a "cement foreman" though his supervisory work also covered the installation of steel. The verdict of the jury was in favor of defendants.

The facts appear as follows: At the place where the accident occurred there were two large basins in which floating drydocks were being built. The basins fronted on the river, and a temporary dirt levee across the south end of the basins kept the water out while the drydocks were in the course of construction. At the time of the accident those dirt levees were being replaced by permanent concrete gates. Each gate was in two sections; on the far side of each basin and between the basins, separating them, were planked ramps on which the concrete trucks backed down to pour the cement, through chutes accessible to the trucks on the ramps, into the frames for the gates. The west section of the west gate had been completed by pouring concrete from the west ramp, and the next stage was to complete the east section of the same gate by pouring concrete from the center ramp. Plaintiff was the foreman in charge of the concrete and steel work. On the morning of the accident he had been working in the west basin where the west section of the gate across that basin was being built. When this work was completed, plaintiff ascended to the west ramp by means of a ladder. There he saw the truck driven by Walker parked in the middle of the west ramp 100 or 150 feet north of the south end thereof. He told the driver that no more concrete was needed for the west section of the gate and directed the driver to take the load to the center ramp, where the concrete was to be poured for the east section of the gate. He got into the truck and accompanied the driver while he drove to the north end of the west ramp and then into the center ramp. After the truck had backed south on the center ramp 150 or 200 feet, further progress was blocked by a parked tractor. Plaintiff got out of the truck and asked the driver of the tractor to move it out of the way, so that the truck could be backed down the ramp.

There is a conflict in the testimony as to the position occupied by the truck in backing south on the center ramp, and also as to what was said between plaintiff and the truck driver. The ramp was about 700 feet long and 35 feet wide. The center part of the ramp was between guard rails and was approximately 25 feet wide. Abutting the guard rail at each side of the 25-foot center lane was a craneway containing tracks over which an overhead crane operated. Between the craneway and another guard rail at the edge of the ramp was an area about 3½ feet wide where the workmen walked, and which they used to park kits and other personal effects. According to plaintiff's witnesses, it was the practice of the drivers to back the trucks down the ramp on the side opposite the chute into which concrete was to be poured and to bring the truck, by a simple turn, into position for pouring. According to defendants' witnesses, it was the practice of the drivers to back the trucks down the west side of a ramp, using the guard rail to the left of the driver as a guide, and to bring the truck into position for pouring by making a turn one way or the other about 30 feet from the chute. Defendants call attention to evidence to the effect that the view of the driver of the transit mix truck, when backing, is obstructed to a great extent by the large concrete drum in back of the driver's cab, and that defendant Walker got out on the running board of his truck to be able to see at all behind him; and even then a large part of his field of vision to his right-hand side was cut off.

According to plaintiff's version, he directed the truck driver to keep the truck on the east side of the ramp as it backed south, and that it backed south in that position, 5 to 7 feet west of the guard rail on the east, until the parked tractor was encountered. After plaintiff had asked the tractor driver to move his vehicle out of the way, plaintiff returned to the truck. It was still on the east side of the center ramp. Plaintiff again told the truck driver to keep the truck on the east side of the ramp in backing south. Plaintiff then commenced walking to the south end of the ramp. For a short distance he walked on the east side of the ramp; he then moved to the west side. His position in walking south on the west side of the ramp was 5 or 6 feet east of the west guard rail. When he had walked about 150 feet he turned around and looked at the truck, which was still on the east side of the center ramp. While walking on the west side of the ramp in a position about 5 feet east of the guard rail, plaintiff was struck by the west side of the truck. He was then about 150 feet north of the south end of the center ramp. There was no obstruction on the east side of the ramp.

According to defendant Walker's version, he was not directed by plaintiff to keep the truck on the east side of the center ramp while backing south. The truck was backing south on the west side of the ramp, 2 or 3 feet east of the guard rail on the west, when it encountered the parked tractor. Plaintiff got out of the truck and asked the tractor driver to move. He then motioned defendant Walker to resume backing the truck south, and Walker complied. Plaintiff turned around and started walking south. He was approximately 50 feet south of the truck and next to the guard rail on the west side of the center ramp. Defendant Walker did not see him change his position. The truck angled toward the east side of the ramp. During this movement defendant Walker lost sight of plaintiff. He did not again see plaintiff until after plaintiff was struck by the truck. At that time the truck was about in the middle of the ramp.

Although the sufficiency of the evidence to support the judgment is not attacked, an understanding of the facts and the conflicting evidence is necessary in order fully to consider the attacks made by plaintiff upon the trial court's giving of certain instructions and its refusal to give others. The plaintiff and appellant contends that defendants' counsel did certain things upon the trial which amounted to prejudicial misconduct justifying a reversal in view of the conflicting evidence. This latter point may well be disposed of prior to a consideration of the instructions. It is alleged in an affidavit presented in support of the motion for new trial, that the attorneys for respondents, over the objection of plaintiff, argued that if plaintiff had a permanent injury he could get a permanent award in money from the Industrial Accident Commission. During the hearing on the objections the court stated: "As I said, this matter will be covered by the instructions to the jury. It is true that the Industrial Indemnity Exchange has expended certain moneys for benefits due the plaintiff, but, it, the Exchange, is entitled to recover any moneys spent by it out of any recovery that may be awarded the plaintiff in this case." No objection is raised to the statement of the court.

An affidavit filed by respondents on the motion for new trial sets forth that at the commencement of the trial the attorney who conducted the trial for the appellant was interrogated by the court in chambers relative to filing a notice of lien by the employer of plaintiff, and that the attorney "acquiesced by an affirmative statement that it was impossible to conceal the existence of benefits of the compensation law in this case and stated that he would file a notice of lien on behalf of the employer." The claim of lien under the provisions of the Labor Code was filed, and set forth payments made for compensation, hospital and medical treatment, and that the insurance carrier averred on information and belief that it would become liable in the future for an amount not yet ascertainable. There is no affidavit on file which denies that the attorney for plaintiff "stated that he would file a notice of lien on behalf of the employer" and no denial that "it was impossible to conceal the existence of benefits of the compensation law in this case."

[1-4] An employee may claim compensation for injuries and may bring an action for damages proximately resulting from an injury against a person other than an employer notwithstanding the payment of compensation by the employer. An employer who is obligated to pay compensation may bring an action against a third party for the injuries sustained by the employee, or, if the employee brings such action, the employer may make a claim against such third party and may recover in the same suit the total amount of compensation, etc., paid to an employee or his dependents. Labor Code, sec. 3852, St. 1939, p. 2519. In the present case the employee caused to be filed the claim of lien of the employer. "If the employee joins in or prosecutes such action, either the evidence of the amount of disability indemnity or death benefit paid or to be paid by the employer or the evidence of loss of earning capacity by the employee shall be admissible, but not both. Proof of all other items of damage to either the employer or employee proximately resulting from such injury or death is admissible and is part of the damages." Labor Code, sec. 3855, St.1937, p. 274. At the request of plaintiff the trial court instructed: "It has been established in this case that at the time and place of the happening of this accident the plaintiff Huber was employed by the Pollock-Stockton Shipyard and was acting within the course and scope of his employment. In this connection and pursuant to the Labor Code of this State, the Industrial Indemnity Exchange, compensation insurance carriers for said employer, have filed their lien in this case for compensation benefits paid. You are not to take this fact into consideration in determining the amount of damages to be awarded plaintiff, if damages are to be awarded. If plaintiff is entitled to recover damages they shall be assessed by you in accordance with the instructions given you on the subject." This instruction correctly states the law. An injured em-

ployee is entitled to bring an action at law against a third party responsible for the injury and the injured person should not be prejudiced by reason of the fact that he is receiving compensation when such fact is extraneous to the issue. Only where the existence of compensation insurance is relevant to a material issue may it be considered by the jury and, therefore, may it be discussed in argument. Brown v. McCuan, 56 Cal.App.2d 35, 132 P.2d 838, citing Hatfield v. Levy Brothers, 18 Cal.2d 798, 117 P.2d 841; Weis v. Davis, 28 Cal.App.2d 240, 82 P.2d 487; Gillette v. City and County of San Francisco, 41 Cal.App.2d 758, 107 P.2d 627. Here the existence of insurance was a fact of record which could not be kept from the jury, and the weight the jury attached to this fact and defendant counsel's argument thereon were fully considered by the trial judge on the motion for new trial. Further, the jury had been properly instructed concerning the lack of relevance to the subject of damages of the fact of compensation insurance, the basic issue upon which the fact is prejudicial.

[5, 6] Under all the circumstances of this case the claim of prejudicial misconduct is not well founded. Assuming that defendants' counsel in the argument stepped out of bounds, "Where counsel is charged with misconduct for improperly injecting insurance into the case, the denial by the trial court of a motion for a new trial made on that ground will be deemed a determination by it of good faith on the part of counsel and that defendants were not prejudiced." Hatfield v. Levy Brothers, supra, 18 Cal.2d at page 814, 117 P.2d at page 849. The cases cited by appellant for the proposition that defendant counsel's argument to the jury concerning compensation insurance constituted prejudicial misconduct were cases in which the trial judge granted a motion for new trial. In Brown v. McCuan, supra, 56 Cal.App.2d at pages 41. 42, 132 P.2d at page 841, the court said: "The cases on which appellant relies to support his position are clearly distinguishable in that they involve appeals from orders granting new trials where one of the grounds for the granting of the motion for a new trial was prejudicial misconduct of the attorney. Baroni v. Rosenberg, 209 Cal. 4, 284 P. 1111; Amore v. Di Resta, 125 Cal.App. 410, 13 P.2d 986; Ferrario v. Conyes, 19 Cal.App.2d 58, 64 P.2d 975; Mangino v. Bonslett, 109 Cal. App. 205, 292 P. 1006. Walling v. Kimball, 17 Cal.2d 364, 110 P.2d 58, notes this difference in approach to the problem of what constitutes prejudicial misconduct on appeal. But, when the case comes to us after the trial judge has denied a new trial urged upon these grounds and has thus found that the claimed misconduct was not prejudicial, the judgment must be affirmed unless there is no reasonable basis for such finding. We may not assume that the jury denied appellant any recovery because it believed he might get some compensation from another source. It is more reasonable to assume that the verdict followed the evidence on the issues of negligence and contributory negligence."

[7] The first three instructions to which plaintiff objects may be considered together. The first is: "The defendant P. Walker had a right to move his truck at the time and place of the accident. Such right was equal in every respect to the right of the plaintiff to be where he was at the time of the accident. Just as their rights were equal, so also was the duty to exercise ordinary care under all the circumstances. The plaintiff could not assume or act or rely upon the assumption that he would not be injured by a moving truck. On the contrary, he was required to keep such a lookout for such trucks as, under similar circumstances, an ordinarily prudent person would have kept or done for his protection." This instruction was approved in Warnke v. Griffith Co., 133 Cal.App. 481, 24 P.2d 583. A similar instruction was given in Clarke v. Volpa Brothers, 51 Cal.App.2d 173, 124 P.2d 377. In the latter case the court said that the facts in the Warnke case were undisputed while those in the Clarke case were disputed, and that the issue of whether plaintiff was in a position of danger, accordingly, should be left to the jury. Scott v. Gallot, 59 Cal.App.2d 421, 138 P.2d 685, was an action wherein the trial court granted plaintiff's motion for a new trial. It was held under the facts in that case that the question of whether plaintiff was in a position of danger should be left to the jury, and suggested that the instruction should be modified on a retrial. Here the jury were told that although plaintiff had no absolute right to rely on the assumption that he would not be injured by a moving truck, the plaintiff was required to exercise only that amount of care as under similar circumstances an ordinarily prudent person would have kept or done for his own protection. In view of the fact that there is no evidence that the truck driver was confined by regulation to the side of the ramp plaintiff thought he would come down, the fact that the ramp was over 700 feet in length, a greater distance than an ordinary city block, and the general instructions on contributory negligence which were given, it can not be said that this instruction was prejudicially erroneous. The instructions given indicate that on this runway the parties were restricted by their reciprocal rights, which rights were to be determined by the jury in analyzing what would constitute ordinary care under the circumstances. These circumstances were still left in the jury's hands for determination. The jury can not be said to have been misled, particularly in view of the other instructions on contributory negligence.

[8, 9] The second attacked instruction reads: "The defendant Walker at the time and place of this accident had a right to assume, so long as he himself was using ordinary care, that all other persons would use the same amount of care for their own safety. This right of the defendant to assume that other persons would use ordinary care continued until such time as the contrary was made apparent to him." A corresponding instruction reads: "If you find that the plaintiff was exercising ordinary care, he had a right to assume that others too would perform their duty under the law, and he had a further right to rely and act on that assumption. Thus it was not negligence for plaintiff to fail to anticipate injury which might come to him only from a violation of law or duty by another. However, an exception should be noted. The rights just defined did not exist if it was reasonably apparent to plaintiff, or in the exercise of ordinary care would have been apparent to him, that another was not going to perform his duty." It is claimed that, respecting assumptions, one standard is set up for plaintiff and another for defendants. It should be noted that the instruction claimed to be erroneous in reference to an "assumption" by Walker was contingent upon Walker's using ordinary care. In addition, the instruction contained language to the effect that the right to the assumption continued until "the contrary was made apparent to him." It may be said that the instruction with respect to plaintiff appears to be a definite and correct statement; the instruction in reference to Walker is not incorrect though in form and substance it could be improved. In effect they are practically the same. Other instructions read: "The mere fact, if you find it to be a fact, that the defendant Walker did not know of the presence of the plaintiff in the path of his truck will not excuse him from conduct which would have been negligent had he known of the presence of the plaintiff. It was the duty of Walker to make reasonable use of his faculties of sight and hearing and to apprise himself of danger to others, including the plaintiff, in the movement and operation of his truck, if danger there was." "All persons must use ordinary care when their conduct may affect any other person or when they may be affected by the conduct of any other person. It is as much the duty of a person to exercise care for his own safety and protection as it is the duty of the other person to exercise ordinary care towards him with regard or with respect to his safety." When the instructions are read together it is apparent that defendants' right to indulge in assumptions was restricted by what he would have observed if he made reasonable use of his senses.

[10, 11] Appellant complains of the refusal to give an instruction embodying "intent" to injure plaintiff. The complaint is based upon negligence alone without reference to gross negligence or wilful misconduct. Intent is not ordinarily an essential element of negligence and it was no error to refuse such an instruction in this case.

[12-14] Plaintiff also complains of three instructions on the subject of contributory negligence. The objections are rather technical and do not require quotation in full. The first one, it is contended, assumes that plaintiff was in a position of danger but the instruction is qualified as follows: "* * * if you find that at and immediately before the accident the plaintiff was in a position of danger." This qualification could hardly lead the jury to believe the position of danger was undisputed. Hatfield v. Levy Brothers, supra; Corbin v. Bedel, 69 Cal.App.2d 60, 158 P.2d 221. In the second instruction on contributory negligence it is contended that it is assumed as a fact that plaintiff was working at a dangerous vocation and that he had voluntarily placed himself in a position of danger. The wording is qualified as follows: "* * * * as may be

known to him." It is also contended that the jury was told that momentary forgetfulness of a known danger would prevent recovery as a matter of law. Under certain circumstances the instruction, as given, may be proper. Ramos v. Service Bros., 118 Cal.App. 432, 5 P.2d 623. In Neel v. Mannings, Inc., 19 Cal.2d 647, 122 P.2d 576, it was held that momentary forgetfulness of a known danger will not prevent a recovery unless the forgetfulness shows a want of ordinary care. Kirk v. Los Angeles Ry. Corp., 26 Cal.2d 833, 161 P.2d 673. In the present case there was no attempt to take the question from the jury and decide the matter as a question of law. The jury was sufficiently instructed generally on ordinary care (Fowler v. Allen, 49 Cal.App.2d 214, 121 P.2d 41), and in particular in the instruction attacked the jury's attention was directed to the "exercise of ordinary care * * * commensurate with such danger as may be known to him."

[15] The third instruction of this group is short and reads as follows: "If there are two ways of performing an act, one of which is dangerous and the other safe, a person who, with knowledge of the danger and of the existence of both of the ways, voluntarily chooses the perilous one, is guilty of negligence." Plaintiff contends there was no evidence to justify the giving of the instruction, and that it is not a correct statement of the law; that one is not guilty of negligence merely because he voluntarily chooses the perilous way of performing an act—he is guilty of negligence only in the absence of a showing of the existence of an emergency, sudden peril or other circumstances justifying such choice. 38 Am.Jur. 873. Defendants argue that the instruction was applicable to the evidence because it was shown therein that there was a strip 3 feet wide on each side of the ramp, protected by guard rails, where plaintiff could have walked and the truck could not have been driven; and that the instruction is a correct statement of the rule as set forth in 19 Cal.Jur. 588. An instruction similar to the one given here was approved in Stricklin v. Rosemeyer, 61 Cal.App.2d 359, 142 P.2d 953.

[16] Plaintiff also complains of the refusal of the court to give an instruction to the effect that contributory negligence is not based upon a possibility of avoiding an accident, but it appears to be covered sufficiently by the following instruction, also proposed by plaintiff: "No one can be charged with contributory negligence merely because he might have avoided the accident had he acted differently. If the plaintiff at the time and place of the happening of this accident did all that an ordinarily prudent man would have done under the same or similar circumstances, then that is all the law required and he is not chargeable with contributory negligence."

[17] Plaintiff also complains of the refusal to give an instruction on imminent peril. Defendants argue that plaintiff's negligence was not based on any act of his when confronted with a sudden peril, but on his not avoiding the known peril of the backing truck on the ramp either by keeping to the walkway or by keeping a sufficient lookout and that the presence of the backing truck was at all times known to plaintiff and therefore could not constitute sudden peril. The defendants' position must be sustained.

[18-20] Plaintiff requested and the court refused to give an instruction covering and enlarging on Code of Civil Procedure, sec. 2061, subd. 3, "That a witness false in one part of his testimony is to be distrusted in others." Instructions on the subdivision of section 2061 are to be given "on all proper occasions. Appellant does not call attention to any particular reason why it would have been proper to give the instruction in this case except to say that "the testimony was sharply in conflict on material issues." Unless the refusal was prejudicial, the action of the court is not a ground for reversal. Wallace v. Pacific Electric R. Co., 105 Cal.App. 664, 288 P. 834; Medlin v. Spazier, 23 Cal.App. 242, 137 P. 1078; Reynolds v. E. Clemens Horst Co., 35 Cal.App. 711, 170 P. 1082; McSweeney v. East Bay Transit Co., 60 Cal.App.2d 807, 141 P.2d 787. And here the refusal to give the instruction could not have been prejudicial as no claim of falsehood has been made.

When all of the instructions attacked are read no error appears that may be classified as prejudicial. When the instructions are read in their entirety it appears that each side was treated justly and fairly.

The judgment is affirmed.

PETERS, P. J., and KNIGHT J., concur.

Hearing denied; CARTER, J., dissenting.

DOLTON v. GREEN et al.*

Civ. 14867.

District Court of Appeal, Second District, Division 1, California.

Oct. 22, 1945.

Rehearing Granted Nov. 16, 1945.

1. Railroads ⇐324(1)

The rules of caution governing conduct of vehicle operators approaching tracks of interurban electric system laid upon private right of way, rather than upon city streets, are the same as the rules applied to steam railroad crossings in testing negligence of party whose conduct is in question.

2. Railroads ⇐347(1)

In action for injuries when plaintiff's truck in making left turn on city boulevard was struck by interurban electric car operated upon private right of way, admission of ordinance limited in scope to operation of streetcars was error, since such car was not a "streetcar," and fact that private right of way was intersected at intervals by public highways where track was laid flush with the street did not convert such part of track into a street railway track.

See Words and Phrases, Permanent Edition, for all other definitions of "Streetcar".

3. Appeal and error ⇐237(2)

Where evidence is apparently admissible and no motion is made to strike it, objection to its admissibility is waived; but, where challenged evidence is obviously inadmissible at time it is offered and appropriate objection is made to its introduction, subsequent motion to strike it is not necessary to preserve the error on appeal.

4. Railroads ⇐350(16)

In action for injuries when plaintiff's truck in making left turn on city boulevard was struck by interurban electric car plaintiff's contributory negligence was under the evidence a question of fact.

◆

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Action by Thomas F. Dolton against D. C. Green and another to recover for injuries and damages sustained when plaintiff's truck collided with an interurban electric car. From a judgment for plaintiff, defendants appeal.

Reversed and remanded.

Frank Karr, C. W. Cornell, O. O. Collins, and Malcolm Archbald, all of Los Angeles, for appellants.

Claude A. Watson, Bernard Brennan, and Montgomery G. Rice, all of Los Angeles, for respondents.

WHITE, Justice.

This action was instituted by plaintiff to recover damages for personal injuries and property damage allegedly sustained as the result of a collision between a Chevrolet pick-up truck driven by plaintiff and an interurban electric car of the defendant Railway Corporation, which was being operated by defendant D. C. Green.

By his complaint, plaintiff alleges general negligence in the operation of the electric car. Defendants' answer denies any negligence in the manner in which the electric car was operated and, as an affirmative defense, pleads contributory negligence on the part of the plaintiff.

The cause proceeded to trial before the court sitting without a jury. By its findings of fact the court determined that plaintiff was free from negligence and that the proximate cause of the accident was the negligence of defendants in the operation of the electric car. Accordingly, judgment was entered in favor of plaintiff against both defendants. A motion for a new trial was denied. From the judgment, defendants prosecute this appeal.

The accident in question happened about eight o'clock on the morning of March 26, 1942, at the intersection of Venice and National Boulevards, in the City of Los Angeles.

The record reflects that National Boulevard is a paved street extending north and south of Venice Boulevard. The latter is also a paved street, extending east and west and is a divided highway, the north and south pavements thereof being separated by the right-of-way of the defendant Railway Company. The property of the private right-of-way is 50 feet wide. Two sets of tracks extend along this right-of-way, the northerly tracks being used by westbound and the southerly tracks by eastbound trains.

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* Subsequent opinion 164 P.2d 795.

By a written stipulation of fact, the nature of the rail operations conducted by defendant Railway Company was thus described: The electric car involved in the accident was engaged in interurban passenger service between Los Angeles and Santa Monica. The rails upon which this operation was conducted extended a distance of 17 miles between the aforesaid points. For about 11½ miles of this total distance, the rails were laid upon a private right-of-way of defendant Railway Company, which was constructed with T rails extending their full height above the ties, the tops of which were level with the ground. Attached to the stipulation is a sketch, from which it appears that for a distance of several miles, both east and west from National Boulevard where the accident occurred, the trains run over a private right-of-way of the Railway Company. Photographs looking along the tracks, both to the east and to the west from National Boulevard, show that the right-of-way extends straight in both directions as far as the eye can see and that there is no obstruction to the view of a motorist looking for approaching trains.

The paved portions of Venice Boulevard and the right-of-way are separated by cement curbings so that vehicular traffic is excluded from the track area except at road crossings, where the pavement of the road is laid flush with the tops of the rails.

Venice Boulevard consists of two separate roadways, which lie on each side of the right-of-way. For convenience, they will be hereinafter referred to as the North and South Roadways of Venice Boulevard. Vehicular traffic moves both east and west on each of these roadways. As a result of this construction, there are six entrances to the intersection of Venice and National Boulevards: two from National and four from Venice. Each of these entrances is posted with a standard boulevard stop sign. A railroad cross arm is located in the southeast corner of the intersection of the right-of-way and National Boulevard, while a standard automatic signalling device, commonly referred to as a wig-wag, is located on a pole at the northwest corner of the intersection of the right-of-way and National Boulvard.

Concerning the circumstances surrounding the collision, plaintiff testified that he had been over this crossing several times prior to the day of the accident and was cognizant of the fact that trains were operated along the tracks. That about eight o'clock on the morning of March 26, 1942, he drove his Chevrolet pick-up truck west on the North Roadway of Venice Boulevard toward National Boulevard. He stopped at the stop sign at National Boulevard and then made a "broad left-hand turn into National Boulevard across the Pacific Electric tracks." In making this left turn, he pulled in behind a brown sedan which was going south on National and followed it at a distance of about 15 feet and at a speed of about 10 miles an hour. Plaintiff testified he continued to follow this brown sedan at the same speed until it suddenly stopped for traffic proceeding east and west along the South Roadway of Venice Boulevard. Plaintiff stopped his vehicle about five feet behind the sedan, at which time he was right in the middle of the tracks on which the accident occurred. He further testified that when he stopped on the tracks he looked and observed the electric car which he estimated was then 200 feet away. He further testified that he looked around to see if he could back up but saw an automobile five feet behind him.

Plaintiff further testified that when he saw the electric car approximately 200 feet away, he formed no opinions as to its speed. The automobile in front of plaintiff remained in the same position up to the time of the collision. Plaintiff testified that the oncoming electric car "hit me broadside in the center of the right-hand side of my automobile." Regarding the observations made by him of the approaching electric car, plaintiff testified: "I saw the train approaching when I made the boulevard stop at the north of stop sign. The train was then beyond the next street which was the average length of a city block west of National Boulevard." It was stipulated that the average city block is four to five hundred feet in length. After giving a visible sign of his intention to make a left-hand turn when he was 58 feet from the tracks on which the train was traveling, plaintiff observed it coming toward him. He testified he could stop his truck within 10 to 12 feet and as he was approaching the tracks of defendant Railway Company, he observed traffic moving west on the south side of Venice Boulevard. As we read plaintiff's testimony, it appears that, from the time he observed the electric car when he was stopped on the tracks and the car was some 200 feet distant, he never again looked at it, up to the time of the impact, nor did he at any time form an estimate as to the speed of the approaching car.

Mrs. Thelma Russell, called as a witness by plaintiff, testified that she was walking south on the west side of National Boulevard some two or three hundred feet north of the tracks. She first observed the Pacific Electric car when it was three or four hundred feet west of National Boulevard. She continued to observe it and estimated that the car was traveling about 50 miles an hour from the time she first saw it until it struck the plaintiff's truck. When this witness first saw plaintiff's vehicle it was "right on the tracks" at the point where the accident occurred. She testified that when she first observed plaintiff's automobile it was proceeding very slowly and suddenly came to a stop; that there was an automobile in front of plaintiff's which was also stopped and an automobile behind him.

Another witness, J. M. Lee, called as a witness for plaintiff, testified he was riding in a truck which was being driven by another man. The vehicle was headed north on National Boulevard, came to a stop at the stop sign for the South Roadway of Venice Boulevard. When this witness first observed plaintiff's truck it was half way across the set of tracks north of the tracks on which the accident occurred. He first observed the electric car when it was approximately from five to six hundred feet away from the intersection and traveling at a speed of from forty to fifty miles an hour up to the time of the collision. He testified as to the place where the electric car stopped after the collision and it was stipulated the distance was 500 feet east of National Boulevard. This witness denied that any automobile was stopped in front of that of the plaintiff and testified that plaintiff's automobile was moving at the time of the accident. This witness was asked: "To be sure there is no mistake about it, there wasn't any traffic in front of Mr. Dolton that stopped at all?" to which he answered, "No, they were going this way" (indicating). He was then asked: "You are indicating that they turned to the right to go west on the south half of Venice?" He answered: "Yes." This witness further testified that he saw only three automobiles going across the tracks, that of plaintiff and two others that were preceding him; that at the time of the accident, the first of the three automobiles had passed the corner and the one immediately in front of plaintiff was just going to turn west and had not quite proceeded on to Venice Boulevard.

Another witness, Ernest Edward Hall, called by plaintiff, testified that he was the driver of the vehicle in which the preceding witness was riding. He first saw the truck involved in the accident when it was coming south across the northerly set of tracks and when he first saw the electric car it was about 150 feet from the intersection. His estimate of the speed of the car was 50 to 55 miles an hour and he further stated that its speed did not change from the time he first saw it until the impact. He also testified that from the time he first saw the electric car and plaintiff's truck, traffic was going both ways on the South Roadway of Venice Boulevard; that there was an automobile in front of plaintiff's truck which checked its speed because of an automobile making a left turn from the South Roadway of Venice Boulevard into National Boulevard. This witness further testified that there was an automobile following that of plaintiff, but it had not reached the north set of tracks. This witness testified positively that when plaintiff started onto the south tracks where the accident occurred the electric car was about 50 feet away, that plaintiff did not stop on the tracks but merely checked his speed.

The defendants produced as a witness David Wallace, who operated a service station at the northwest corner of Venice and National Boulevards. He testified that his attention was called to the electric car by its whistle, that when he glanced up and observed the car it was 100 to 150 west of the intersection; that the whistle ceased for approximately a second and then started blowing in sharp and sudden blasts, at which time he glanced over to the intersection and observed plaintiff's truck just about the moment of the impact.

John R. Stevenson testified he was the conductor of the electric car, but being on the inside thereof did not see plaintiff's truck before the accident. He testified that as the car was approaching the crossing, he heard two long and two short blasts of the whistle and that thereafter the motorman continued blowing several short blasts of the whistle. He testified the car had been traveling about 35 miles an hour;

that it was slowed down about 300 feet from the crossing to a speed of about 20 or 25 miles an hour by an ordinary service application of the brakes.

E. A. Knoller, another passenger on the electric car, was seated just behind the motorman in the front seat. He first saw plaintiff's truck going west on Venice Boulevard before it turned left; at that time, the electric car was four or five hundred feet from the intersection; that he saw the truck enter the intersection; that it turned left and continued to move onto the tracks at a speed of eight or ten miles an hour. This witness testified that there was no traffic in the intersection other than plaintiff's car. He also testified that the speed of the electric car was reduced to 25 or 30 miles an hour when it was 150 feet from the crossing and that he heard the whistle of the car start to blow when it was about 200 feet from the crossing.

Wayne H. Gillette, another passenger, seated on the second seat from the front on the right-hand side of the car, testified that when he first saw the truck it was headed toward the tracks. That the electric car was about 200 feet from the intersection moving approximately 25 to 30 miles an hour. He continued to watch the truck until it disappeared in front of the train just before the impact; that plaintiff's truck was continuously in motion and going slowly, probably 25 or 30 miles an hour. This witness testified he did not observe any traffic in front of the truck. He heard the whistle of the electric car when the latter was about 200 feet from the crossing and that it continued to blow until the car was a very short distance from the intersection. This witness testified that when the truck drove onto the tracks on which the accident occurred, the electric car was about 40 or 50 feet from the intersection. That he felt a sharp application of the brakes of the train about 50 feet before the impact occurred.

Claude Green, the motorman of the electric car involved in the accident, testified he first observed the truck when the car was about 200 feet from the intersection. He testified he watched the truck from the time he first saw it until the impact; that it was moving at about 10 or 12 miles an hour when he first saw it, but slowed down slightly when it got near the west-bound tracks. He testified that when he was about 50 feet from the point of the impact, he concluded the truck was not going to stop; that the train was then traveling about 25 miles an hour, at which time he applied the emergency. He further testified: "I tooted the whistle quick in short snappy blows of the whistle. At the time I applied the emergency brakes the train was traveling approximately 25 miles an hour. I would estimate that the speed of the train was retarded to about 20 miles an hour at the time of the accident." This witness also testified that he had operated a car of the type involved in the accident for about three years prior thereto; that the grade of the tracks immediately east and west of National Boulevard is just about level; that "going at a speed of 50 miles an hour on that track I could stop the electric car in about 500 feet by an application of emergency air, at a speed of 35 miles an hour I could stop it in about 350 feet, and at a speed of 25 miles an hour I could stop it between 225 and 250 feet." The motorman testified that when the impact occurred, "something hit me and knocked me out. When I came to, the train was coasting. The brakes are applied and released on the train by an instrument known as the air valve handle. When I came to, this handle was in a released position and I immediately applied brakes into emergency a second time."

[1] The rules of caution which govern the conduct of vehicle operators approaching the tracks of an electric interurban system where such tracks are constructed as they were at the point of the accident here in question are the same as the rules which are applied to steam railroad crossings in testing negligence of the party whose conduct is in question. Such was the holding of our Supreme Court in the recent case of Lund v. Pacific Electric Railway Co., 25 Cal.2d 287, 153 P.2d 705, in which case, with relation to the highways involved, the construction of the tracks was identical to the physical conditions prevailing in the case now before us. In the cited case, 153 P.2d at page 109, the Supreme Court held:

"The law of this state has already been settled adversely to plaintiffs' position. Here the defendant's cars were operated in interurban service upon tracks laid upon a private right of way, rather than upon city streets. Under such circumstances the rules governing their operation, including the traversing of street intersections, are those pertaining generally to steam or commercial railroads and not those applicable peculiarly to streetcars which use the city streets in common with other traffic. See Simoneau v. Pacific Electric Ry. Co., 1911, 159 Cal. 494, 496–501, 115 P. 320, 329; Riney v. Pacific Electric Ry. Co., 1919, 45 Cal.App. 145, 148, 187 P. 50; Cash v. Los Angeles Ry. Corporation, 1935, 6 Cal.App.2d 738, 740, 45 P.2d 280."

In defining the rights and obligations of vehicle drivers under the conditions with which we are here confronted, it was held in Billig v. Southern Pac. Co., 192 Cal. 357, 362, 219 P. 992, 994, as follows:

"In the foregoing cases and in others yet to be cited the rule is that it is the duty of a person approaching the crossing of a suburban railroad being operated outside of the limits of cities, whether the same are steam or electric railroads or are railroads upon which motor cars propelled by gasoline are being used, to stop and look and listen for such approaching trains or cars and to yield the right of way to such trains or cars. Green v. Southern Cal. Ry. Co., 138 Cal. 1, 70 P. 926; Murray v. Southern Pac. Co., 177 Cal. 1, 169 P. 675; Herbert v. Southern Pac. Co., 121 Cal. 227, 53 P. 651; Griffin v. San Pedro L. A. & S. L. R. Co., 170 Cal. 772, 151 P. 282, L.R.A.1916A, 842; Thompson v. Southern Pac. Co., 31 Cal.App. 567, 161 P. 21; Basham v. Southern Pac. Co., 176 Cal. 320, 168 P. 359; Simoneau v. Pacific Elec. Co., 159 Cal. 494, 15 P. 320; Loftus v. Pacific Electric Ry. Co., 166 Cal. 464, 137 P. 34; Heitman v. Pacific Electric Ry. Co., 10 Cal.App. 397, 102 P. 15; Baker v. Southern Pac. Co., 184 Cal. 357, 93 P. 765; Young v. Southern Pac. Co. [189 Cal. 746], 210 P. 259, 262. In the case last above cited the court, in applying the foregoing rule to the facts of that case said: 'The law presumes that a person possessing normal faculties of sight and hearing must have seen and heard that which was within the range of his sight and hearing. Absent-mindedness or forgetfulness will not suffice as an excuse for the neglect of a person about to cross a railroad track to look and listen for a possible approaching train. And a person who attempts, regardless of warnings, to cross in front of a moving train, even though he be apparently in a condition of mental abstraction and consequently indifferent to the peril of his situation, is nevertheless negligent'; and upon a former appeal of the same case this court, upon the same facts, held that such a person would be negligent as a matter of law. Young v. Southern Pac. Co., 182 Cal. 369, 190 P. 36.

"Turning from the right and duty of persons approaching upon a highway at its intersection with a suburban railroad to the right and duty of the engineer or motorman in charge of such suburban train or car in approaching such intersection, this court has held in numerous and uniform cases that such engineer and motorman has the right to presume that a person thus approaching the crossing of a suburban railway will perform the duty which the law imposes upon him under the foregoing authorities, and in the reasonable exercise of his faculties of observation and caution will not essay such crossing until the danger due to the approaching train or car has passed, *and it has accordingly been held that the operator of such train or car was not bound to check the otherwise rightful speed of his train or car in approaching and passing such crossing until at least he has reason to believe that such person so approaching such crossing is not performing, or is not likely to perform, his duty in the foregoing regard.*" (Emphasis added.)

Relying upon the foregoing rules and the authorities supporting them, appellants first contend that the trial court committed prejudicial error in receiving into evidence over their objection certain sections of an ordinance of the City of Los Angeles which regulated operators of streetcars with respect to speed and stopping in obedience to boulevard stop signs.

The sections of the aforesaid ordinance, which is numbered 77,000 of the Municipal Code of the City of Los Angeles, read as follows:

Section 80.21:

"(a) The Commissioners are hereby authorized to determine those streets and intersections at which traffic is hazardous or dangerous to life or property by reason of the volume of traffic upon such streets or at such intersections, or the lack of visibility of the drivers of vehicles approaching said streets or intersections, or because of the numerous reported accidents or the possibility thereof, or by reason of other physical conditions likely to render any such street or intersection dangerous or hazardous to life or property.

"(b) When the Commissioners have determined that a street or intersection is dangerous or hazardous to life or property, they are authorized and empowered to place and maintain, subject to the approval of the Council, stop signs at or near such of the entrances to said streets or intersections as they shall designate.

"(c) Every such stop sign shall conform to the requirements of the Vehicle Code."

Section 80.22:

"When stop signs are erected and maintained pursuant to Section 80.21 or pursuant to any former ordinance or resolution at the entrance to any intersection, every driver of a vehicle and every operator of a street car shall stop at every such stop sign before entering the intersection, except when directed to proceed by a police officer or traffic control signal."

Section 80.43:

"(a) The operator of any street car shall not drive said street car at a speed exceeding the following:

"1. Fifteen (15) miles per hour when traversing another street car crossing or a highway crossing or when turning upon curves, in either event when the operator does not have an unobstructed view along such intersecting rails or highway or around such curve within a distance of two hundred (200) feet; also when passing schools while persons are entering or leaving the grounds thereof.

"2. Twenty (20) miles per hour in business districts.

"3. Twenty-five (25) miles per hour in residence districts.

"4. Forty-five (45) miles per hour in all other places.

"(b) The provisions of this section shall not apply when a street car is being operated upon a private right of way which is effectively protected from vehicular traffic."

Appellants objected to the introduction of sections 80.21 and 80.22 on the ground, among others not here pertinent, that said sections were "incompetent, irrelevant and immaterial, having no bearing upon the operation of interurban cars on tracks on a private right-of-way; that if construed as applying to such operation, said sections would be unconstitutional."

To the introduction of section 80.43 of the ordinance, appellants objected on the ground that said section was "wholly immaterial, having no bearing on the facts at issue for the reason that said section was not applicable to the operation of electric trains upon a right-of-way such as was involved in the case at bar".

[2-4] The objections were overruled and each of the foregoing sections of the ordinance was received in evidence. The ruling was erroneous. The provisions of the ordinance are limited in scope to the operation of street cars. A street car is defined in Webster's New International Dictionary, second edition, as "a car, usually a passenger car, running through the public streets." The same authority defines a street railway as "a street car line." In Piedmont Cotton Mills v. Georgia Ry. & Electric Co., 131 Ga. 129, 62 S.E. 52, 58, the court states:

"'Street cars', accurately speaking, are cars which traverse the streets of a town or city, and carry passengers, who get on and off at various points along the line. They have been considered as vehicles of street travel, * * *."

It is therefore the nature and location of the tracks rather than the character of the particular car that is running upon the tracks that determines the applicability of the ordinance. Respondent directs our attention to the fact that the car here in question is "of the type which customarily functions in local traffic"; "would stop at any corner on signal"; but, as pointed out in Simoneau v. Pacific Electric Ry. Co., 159 Cal. 494, 501, 115 P. 320, if the test were not the location and nature of the tracks rather than the character of the particular car, very little protection would be afforded the public by these safety ordinances, because interurban trains would be exempt from the ordinance when operating upon tracks which are laid upon public streets, that is to say, streets from the use of which as a public highway the public is not excluded. There can, therefore, be no doubt applying the foregoing test, that in so far as the track was laid along the private right-of-way in such manner as to exclude the general public from the use of any part of the right-of-way, such track was not a street railway track and the car operated over such right-of-way was not a "street car" in contemplation of the ordinance. Nor does the fact that the private right-of-way was intersected at intervals by public highways devoted to vehicular traffic, at which intersections the track is laid flush with the street so that vehicles might cross the track on such street, convert this part of the track into a street railway track. As was said in Simoneau v. Pacific Electric Ry., supra, 159 Cal. at page 500, 115 P. at page 324:

> "The respondent draws attention to the fact that, for the width of Thirty-eighth street the track was laid flush with the surface so that passengers and vehicles might cross on the street. It cannot be said that this part of the track was thereby converted into a street railway track. A street railway, as we have seen, is one running along a public street, not across one. To adopt the contention of the respondent in this regard would mean that the track of every commercial or steam railroad which in entering the city of Los Angeles crossed any street became to the extent of the width of such street a street railway track. This is obviously not the intent of the ordinance."

Upon the authority of Simoneau v. Pacific Electric Railway, supra, and Lund v. Pacific Electric Railway Co., supra, it must be held that when the ordinance speaks of street cars it has reference to cars operated on rails along and upon the streets of the City of Los Angeles and not to cars or trains of cars operated on a private right-of-way which at intervals merely cross a street. Had the drafters of the ordinance intended otherwise, it would have been easy and simple to so provide. Lund v. Pacific Electric Railway Company, supra, 153 P.2d at page 709. To us it is clear from the record that, at the time and place with which we are here concerned, the electric car was being operated as part of an interurban rapid transit system between Los Angeles and Santa Monica and not as a street car. Hence, the admission of the aforesaid ordinance into evidence was error. Respondent urges that appellants cannot now complain of the introduction of the ordinance into evidence because they failed to make a motion to strike the same. It is only where the evidence is apparently admissible and no motion is made to strike it when the contrary is shown that an objection to its admissibility is deemed to have been waived, but where, as here, the challenged evidence was obviously inadmissible at the time it was offered and appropriate objection was made to its introduction, a subsequent motion to strike is not necessary to preserve the error on appeal. Ballos v. Natural, 93 Cal.App. 601, 608, 269 P. 972; Nakamura v. Los Angeles Gas & Electric Corporation, 137 Cal.App. 487, 490, 30 P.2d 1022. The error complained of requires a reversal of the judgment because we cannot say what weight and influence the improper evidence had upon the trial court in framing its findings of fact wherein it determined that respondent was free from negligence and that appellant motorman was guilty of negligence which proximately contributed to respondent's injuries. Davis v. Robinson, 50 Cal.App.2d 700, 705, 123 P.2d 894. Appellants' contention that respondent was, as a matter of law, guilty of negligence cannot be sustained. Although respondent's actions must be viewed in the light of the standard of conduct required of persons operating vehicles at railroad crossings, nevertheless, we are not prepared to say that reasonable minds could draw but one inference from respondent's conduct and that such inference points inevitably to the conclusion that in driving onto the appellant Railway's track respondent closed his eyes to the dangers necessarily involved and "blindly, recklessly and imprudently" attempted to cross in front of an approaching electric car. While there is in the record testimony which would support a finding of negligence upon the part of respondent, nevertheless, if his testimony is to be believed, then it cannot be said as a matter of law that he was guilty of negligence. True, respondent saw the electric car approaching when he was standing at the stop sign but the car was then four or five hundred feet away. Respondent also admitted that he again saw the car as he made his left-hand turn when he was 58 feet from the car tracks, but when he completed his left-hand turn and found himself in the southbound traffic consisting of four or five other vehicles he was deprived of freedom of action. When the traffic in front of him halted he had no alternative except to stop. He could not turn aside and he could not go backward because of the automobile to his rear. The situation here present is not comparable to those existing in the cases cited by appellants wherein the vehicle driver approaches and goes upon the track with perfect freedom of action to stop, accelerates his speed or turn aside. Under the circumstances present in the case at bar, we are not warranted in saying that no reasonable person would have conducted himself as respondent did in the operation of his vehicle. The question of contributory negligence, in view of the conflict in the evidence concerning the situation in which respondent found himself and the manner in which he acted thereunder, was therefore one of fact and not of law.

For the foregoing reasons the judgment is reversed and cause remanded for a new trial.

YORK, P. J., and DORAN, J., concur.

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71 Cal.App.2d 403

In re LINGG'S ESTATE.

EGGERT et al. v. AMERICAN TRUST CO. et al.

Civ. 12841.

District Court of Appeal, First District, Division 2, California.

Oct. 30, 1945.

Hearing Denied Dec. 27, 1945.

1. Executors and administrators 🔑314(11, 12)

A decedent's heirs or devisees may consent to distribution of estate in particular manner, and court may incorporate their contract in distribution decree either expressly or by apt reference, in which case consenting parties cannot complain on appeal that decree departs from terms of decedent's will.

2. Estoppel 🔑98(3)
Executors and administrators 🔑314(12)

Where testator's widow consented to decree of distribution of the estate so that she could not later have objected to it or appealed from it, persons claiming under widow as heirs, legatees and devisees could not do so. Probate Code, §§ 41, 201, 1120.

3. Executors and administrators 🔑315(6)

A decree, distributing residue of testator's estate in entering distribution decree conclusive adjudication of validity of testator's disposition thereof, terms of testamentary trust and rights of all parties claiming any legal or equitable interest under will, supersedes the will, and prevails over any provision therein inconsistent with decree.

4. Judgment 🔑355

Judicial errors, which are fault of exercise of judicial discretion in rendition of orders or judgments, may be corrected only by statutory procedure.

5. Executors and administrators 🔑315(4)

The superior court's inadvertence or mistake in overlooking statutory limitation of value of property which may be bequeathed to charity to one-third of testator's estate in entering distribution decree is not clerical, but judicial, error, and hence not subject to correction on motion before delivery to charitable organization of part of residue of testator's estate distributed to such organization by decree. Probate Code, § 41.

◆

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

In the matter of the estate of Henry F. Lingg, deceased. From an order denying a motion by Hazel Eggert and another to amend and correct a final distribution decree, under which the American Trust Company, trustee under deceased's will, was about to deliver part of the residue of the estate, to the Roman Catholic Orphan Asylum of San Francisco, movants appeal.

Affirmed.

George D. Collins, Jr., of San Francisco, for appellant.

Brobeck, Phleger & Harrison, of San Francisco, for respondent Roman Catholic Orphan Asylum of San Francisco.

GOODELL, Justice.

This appeal was taken from an order denying the appellants' motion to amend and correct the decree of final distribution in this estate. The motion was made over two years after distribution, and at the time (shortly after the death of the testator's widow) when the respondent trustee was about to deliver to the respondent Orphan Asylum, that part of the residue of the estate distributed to it by the decree. The share thus going to charity consisted of securities, the value of which may be conceded to be in excess of the statutory limit of one-third of the estate (sec. 41, Probate Code). The appellants' motion was designed to prevent the respondent Orphan Asylum from receiving more than such one-third, and to obtain all in excess thereof for themselves as heirs, legatees and devisees of the testator's widow.

The testator died on December 7, 1940, leaving as his next of kin his wife, Matilda Lingg, three brothers and a sister. The widow was executrix of the will. Her account shows that the appraised value of the estate accounted for by her was $43,851.85, of which approximately 70% was in stock and bonds.

The widow was not very liberally provided for by the will. She was bequeathed $1,000 in cash, also personal effects, jewelry, an automobile, and the household furnishings; she was devised a life estate in real property on Capistrano Avenue, Berkeley (which property apparently already stood in her name) with the remainder to the appellant Hazel Eggert, her daughter by a former marriage; she was also devised a life estate in real property on Grant Street, Berkeley, with the remainder to the respondent Orphan Asylum; she was bequeathed the income for her life from the residue (after the payment of several money legacies), which residue formed the corpus of a testamentary trust. This residue consisted of securities, and the will provided that upon the widow's death the trust should terminate and the trustee should pay certain legacies out of the corpus and pay "the remainder and/or residue of said Trust Fund to the Catholic Orphanage of San Francisco Diocese".

The inheritance tax appraiser determined that the net estate amounted to $38,329.59; that $28,665.70 thereof was community property and $9,663.89 thereof separate property.

It is evident that the widow was not content to take only under the will, for the decree of distribution found that she "has elected to take and receive her community share of the estate", and that "pursuant to agreement between said Matilda Lingg, and the interested residuary devisees, legatees and beneficiaries under the will of said deceased, that the community share of said Matilda Lingg consists of that portion of the estate of said deceased hereinafter distributed to said Matilda Lingg which is designated as her community share".

The stocks and bonds were valued, according to the account, at about $30,500, ($30,745.83 to be exact). Had the decree of distribution followed the terms of the will all these securities would have gone into the residue, but under the settlement which came about because of the widow's assertion of her community right, there was a division of these securities. As a consequence there were distributed to her, outright, securities of the value of approximately $13,500 or about 45% of the whole, which left securities of the value of approximately $17,000, or about 55% of the whole, to fall into the residue. In short, instead of approximately $30,500 in stocks and bonds forming the residue, the major part of which eventually would go to the respondent Orphan Asylum, only a little over half thereof did so. Under the decree of distribution, notwithstanding this division, the widow still received the income for life from approximately $17,000 of securities which went into the residue.

[1] The appellants contend that the provisions of the decree of distribution which obviously distributed more than one-third of the estate to charity, could not be conclusive because it was impossible to determine at the time of distribution, or until the termination of the trust on the death of the widow whether the devise and bequests to charity exceeded one-third of the estate, and, if so, the amount of such excess. In this connection they claim that under sec. 1120, Probate Code the court retained jurisdiction because a trust continuing after distribution was involved (citing In re Estate of Evans, 62 Cal.App.2d 249, 144 P.2d 625). Appellants rely on In re Estate of Campbell, 175 Cal. 345, 165 P. 931 and In re Estate of Burns, 26 Cal.App.2d 741, 80 P.2d 77. Before discussing those cases, however, we would advert to the important fact that a settlement was agreed on before distribution, to which agreement the widow and "the interested residuary devisees, legatees and beneficiaries" were parties. Included in such group was the respondent Orphan Asylum, the largest devisee and legatee, and presumably included also were these appellants, for their legacies (in no way involved in the present controversy) were to come out of the residue before the Orphan Asylum was to receive the rest of it. This agreement was made notwithstanding the widow could have insisted on her community right without asking leave of the other beneficiaries (sec. 201, Probate

Code). "The heirs or devisees may consent to a distribution in a particular manner, and the court may incorporate their contract in its decree, either by express terms or by apt reference * * *. The consenting parties cannot complain on appeal that the decree departs from the terms of the will". (11b Cal.Jur. p. 767). The decree herein departed from the will in that it gave the widow some $13,500 in securities which the testator had not left her, and thereby reduced the bequest to charity by exactly that much. That, the only departure, was by the widow's own election. The testator left no issue. His only next of kin were his wife, three brothers and a sister. The brothers and sister were not mentioned in the will, did not appear in the proceedings or object to the distribution, and they are not parties to this appeal. Hence the widow would seem to be the only person who could have objected to the charitable bequest in excess of the one-third limitation, or benefited by a reduction of such bequest. See In re Estate of Cottrill, 65 Cal.App.2d 222, 150 P.2d 214; see also Matter of Estate of Dwyer, 159 Cal. 680, 687, 115 P. 242, which explains the theory and purpose of the legislation relating to charitable bequests. She was the executrix of the will, and of course knew from the very outset that it made exceedingly generous provision for charity. She saw fit to assert her community right, with the results already noted. The fact that she did not demand more would indicate that she was disinclined to further cut into the bequest which her husband had intended for charity.

[2] If, as the appellants now contend, the court could not have determined the excess, if any, until after the widow's death, Mrs. Lingg could have asked for such form of distribution as would have reserved that question until the excess, if any, could be ascertained. See In re Estate of Campbell, supra, 75 Cal. at page 352, 165 P. 931, where such procedure is suggested. Instead of doing so she consented to the very distribution to the respondent Orphan Asylum which the decree, now under attack by her heirs, granted.

It would seem, then, that Matilda Lingg, having consented to the decree, could not have later objected to it, or appealed from it. In re Estate of Lorenz, 124 Cal. 495, 57 P. 381; Hibernia, etc., v. Waymire, 152 Cal. 286, 287, 92 P. 645; People v. Hodges, 205 Cal. 476, 477, 271 P. 897; In re Estate of Hunt, 102 Cal.App. 650, 654, 283 P. 366; Kentera v. Kentera, 66 Cal.App.2d 373, 375, 152 P.2d 238. Nobody else appealed. If she could not have successfully made this motion, then certainly these appellants, who avowedly claim through and under her as *her* heirs, legatees and devisees, could not do so. They were stepchildren of the testator and not within the class of persons who would benefit if the charitable bequest were to be cut down to the statutory one-third. See Cottrill and Dwyer cases, supra.

In re Estate of Campbell, supra, was a case where the court on *partial* distribution attempted to decide then and there that the will violated the one-third limitation, although the will was full of contingencies. The decree of partial distribution was reversed, the court holding that whether the one-third limitation was exceeded or not could not possibly be determined at that time because all the persons upon whose deaths the charitable bequests would become effective were still alive. The opinion [175 Cal. 345, 165 P. 932], says that "the only way in which the rights of all parties can be fully protected is at this time to distribute all the property to the trustee, for the purposes of the trust, *reserving the matter of further distribution until the termination of the trust,* at least in so far as the charitable bequest is concerned." (Emphasis ours.) In re Estate of Burns, supra, was an appeal from a judgment of non-suit in a will contest grounded on claimed undue influence. The court simply held that whether or not the one-third limitation was exceeded could not then be decided. The court eliminated that question by saying that it was conceded "that the sole question involved on this appeal is whether the evidence produced by them [appellants] established a prima facie case of undue influence." [26 Cal.App.2d 741, 80 P.2d 82.] Manifestly such an appeal was not the time or place for the determination of such a question as the validity of a charitable trust contained in a will.

[3] In addition to what has been said, we are satisfied that the rule found in the cases cited by the respondent Orphan Asylum is determinative of this controversy. That rule is stated in 11b Cal.Jur. p. 796,

§ 1296. It has been applied in a number of cases, among which are Goldtree v. Allison, 119 Cal. 344, 51 P. 561; In re Trescony, 119 Cal. 568, 51 P. 951; Keating v. Smith, 154 Cal. 186, 97 P. 300; In re Estate of Scrimger, 188 Cal. 158, 206 P. 65; Cook v. Cook, 17 Cal.2d 639, 652, 111 P.2d 322 and In re Estate of Gardiner, 45 Cal.App.2d 559, 564, 114 P.2d 643; In Keating v. Smith, 154 Cal. at page 191, 97 P. at page 302, the rule is clearly stated as follows:

"The will attempted to create a trust which, considered by itself, was no doubt invalid under the rule declared in Re Estate of Fair, 132 Cal. 523, 60 P. 442, 64 P. 1000, 84 Am.St.Rep. 70. The validity of the trust is, however, no longer open to question. The decree of the superior court distributing the residue of the estate to trustees upon certain trusts is a conclusive adjudication of the validity of the disposition made by the testator. Crew v. Pratt, 119 Cal. 139, 51 P. 38; Goldtree v. Allison, 119 Cal. 344, 51 P. 561.

"And it is equally conclusive as an ascertainment and adjudication of the terms of the trust, and of the rights of all parties claiming any legal or equitable interest under the will. Goad v. Montgomery, 119 Cal. 552, 51 P. 681, 63 Am.St.Rep. 145; Williams v. Marx, 124 Cal. 22, 56 P. 603; More v. More, 133 Cal. 489, 65 P. 1044. The decree supersedes the will and prevails 'over any provision therein which may be thought inconsistent with the decree'. Goad v. Montgomery [119 Cal. 552, 51 P. 681, 63 Am.St.Rep. 145]. In determining the rights of the widow, we are, therefore, to look, not to the terms of the will, but to those of the decree of distribution."

The Scrimger case, supra, contains several points of similarity to this case. In the first place that was an appeal from an order settling the account of a trustee made about ten years after the decree of distribution had become final. Here the appeal was taken from an order denying the appellants' motion, made at the time when the trustee's account, rendered a year and a half after the decree of distribution had become final, was before the court for settlement. In both cases the attack was based upon a claimed violation of the section dealing with charitable devises and bequests. In the Scrimger case the will had been made less than 30 days before the testator's death but, despite that, the decree had followed the will and distributed one-third to charity. In an attack made by a suit in equity (McGavin v. San Francisco Protestant Orphan Asylum, 34 Cal.App. 168, 167 P. 182), some time after the decree of distribution had become final a legatee sought for the first time to raise the point that the will had been made within 30 days before death. The trial court gave judgment setting aside the decree of distribution on the ground that in so far as it purported to distribute one-third to charity it was void. The basis of the judgment was the mistake of the attorney handling the estate in overlooking the 30 day point, just as the appellants' motion herein was made on the ground that the court had by *oversight* distributed more than one-third to charity. The judgment was reversed. About 10 years after the decree of distribution, when the trustees filed their account, another attack was made, based, inter alia, upon the 30-day point theretofore litigated in the McGavin case. The court declined to upset the decree of distribution, holding (188 Cal. at page 169, 206 P. at page 70,) that "The court had jurisdiction to make an erroneous decree of distribution, and, even though the facts showing such error appeared upon the face of the decree, it would not be void as to such provisions. The remedy would be by appeal." The court in the same opinion (188 Cal. at pages 164, 165, 206 P. at page 68) had stated at some length the rule found at 11b Cal.Jur. p. 796, supra, and likewise stated in Keating v. Smith, supra. In the Scrimger case, the court refused to concede that the decree of distribution was erroneous, saying (188 Cal. at page 169, 206 P. at page 70), "Moreover, the mere fact that the decree of distribution was made in accordance with the terms of the will, notwithstanding the fact that the will was invalid as to the charitable bequests, would not necessarily show that the decree was erroneous. It might have been consented to by the persons who would otherwise be entitled to receive the trust estate and for that reason be valid." In the same connection it is interesting to note that in the McGavin case, 34 Cal.App. at page 173, 167 P. at page 184, the court said: "In conclusion it may be said that, in the absence of the explanation given by the plaintiff, the conduct of the parties is inexplicable, except upon the theory that the mother and sister of the deceased had originally concluded that the orphanages designated in the invalid provision of the will should receive the benefit of the bounty of their relative, regardless of its vulnerability to attack; and that the present suit, instituted after the death of the mother, is the result of an after-thought and a changed attitude on the part of the plaintiff." In the case at bar, in discussing the consent feature of the decree here under attack we have pointed out that Matilda Lingg might well have intended that all over and above what she then claimed, *and received by the decree,* should go to charity, as her husband had intended it (and more) should go. The observations in both cited cases are particularly pertinent to this case and (as in the Scrimger case) it is not necessary to hold that the decree herein was erroneous.

The appellants' reliance upon the Campbell case is because (they argue) it was not until Matilda Lingg died and the corpus was ipso facto released and ready for delivery to charity that the amount of the excess could be determined, hence that at the time of distribution she was in no position to raise the question and never had her day in court on this issue. We believe this contention has already been answered herein.

When the court found that none of the provisions of the decree of distribution was the result of mistake or inadvertence on the part of the court, Matilda Lingg or any other person, but that the decree "is a valid and binding determination of the rights of all persons in and to all of the property of the decedent", it had before it, of course, the record from which clearly appeared all the facts respecting the widow's assertion of her community right; the agreement reached before distribution; the appraised value of the community and separate property and the appraised value of all the securities bequeathed to charity. The court knew, moreover, that the widow was executrix, and that, as such, she had signed the petition for distribution. With all these facts before it, the court could not have concluded otherwise than it did.

[4, 5] There is another and separate reason why the court's ruling was right. It is settled law that "judicial error which occurs in the rendition of orders or judgments which are the fault of an exercise of judicial discretion may not be corrected except by statutory procedure." Phillips v. Trusheim, 25 Cal.2d 913, 916, 156 P.2d 25, 26, citing Stevens v. Superior Court, 7 Cal.2d 110, 59 P.2d 988. The appellants' motion was made on the ground of judicial inadvertence or mistake in that the court overlooked the one-third limitation contained in sec. 41, Probate Code, when it entered the decree of distribution. This was no clerical error. If there was an oversight it was a judicial error and not subject to correction by a motion such as that made herein.

The order is affirmed.

NOURSE, P. J., and STURTEVANT, J., concur.

Hearing denied; CARTER, J., dissenting.

WILKINS v. CITY OF SAN BERNARDINO et al. *

Civ. 3293.

District Court of Appeal, Fourth District, California.

Oct. 30, 1945.

Hearing Granted Dec. 27, 1945.

1. Municipal corporations 🔑601

A municipality may zone territory within its limits so as to provide for various occupancies in various zones, provided zones as established are reasonably related to the public health, safety, morals or general welfare and none of the zones created constitute an unwarranted invasion of private property rights.

2. Municipal corporations 🔑601

The creation of small business zones entirely within residential sections is valid and is within the reasonable exercise of the police power of a city.

3. Municipal corporations 🔑601

The drawing of boundary lines of zones within a municipality must of necessity be more or less arbitrary, so that fact, alone, that property adjoining such a line is placed in one zone although owner would prefer another is no ground for complaint.

4. Eminent domain 🔑2(1)

Increasing or diminishing value of property by restricting its use under a valid zoning ordinance does not render ordinance void.

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* Subsequent opinion 175 P.2d 542.

5. Municipal corporations ⚷601

Zoning areas for single family dwellings is a valid exercise of the police power by a city as tending to promote the general welfare.

6. Municipal corporations ⚷601

The common council of San Bernardino is vested with constitutional authority to zone areas of the city and limit the use of property in some of those areas to single family dwellings and use in other areas to business establishments or multiple dwellings.

7. Municipal corporations ⚷601

A zoning ordinance, otherwise valid, is void as to particular property if a small parcel is zoned for residential purposes when it is entirely surrounded by business or commercial enterprises, if property zoned for residential use is entirely unsuited for residential purposes, or if purpose of ordinance is not to promote and protect public welfare but create a monopoly of use of property within a certain zone and exclude other enterprises from the city.

8. Municipal corporations ⚷601

Where property owner owned vacant land in area zoned for small business and multiple dwellings as well as in areas zoned for single family dwellings, and his property in latter area was surrounded on three sides by other property zoned for single family dwellings, and zoning ordinance was not designed to create a monopoly of multiple dwellings and property in single family zones was suited for residential use, zoning ordinance was valid as applied to owner's property in single family zone.

9. Municipal corporations ⚷601

The existence of heavily traveled streets and boulevards in the neighborhood has no bearing on question as to whether particular property should be zoned for single family dwellings or multiple dwellings.

10. Municipal corporations ⚷601

Owner of property in zone for single family dwellings was not entitled to erect multiple dwellings thereon because of other nonconforming uses in the neighborhood, such as dwellings erected on lots containing a smaller footage than minimum specified for single family dwellings by zoning ordinance.

11. Municipal corporations ⚷621

Where owner of property in single family dwelling zone knew that zoning ordinance did not permit him to build multiple dwellings and he applied for building permits to erect single family dwellings, his deliberate violation of ordinance by changing plans and erecting multiple dwellings conferred no new rights on him to violate the ordinance.

12. Evidence ⚷5(2)

Court took judicial notice that a houseing shortage exists in San Bernardino and in many other places in California.

13. Municipal corporations ⚷601

The existence of a housing shortage in San Bernardino did not excuse plaintiff's deliberate violation of zoning ordinance by erecting multiple dwellings on properties zoned for single family dwellings and did not furnish valid reason for holding zoning ordinance void in its application to plaintiff's property.

14. Appeal and error ⚷989

Evidence consisting of what court saw in taking a view of premises, like all the other evidence, must be weighed, considered, construed and applied under principles of law governing appellate review.

15. Municipal corporations ⚷63(1)

Fixing boundaries of a zone is a legislative act committed to the sound discretion of the legislative body and the courts cannot interfere.

16. Municipal corporations ⚷122(2)

The strong presumption in favor of validity of a legislative act applies to municipal zoning ordinances.

◆

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by A. L. Wilkins against the City of San Bernardino, W. C. Seccombe, Mayor, and Howard Holcomb and others, as members of the common council of such city, to enjoin the enforcement of city zoning ordinance as it affected certain property owned by plaintiff. Judgment for plaintiff and defendants appeal.

Reversed.

H. R. Griffin, City Attorney, and Martin J. Coughlin, both of San Bernardino, for appellants.

E. John Eriksson and Homer M. Bail, both of San Bernardino, for respondent.

MARKS, Justice.

This action was brought to enjoin the City of San Bernardino and the individual defendants who composed its common council from enforcing the provisions of its zoning ordinance as it affected certain property owned by plaintiff. After taking considerable evidence and viewing the premises the trial court found that the provisions of the ordinance as it affected plaintiff's property involved here "is not reasonably related to the public health, safety, morals or general welfare, and constitutes an unreasonable, oppressive and unwarranted invasion of plaintiff's property rights * * *." The injunction was ordered issued and this appeal followed.

"E" Street is one of the main traveled streets of the city of San Bernardino. It runs north and south and connects with the highway leading into and across California from the east. It carries heavy traffic of all kinds. Marshall Boulevard is a main east and west artery running through the northerly portion of the city of San Bernardino and carries considerable local traffic. It intersects "E" Street at right angles. Acacia Street is the first north and south street west of "E" Street. The distance between the west line of "E" Street and the east line of Acacia Street is approximately 394 feet.

In the subdivision of the block between "E" and Acacia Streets north of Marshall Boulevard the lots were laid out 50 feet wide and approximately 394 feet long with the longest dimension running east and west from Acacia Street to "E" Street. Lot 72 of the tract borders Marshall Boulevard on the north. Lots 71, 70 and 69 lie consecutively north of Lot 72. Plaintiff owned the easterly portions of lots 72 and 71 and all of lots 70 and 69. He also owned other property bordering the intersection. He had constructed a two-story business building on the northwest corner of the intersection with stores on the ground or first floor and apartments above. He had also erected multiple dwellings and garages on the portions of lots 70 and 69 west of this building, extending west to a point 112 feet east of the east line of Acacia Street. These buildings were well constructed and conformed in all respects to the zoning and building ordinances of the city of San Bernardino. All of the lots lying south, west and north of plaintiff's property, except the property along "E" Street which was zoned for business, were occupied by single family dwellings, except that the evidence may indicate that two single family units were constructed on one lot on the west side of Acacia Street a short distance north of Marshall Boulevard.

The first zoning ordinance of the city of San Bernardino was passed in 1925. It was superseded by another zoning ordinance in 1930. This was also superseded by the zoning ordinance in question here which was passed on May 4, 1942. These ordinances followed the same general plan, the southerly line of the northerly single family dwelling zone being placed progressively north to meet the changed conditions brought about by the rapid growth of the city. The present south line of this zone is 150 feet north of the north line of 23d Street which is about ten blocks south of Marshall Boulevard and the property in question here. Small business zones were provided for in the single family residence zones to provide neighborhood trading centers for the convenience of the inhabitants. Multiple dwellings could be erected in these small business zones. The property lying on the four corners of "E" Street and Marshall Boulevard composed one of these small business zones. This small business zone is entirely surrounded by property zoned for single family dwellings.

In June 1940, plaintiff filed an application requesting that all of Lots 70 and 69 be included in the neighborhood business zone. This application was denied as to the west 112 feet of these lots abutting on Acacia Street but was granted as to the balance of the lots. On March 11, 1942, he filed an application to change the west 112 feet of the lots from the single family dwelling zone to the multiple dwelling zone. This application was denied. In April 1942, he applied for a building permit for multiple dwellings on the whole of the two lots which was denied because the west 112 feet was in the single family dwelling zone. In May and in June 1942, he applied for and obtained two permits to erect a two-story and garage and single family dwelling on the west 112 feet of each of Lots 70 and 69. His plans submitted with the applications showed single family dwellings. Instead of following these plans he erected two multiple family units with one apartment and garages on the first floors and two apartments on the second floors. This was in violation of his building permits and the zoning ordinance of the city. The facts detailed show clearly that these violations were deliberate on the part of plaintiff. There is no contention that the buildings are not modern and well constructed.

He again filed an application to change the zone on the west 112 feet of the two lots to permit the use of the multiple dwellings he had erected. This application was denied in May 1943, was reconsidered and was again denied in August 1943. This litigation followed with the results already indicated.

[1, 2] No question is raised as to the due passage of the San Bernardino zoning ordinance. The right of a municipality to zone territory within its limits thus providing for various occupancies in the various zones is admitted and cannot be questioned, provided the various zones as established are reasonably related to the public health, safety, morals, or general welfare, and none of the zones created constitute an unreasonable, oppressive or unwarranted invasion of private property rights. The creation of small business zones entirely within residential sections has been upheld as a practice in almost universal operation and one that is within the reasonable exercise of the police power of a city. Zahn v. Board of Public Works, 195 Cal. 497, 234 P. 388; Feraut v. City of Sacramento, 204 Cal. 687, 269 P. 537; Harris v. City of Piedmont, 5 Cal.App.2d 146, 42 P.2d 356.

[3, 4] It is also established that drawing the boundary lines of the zones must of necessity be more or less arbitrary for in the nature of things there cannot be much difference between property on one side of an imaginary line and that on the other. Brown v. City of Los Angeles, 183 Cal. 783, 192 P. 716; Zahn v. Board of Public Works, supra. Increasing or diminishing the value of property by restricting its use under a valid zoning ordinance does not render the ordinance void as it is one of the incidents which may follow the valid exercise of the police power which permits property to be taken or damaged for public use under that power, when properly exercised, without compensation to the owner, Patrick v. Riley, 209 Cal. 350, 287 P. 455; Graham v. Kingwell, 218 Cal. 658, 24 P.2d 488; Coelho v. Truckell, 9 Cal.App.2d 47, 48 P.2d 697. This is one of the penalties, or benefits, depending on the point of view, incident to the privilege of living under the conditions of modern society where some of the personal and property rights that may be enjoyed by an isolated person must be surrendered to and circumscribed by the welfare of the larger group.

[5] It is also settled that zoning areas for single family dwellings is a valid exercise of the police power by a city and tends to promote the general welfare because it tends to promote and perpetuate the American home and thus lay a proper foundation for the sound character and caliber of its citizenry. The reasons for this rule and the advantages to society of single family residence districts over those containing apartments, flats or hotels is discussed at length in Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 38 A.L.R. 1479, and need not be repeated here.

[6] These authorities bring us to the conclusion that the common council of San Bernardino is vested with the legal constitutional authority to zone areas of the city and limit the use of property in some of those areas to single family dwellings and other areas to business establishments or multiple dwellings.

While the foregoing is true as to the law governing a general zoning plan which was followed in San Bernardino, it is also true that the actual zoning as its affects individual properties must not be an unreasonable, oppressive or unwarranted invasion of an owner's property rights. To protect the rights of an individual property owner against such invasion the courts have not hesitated to examine the effect of a zoning ordinance, legally adopted and proper in its general plan, as affecting individual properties and if that effect on such properties has been found to be clearly unreasonable, oppressive or unwarranted, have held the ordinance void as to them.

Instances where zoning ordinances were held void as to certain property are cited and relied upon by plaintiff and should be briefly reviewed.

Reynolds v. Barrett, 12 Cal.2d 244, 83 P.2d 29, was an action in which a single lot entirely surrounded by business structures was zoned for residential purposes. The court held the ordinance void as to that lot.

The zoning ordinance involved in Skalko v. Sunnyvale, 14 Cal.2d 213, 93 P.2d 93, 94, limiting the land of plaintiff to use for residential purposes was held void as affecting that property because "considering all the facts shown by the record, it clearly appears beyond question that the land owned by the appellant is entirely unsuited for residential purposes." A similar conclusion was stated in Hurst v. Burlingame, 207 Cal. 134, 277 P. 308, after the court had held the zoning ordinance void because of the failure to follow the provisions of the zoning act (Stats.1917, P. 1419) in adopting it. Also it appeared that the plaintiff's property was entirely surrounded by property occupied by commercial enterprises which would be an additional reason for holding the ordinance void as to plaintiff's property had it been legally passed.

Hagenburger v. Los Angeles, 51 Cal. App.2d 161, 124 P.2d 345, is also relied upon by plaintiff. There the plaintiffs were engaged in the business of raising nursery plants on leased property zoned for single family dwellings, which property was practically surrounded by business properties. The court repeated the rule that a small property surrounded by property devoted to commercial or business enterprises should not be zoned for residential purposes. The real ground of the decision was found in the language of the zoning ordinance which permitted farming in the zone in question. After a review of many authorities the court held that raising nursery plants was farming as the term was used in the ordinance and that the use made of the property by plaintiff was not prohibited by the ordinance.

In re White, 195 Cal. 516, 234 P. 396, 397, is also cited by plaintiff. That case involved the validity of a zoning ordinance of the city of Atherton as it affected the property of petitioner. The city had 2500 acres within its limits. The ordinance divided the city into two zones, one of these less than 1.1 acres, was an unrestricted zone in which business could be conducted, the other a residential zone in which no businesses could be conducted. The unrestricted area was at the time of the enactment of the ordinance as well as at the time of the trial, "fully occupied to the exclusion of other business, by a gasoline service station and a restaurant." Petitioner built a small real estate office on his property in the residential district and proceeded to conduct business there. He was arrested and convicted of violating the provisions of the zoning ordinance and was ordered discharged by the Supreme Court because the purpose and effect of the ordinance was not to promote the health, safety, morals or general welfare of the public but instead to grant "a monopoly to the business establishments already situate in the 1¹⁄₁₀ acres of the 'unrestricted district'. In other words, under the guise of regulating business and segregating it to a particular district, the ordinance in fact prohibits all business save and except that of the favored two already established."

[7] It should be unnecessary to review other cases of similar import as the foregoing illustrate the general circumstances under which zoning ordinances have been held void as to certain properties. They fall into three general classes: (1) Where a small parcel of property is zoned for residential purposes when it is entirely surrounded by business or commercial enterprises; (2) where the property zoned for residential use is entirely unsuited for residential purposes; (3) where the purpose of the ordinance is not to promote and protect the public health, safety, morals or general welfare but to create a monopoly of use of property within a certain zone and exclude other enterprises from the city.

[8] It is clear from the facts of this case already recited that none of the foregoing reasons for holding a zoning ordinance void as to individual property is applicable here. Plaintiff's properties, the west 112 feet of Lots 70 and 69, are bounded on three sides by property zoned for use by single family dwellings. His property is not a small island in a district devoted to business or commercial uses. This property is not entirely unsuited for residential use any more than the adjacent properties which are now being used as sites for single family dwellings. There is no suggestion that the ordinance creates a monopoly of use in the district as many other sites for multiple dwellings are available in the neighborhood and elsewhere in the city. Plaintiff owned vacant property within the small business district centering at the intersection of "E" Street and Marshall Boulevard upon which he could have erected multiple dwellings.

[9] Plaintiff's argument that the existence of heavily traveled streets and boulevards in the neighborhood of his property should bear on its use for multiple rather

than single dwellings cannot be given any force, it being contrary to the holdings of the courts. Strong v. Hancock, 201 Cal. 530, 258 P. 60; O'Rourke v. Teeters, 63 Cal.App.2d 349, 146 P.2d 983.

[10] Plaintiff argues that there are other nonconforming uses in the neighborhood mainly in the fact that dwellings have been built on lots containing less than 5000 square feet, which is the minimum size specified for single family dwellings by the ordinance of San Bernardino. We cannot see how this argument can assist plaintiff, as violation of one law by another cannot excuse violation of a different law by him and "no vested right to violate an ordinance may be acquired by continued violations." Acker v. Baldwin, 18 Cal.2d 341, 115 P.2d 455, 458; Rehfeld v. City and County of San Francisco, 218 Cal. 83, 21 P.2d 419.

[11] The trial court found, and plaintiff argues, that it is impracticable to use plaintiff's buildings as single family dwellings and that it would be unreasonable for the use of the buildings to be limited to such a purpose.

It is obvious from what we have already said that plaintiff knew that the ordinance of San Bernardino did not permit him to build multiple dwellings on the properties involved. His applications for building permits showed that he planned to erect single family dwellings. During construction he changed his plans, took a chance and finished the multiple dwellings. His deliberate violation of the law conferred no new rights on him nor can it arouse any sympathy in his favor. Magruder v. City of Redwood, 203 Cal. 665, 265 P. 806. In Maguire v. Reardon, 41 Cal.App. 596, 183 P. 303, 305, it was said: "The ordinance does not deprive appellants of any vested rights without due process of law. 'In removing a building erected in violation of law * * * no private right is invaded, because none could grow out of the illegal act.' Baumgartner v. Hasty, supra [100 Ind. 575, 50 Am.Rep. 830]; [City of] Brooklyn v. Furey [9 Misc. 193], 30 N.Y.S. 349."

[12, 13] The trial judge took judicial notice of the housing shortage in San Bernardino and found on that question. We are fully aware of the housing shortage that exists not only in San Bernardino but in many other places in California. The fact of a housing shortage cannot excuse plaintiff's deliberate violation of the law nor can it furnish a valid reason for holding the zoning ordinance void in its application to plaintiff's properties. Nothing in the City of San Diego v. Van Winkle, 69 Cal.App.2d 237, 158 P.2d 774, is to the contrary. There the city brought an action to enjoin the occupancy of a multiple dwelling erected in a single family zone. The trial court granted the injunction but suspended its operation during the existence of the war emergency and the housing shortage there. This was held to be a proper exercise of discretion under the facts disclosed and the law applicable to those facts.

[14] The trial court viewed the premises before deciding the case. Plaintiff urges that what was seen was evidence not in the record which must be presumed to support the findings and judgment. This is in general a correct statement of the law but it cannot result in an affirmance of the judgment in this case. While what the court saw was evidence, that evidence, like all the other evidence in the case, must be weighed, considered, construed and applied under the well-settled principles of law governing us here.

[15] Fixing boundaries of a zone is a legislative act committed to the sound discretion of the legislative body. Sunny Slope Water Co. v. Pasadena, 1 Cal.2d 87, 33 P.2d 672. The courts are not legislative bodies and we cannot substitute what we might think should have been done for what was done within the law by the legislative body. As said in Acker v. Baldwin, supra: "It is now settled beyond question that although a court may differ from the determination of the legislative body, unless a zoning measure is clearly oppressive, it will be deemed to be within the purview of the police power. There will always be difference of opinion as to the means of accomplishing a particular end, but if there is a reasonable basis for the belief that the establishment of a strictly residential district has substantial relation to the public health, safety, morals or general welfare, a zoning ordinance to accomplish that purpose will be upheld." See, also, Magruder v. City of Redwood, supra; Ex parte Quong Wo, 161 Cal. 220, 118 P. 714; Ex parte Hadacheck, 165 Cal. 416, 132 P. 584, L.R.A.1916B, 1248.

Quoting again from Acker v. Baldwin, supra: "Also, the court's finding that the use of the property by the respondent and others for business purposes, has, in nowise, reasonably or otherwise impaired or injuriously affected the public health, safety, morals or general welfare will not sustain the judgment. Courts do not require that the proscribed use of each individual lot in an area zoned will have this effect if the zoning plan, as a whole, promotes these objectives of the police power. Rehfeld v. City and County of San Francisco, supra, [218 Cal. 83, 21 P.2d 419.]"

[16] There is a strong presumption in favor of the validity of a legislative act. Sunny Slope Water Co. v. Pasadena, supra; Reynolds v. Barrett, supra; Skalko v. Sunnyvale, supra. In Reynolds v. Barrett, supra, the court said [12 Cal.2d 244, 83 P.2d 32]: "The power to declare zoning ordinances unconstitutional only should be exercised where no substantial reason exists to support the determination of the city council. If the reasonableness of the ordinance is reasonably debatable the ordinance must be upheld. Zahn v. Board of Public Works, 274 U.S. 325, 47 S.Ct. 594, 71 L.Ed. 1074. The line between business and residential property must be drawn somewhere. The mere fact that business property is located across the street or even adjoining the residential property involved does not determine that the ordinance is invalid or discriminatory. Smith v. Collison, 119 Cal.App. 180, 6 P.2d 277; Feraut v. Sacramento, 204 Cal. 687, 269 P. 537. The fact that nearby business property has the same characteristics as the parcel involved in the proceeding does not justify the court in substituting its judgment for the legislative judgment."

After a study of the record, and under the cited authorities, we are forced to the conclusion that the plaintiff has failed to support his case and that the ordinance in question is a valid exercise of the police power in so far as it affects the property in question here. The ordinance treats that property equally with, and places it in the same zone as the property adjoining it on three sides. Because business and multiple dwellings are permitted on the fourth side is no reason for a court to hold the ordinance void as affecting the property in question here.

The judgment is reversed.

BARNARD, P. J., and GRIFFIN, J., concur.

COVERT v. STATE BOARD OF EQUALIZATION et al. *

Civ. 7143.

District Court of Appeal, Third District, California.

Oct. 24, 1945.

Hearing Granted Dec. 20, 1945.

1. Intoxicating liquors 🔑110

The only conditions imposed by constitutional provision that intoxicating liquor may be sold, etc., in any bona fide hotel, restaurant, cafe, or other public eating place, are that the eating place must be bona fide and that the alcoholic liquor must be consumed in such eating place. Const. art. 20, § 22.

2. Intoxicating liquors 🔑110

The constitutional provision regulating sale of alcoholic liquor must be interpreted in the light of evil which it sought to remedy. Const. art. 20, § 22.

3. Intoxicating liquors 🔑110

The purpose of constitutional provision regarding sale of alcoholic liquor was to outlaw public saloons and public barrooms but to retain to the people of the state the right to purchase alcoholic liquors in any bona fide eating place, thereby fostering the coexistence of two businesses. Const. art. 20, § 22.

4. Constitutional law 🔑14

Generally, an interpretation of a constitutional provision which goes beyond or is contrary to obvious meaning that may be ascribed to such provision, thereby establishing a rule that is not within any accepted definition of language used, is unwarranted.

5. Intoxicating liquors 🔑110

Where constitutional provision regulating sale of alcoholic liquor does not ascribe a particular meaning to "bona fide", the words must be taken according to their common acceptation. Const. art. 20, § 22.

6. Intoxicating liquors 🔑110

Whether a place is a bona fide restaurant or is so operated as to be a saloon or barroom, within constitutional provision authorizing sale of alcoholic liquor in any bona fide restaurant but prohibiting sale in public saloon or barroom, is a question of fact. Const. art. 20, § 22.

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* Subsequent opinion 173 P.2d 545.

7. Intoxicating liquors 🔑70

The constitutional requirement of "bona fides" with respect to public eating place within which alcoholic liquor may be sold does not necessitate showing that principal or most business of such establishment is the dispensing of food, but it is sufficient for licensee to show that a substantial part of business or businesses conducted on premises is the dispensing of food if otherwise such part appears to be conducted in good faith. Const. art. 20, § 22.

See Words and Phrases, Permanent Edition, for all other definitions of "Bona Fide".

8. Intoxicating liquors 🔑110

The principal business test is not applicable in determining what constitutes a bona fide public eating place within constitutional provision authorizing sale of alcoholic liquor only in bona fide public eating place. Const. art. 20, § 22.

9. Intoxicating liquors 🔑58, 106(4)

Under constitutional provision giving State Board of Equalization discretionary powers to deny or revoke liquor license, no fixed rule may be prescribed for determining what constitutes a bona fide public eating place in which alcoholic liquors may be sold. Const. art. 20, § 22.

10. Courts 🔑24

In proceeding to compel State Board of Equalization to revoke an on-sale liquor license, the fact that parties stipulated that mandamus was proper remedy did not confer on court any greater power than it otherwise had. Gen.Laws 1937, Act 3796; Const. art. 20, § 22.

11. Constitutional law 🔑287
Intoxicating liquors 🔑72, 108(10)

Under Constitution endowing State Board of Equalization with exclusive power to license the manufacture, importation, and sale of intoxicating liquors, with discretionary power to deny or revoke any specific liquor license and with authority to determine what shall constitute good cause for denial or revocation, litigants are accorded due process in accordance with the bill of rights and decisions of the board, deliberately arrived at after due hearing, must be deemed to be final and subject to review only to the same extent and in same manner that decisions of other judicial tribunals exercising state-wide powers may be reviewed. Gen.Laws 1937, Act 3796, § 46; St.1933, p. 1704, § 23; Const. art. 13, § 9; art. 20, § 22.

12. Officers 🔑103

Although a court reviewing determination of administrative agency may exercise an independent judgment on both fact and law, record of administrative agency comes before court endowed with a strong presumption in favor of its regularity and party challenging such record has burden of clearly showing the irregularity.

13. Mandamus 🔑154(4)

Party seeking writ of mandate directing State Board of Equalization to revoke on-sale liquor license was required to state a prima facie case entitling him to relief. Gen.Laws 1937, Act 3796; Const. art. 20, § 22.

14. Officers 🔑103

Administrative agencies must be accorded a wide discretion, the abuse of which must appear clearly before courts will interfere.

15. Intoxicating liquors 🔑69, 108(9)

Under constitutional provision empowering State Board of Equalization to deny or revoke any specific liquor license if it shall determine for good cause that granting or denying of such license would be contrary to welfare or morals, the board has power to determine the critical facts. Const. art. 20, § 22.

16. Intoxicating liquors 🔑69, 106(1)

The investment of authority to deny or revoke a liquor license for good cause implies that it be such cause as is deemed sufficient by the body on which the authority is conferred, not some other undesignated agency. Const. art. 20, § 22.

17. Contempt 🔑30

A court has the inherent power to punish for a contempt that interferes with its own processes or proceedings.

18. Intoxicating liquors 🔑69, 108(9)

Under constitutional provision empowering State Board of Equalization to deny or revoke any specific liquor license if it shall appear for good cause that granting or denying such license would be contrary to public welfare or morals, the board exercises judicial functions and is the fact-finding body designated to determine the specific question whether a liquor license should be granted or revoked. St.1933, p.

1704, § 23; Gen.Laws 1937, Act 3796, § 46; Const. art. 20, § 22.

19. **Courts** ⚷107

Where a point of law might properly have been raised by parties or considered by court, but was not so raised or considered, decision of court does not constitute a judicial precedent on that point.

20. **Courts** ⚷107

Where special nature of State Board of Equalization as a constitutionally created body and special character of its powers with respect to liquor licenses were questions which might have been, but were not raised and considered in prior case, decision of court in prior case was not authority on issues involving such questions in present case. Const. art. 20, § 22.

21. **Constitutional law** ⚷80(2)

In absence of a special constitutional enabling provision, the Legislature cannot confer judicial power on administrative board. U.S.C.A. Const.Amend. 14; Const. Cal. art. 1, § 13; art. 3, § 1; art. 6, § 1.

22. **Intoxicating liquors** ⚷45

Provision of Alcoholic Beverage Control Act, which attempts to limit the finality of decisions of the State Board of Equalization and provides for review by court, violates constitutional grant of exclusive power to the board to license the manufacture, importation and sale of intoxicating liquors. Gen.Laws 1937, Act 3796, § 46; Const. art. 20, § 22.

23. **Courts** ⚷56

Where judicial power of court is fixed by constitutional provision, the Legislature cannot limit or extend that jurisdiction.

24. **Intoxicating liquors** ⚷72, 108(10)

The discretionary power lodged with the State Board of Equalization by the Constitution to deny or revoke licenses for good cause may not be whittled down by a proceeding which gives another tribunal the authority to retry the issue on which the discretion was exercised or to substitute its judgment for that of the board. Gen.Laws 1937, Act. 3796, § 46; Const. art. 20, § 22.

25. **Mandamus** ⚷87

Where approximately 80 per cent. of cash received by liquor licensee was derived from sale of intoxicating liquors and approximately 20 per cent. from sale of food, determination of State Board of Equalization that licensee was operating a bona fide public eating place within constitution permitting only a bona fide public eating place, to be licensed to sell alcoholic liquor, was not subject to judicial review by mandamus proceeding to compel the Board to revoke liquor license. Gen. Laws 1937, Act 3796, § 46; Const. art. 20, § 22.

ADAMS, P. J., dissenting.

◆

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Proceeding by E. E. Covert against the State Board of Equalization of the State of California and Thomas C. McMillan for a peremptory writ of mandate directing the State Board of Equalization to revoke an on-sale liquor license previously issued to Thomas C. McMillan. From an adverse judgment, the defendants appeal.

Reversed.

Robt. W. Kenny, Atty. Gen., and Allen L. Martin and J. Albert Hutchinson, Deputy Attys. Gen., for State Equalization Board.

Carl B. Sturzenacker, of Hollywood, and Ralph E. Swing, of San Bernardino, for McMillan.

Donald Paul Covert, of Glendale, for respondent.

PEEK, Justice.

This is an appeal from a judgment of the superior court ordering the issuance of a peremptory writ of mandate directing the State Board of Equalization to revoke an on-sale liquor license previously issued to one Thomas C. McMillan, one of the appellants herein, on the ground that said licensee was violating the applicable provisions of the Alcoholic Beverage Control Act of the State of California, Gen.Laws 1937, Act 3796, and Article XX, section 22 of the Constitution of this state.

It appears from the record that McMillan was the operator of an establishment in Glendale, California, known as the "Tom Tom" or "Esquire" Cafe. While said appellant was so engaged, respondent Covert, on his own behalf and on behalf of other citizens of Glendale and certain organizations, filed with said board a verified complaint in which he alleged, among other things, that McMillan was conducting a public saloon, public bar and public barroom on the licensed premises, and requested the board to revoke and cancel his license. A hearing was held by the board at which considerable evidence was introduced. On behalf of McMillan it was shown that he was equipped to and did serve meals at his premises. However, he testified that his accounts and records disclosed that approximately 80% of his cash receipts were derived from the sale of intoxicating liquors and approximately 20% of his receipts were derived from the sale of food. The board, following the findings and conclusions and the recommendation of its hearing officer, refused to take action against the licensee, and dismissed the complaint.

After exhausting his administrative remedies, respondent Covert petitioned the Superior Court in and for the County of Sacramento for a writ of mandate praying that the action of the appellant board be set aside and that it be directed and compelled to discipline the licensee by revoking his license. The amended petition, among other things, alleged in effect that, as McMillan had testified that the sales of liquor and food in his cafe were in the proportions previously mentioned, under the case of Hammond v. McDonald, 49 Cal.App.2d 671, 122 P.2d 332, it was mandatory upon the board to revoke the license. Included in the petition by incorporation, and made a part thereof, were the findings and recommendations of the hearing officer at the original hearing. To this petition the board demurred, alleging want of jurisdiction, want of legal capacity to sue and failure to state a cause of action on the part of the complainant. The trial court overruled the demurrer and in doing so relied to a great extent upon the case cited by respondent in his petition. The cause was heard and submitted on the transcript of the testimony received at the original hearing.

The court, in its findings of fact and conclusions of law, determined that the only evidence before the board was that McMillan was conducting a public saloon within the meaning of the Alcoholic Beverage Control Act; that the sale of intoxicating liquor was the principal business and the service of food was a side line of said saloon, amounting to a sham to give the business the appearance of a restaurant; that for the purpose of attracting young people particularly, it was designated as a cafe; the rooms were darkened, and mechanical musical instruments played while men and women, many of them young and some in their teens, sat at the bar or at tables, drinking liquor; and that the action of the board in dismissing petitioner's complaint was capricious, arbitrary, without evidence and without right. Thereafter the court rendered judgment for the petitioner Covert, respondent herein, directing the issuance of a peremptory writ of mandate commanding the board to revoke the license in question. The writ was issued accordingly, and from said judgment of the trial court the board and McMillan have appealed.

The sole issue as made by the allegations of respondent's amended petition and appellants' return, and the sole issue upon appeal as presented by the original briefs of the parties, is confined to the question: whether the licensee McMillan was operating a bona fide restaurant, cafe, or public eating place, within the meaning of said Article XX, section 22, in view of the percentage breakdown of the cash receipts derived from his business activities. Subsequently, the additional briefs, which have been filed by amicus curiæ and appellant and respondent, enlarge the question presented originally to the trial court and this court so as to include the contentions that, (1) the trial court erred in making independent findings of fact; (2) appellants' determination of fact was final and conclusive; (3) the establishment operated by the licensee is not a public saloon as a matter of law; (4) the trial court sought to exercise the power and discretion vested in appellant, and (5) the respondent had no justiciable interest in this proceeding.

Following the argument set forth in his petition to the superior court, respondent strenuously contends before us that it first must be determined whether the licensee was operating a "public saloon, public bar or public barroom" before determining whether the licensee was operating a bona fide eating place; that the established and logical rule is one predicated upon the principal business done on the premises; that the receipts of a business are the best method of determining what is the principal business and what is the incidental or side line; that such a determination is one of fact for the board in the first instance, although upon mandate a superior court may consider all of the original evidence and any additional evidence as well as make findings of fact which will be conclusive on appeal.

The portion of Article XX, section 22, of the state Constitution which is pertinent to the discussion herein, provides in part that: "Intoxicating liquors, other than beers, shall not be consumed, bought, sold, or otherwise disposed of for consumption on the premises, in any public saloon, public bar or public barroom within the State; provided, however, that subject to the aforesaid restriction, all intoxicating liquors may be kept and may be bought, sold, served, consumed, and otherwise disposed of in any *bona fide* hotel, restaurant, cafe, * * * or other public eating place * * *." (Italics added.)

[1] This section of the Constitution was adopted by the people of this state at the 1934 general election. Prior to such general election, said section, as originally enacted in 1932, authorized the sale of alcoholic liquors (wines and beers) in hotels, restaurants, etc., when "served and consumed *with meals furnished in good faith* to the guests and patrons thereof." (Italics added.) The words "good faith" as so used therein obviously related to the furnishing *of meals* rather than the place *where meals* were served. The 1934 amendment, however, materially changed such wording and applied the "good faith" language to the place *in which* the liquor was to be sold and consumed, by providing that "intoxicating liquors may be * * * sold, served, consumed, and otherwise disposed of in any *bona fide* hotel, restaurant, cafe, * * * or other public eating place * * *," thereby eliminating all reference to meals. (Italics added.) The only conditions imposed by the section as it now reads are that the eating place must be *bona fide* and that the alcoholic liquor must be consumed "in" such eating place. In the statement addressed to the voters at the 1934 election the proponents of the measure stated:

> "The issue is clear-cut. The sale of beer and wine, with or without meals, and of hard liquor by the drink, with or without meals, must stop in California after November 6th unless the people approve Proposition 2 at the polls. In voting for this proposition the people will vote for the open and regulated sale of all intoxicating liquors, with or without meals, in legitimate eating places so licensed by the State Board of Equalization."

The opponents stated:

> "The places in which all intoxicating liquors may be freely sold and consumed, if the proposed amendment is adopted, are so varied, diversified and numerous that it would amount to no restriction worthy of the name."

From the statements so quoted and from the provisions of the constitutional amendment as adopted, it is evident that it was not the intent of the voters to absolutely forbid the sale or consumption of alcoholic liquors but merely to regulate and prohibit their sale or consumption in certain designated establishments only; or, as stated in the first Hammond v. McDonald case, 32 Cal.App.2d 187, 194, 89 P.2d 407, 411:

> "A reading of the constitutional amendment and the Alcoholic Beverage Control Act, especially sections 1 and 53 thereof, indicates that it was the intention of the people, as well as of the legislature, to prevent the return of the public saloon or barroom to the social life of California after the repeal of the Eighteenth Amendment to the federal Constitution."

[2, 3] If this is the proper view to be taken—and we conclude it is—it becomes necessary to interpret said constitutional amendment in the light of the "evil which it [sought] to remedy." Rector, etc., of Holy Trinity Church v. United States, 143 U.S. 457, 12 S.Ct. 511, 513, 36 L.Ed. 226. In this regard we are indebted to Mr. Swing who in his amicus curiæ brief has set forth the historical background of the public saloon or public barroom as it existed in this state prior to the enactment of the 18th Amendment. From this we find that the conditions then prevalent were little different from those existing in Kansas, when the Supreme Court of that state, in discussing comparable questions in the Intoxicating Liquor Cases, 25 Kan. 751, 37 Am.Rep. 284, stated: "the courts may not read a law simply as they wish it should read. But other matters may also be considered, and among them the evils sought to be remedied. * * * Now what was the evil sought to be remedied by this statute, and the constitutional amendment of which it was an outgrowth? * * * The history of the movement which resulted in the adoption of the 'prohibition amendment,' and the enactment of the law now under consideration, and the object to be thereby secured, are too well known to give rise to any dispute.* * *" Applying these rules to the question now before this court, it would appear that the purpose of section 22, as amended was to outlaw the public saloon and public bar-

room as it previously had been known in California, but still retain to the people of this state the right to purchase alcoholic liquors in any *bona fide* eating place, thereby fostering the co-existence of two businesses, viz., the sale of food and the sale of alcoholic liquor, at the same time lodging with the board the duty of seeing that the two activities were being conducted together in the same place and in a proper manner.

In view of these facts, we are disposed to state the main question thus: Does said constitutional requirement of bona fides with respect to a restaurant, cafe, or other public eating place necessitate the showing that the principal or most business of such establishment is the dispensing of food, or is it sufficient for the licensee to show that a substantial part of the business or businesses conducted on the premises is the dispensing of food, if otherwise such part appears to be conducted in good faith? If the latter is the proper test, then the judgment of the trial court cannot be supported, as the complaint states no cause of action and the writ should not issue to compel the doing of an act which the law does not specially enjoin.

[4] Upon this question, it is our conclusion that the trial court, by defining the expression "bona fide" in terms of the principal amount of business done, has limited the accepted definition of the expression as commonly if not universally used (and presumably as it was used in the Constitution), and that the conclusion reached by that court amounts to what may be termed judicial legislation. Generally it may be said that an interpretation of a constitutional provision, whether by the legislature or the judiciary, which goes beyond or is contrary to the obvious meaning that may be ascribed to such provision, thereby establishing a rule that is not within any accepted definition of the language used, is unwarranted and should be declared invalid. Hammond v. McDonald, 49 Cal.App.2d 671, 686, 122 P.2d 332; State Board of Equalization v. Young's Market Co., 299 U.S. 59, 62, 57 S.Ct. 77, 81 L.Ed. 38. See also 12 C.J. 884, 885, § 387; 16 C.J.S., Constitutional Law, § 151.

[5] Where, as here, the statute has not ascribed a particualr meaning to "bona fide," the words must be taken "according to their common acceptation." In re Herman, 183 Cal. 153, 164, 191 P. 934, 939. Bona fide has many synonyms but none that connotes "principal", "main" or "chief". See Words and Phrases, Perm. Ed., vol. 5, pp. 609, 610. It may denote "a matter of substance" when used in reference to the subscribers necessary to constitute a newspaper one of general circulation. In re Application of Green, 21 Cal. App. 138, 131 P. 91, 93. Likewise it has been held that bona fide operation as a common carrier means giving substantial service as such carrier. Turner v. United States, D.C.N.C., 56 F.Supp. 798, 800, 801. While in United States v. Carolina Carrier's Corporation, 315 U.S. 475, 480, 481, 62 S.Ct. 722, 726, 86 L.Ed. 971, the court, in construing the "grandfather clause" of the Motor Carrier Act, 49 U.S.C.A. § 306 which provided the test of "bona fide operation," stated: "That standard carries the connotation of substantiality." See also Helvering v. Minnesota Tea Co., 296 U.S. 378, 385, 56 S.Ct. 269, 80 L.Ed. 284.

If the words "bona fide" are to be interpreted as substantial they cannot mean large or larger, for there may be several elements all of which are substantial. Fuhrman v. American Nat. B. & L. Ass'n, 126 Cal.App. 202, 210, 211, 14 P.2d 601; Miller v. Commissioner of Internal Revenue, 6 Cir., 84 F.2d 415, 418; Magruder v. Safe Deposit & Trust Co. of Baltimore, 4 Cir., 121 F.2d 981, 985; Pan American Airways Co. v. Civil Aeronautics Authority, 2 Cir., 121 F.2d 810, 813. A substantial element, then, does not mean the principal element. Miller v. Commissioner of Internal Revenue, supra. On the other hand, "principal" means the main or chief element; and where there are several elements the principal one must be the higher or highest in value, character, or importance. See Webster's New International Dictionary, 2d Ed.; Kelty v. Burgess, 84 Kan. 678, 115 P. 583, 584.

Therefore, to hold that the expression "bona fide", as used in section 22 in relation to a hotel, restaurant, cafe, cafeteria, or other public eating place, could mean only that the principal business of such establishment is the serving of food, is to conclude that only one business can satisfy the constitutional requirement. However, the very purpose of said section is to foster a co-existence of the two businesses —liquor and food—it being the duty of the board to see that they are properly conducted together. Conceivably, the Constitution might well have provided that intoxicating liquor could be served in a restaurant where the principal business was the service of food, and the dispensing of liquor a mere adjunct or side line, without the necessity of an additional license, under somewhat the same theory that obtained in the days of the old-fashioned saloon when the dispensing of sandwiches, hard boiled eggs, etc., did not require a restaurant license. But this was not done; and, therefore, neither can a court, however well intentioned, do so.

[6, 7] It further may be said that if a quantitative test of bona fides is an appropriate yardstick of the provision in question, *substantiality* rather than *principality* is the correct measure. To apply a quantitative test and to make it exclusive of all others, as the principal business test necessarily does, a court must discard many other important factual considerations. In other words, "whether any given place is a bona fide restaurant, or is so operated as to be a public saloon, bar, or barroom, is one of fact." Hammond v. McDonald, 49 Cal.App.2d 671, 686, 122 P.2d 332, 340.

It is this statement which we consider to be the basis of the court's determination in the case last cited. The use of the words "principal," "incidental" and "side line" was made in a discussion of the history of the public saloon and public bar in relation to the enactment of section 22. Respondent, however, contends that the court advisedly used such words, and in support of such contention cites the case of Guillara v. Liquor Control Commission, 121 Conn. 441, 185 A. 398, 105 A.L.R. 563, as being directly in point. It is true that in the Guillara case the court, in referring to establishments within the purview of the Connecticut statute, stated that the sale of alcoholic liquors "shall be confined to places in which such sale is an incidental adjunct to another and principal established business." However, an examination of the statute involved in that case, the Liquor Control Act, Gen.Stats. Cum.Supp.1935, ch. 151, clearly shows that the court was merely following the wording of the definitions specifically set forth in section 1012c thereof. That is quite different from the constitutional provision now before this court wherein the only restriction set forth is that sales must be made in a *bona fide* restaurant, etc. Respondent has cited no other case using comparable language, nor has any such case come to our attention.

Turning then to the additional factual matters which must be considered, we find that *bona fide* literally means "by or in good faith," and although expressed in Latin may be considered to have become Anglicized as a term in general use throughout the United States. 11 C.J.S., Bona Fide, p. 387. That text further states: "It has been defined as meaning acting honestly without purpose to defraud; good faith, as distinguished from bad faith; honest; honestly; without actual notice; without fraud or unfair dealing; also, in a derived sense, real. It has been said that the phrase is restrictive, and that its correct province is to qualify things or actions that have relation to the mind or motive of the individual." It is stated thus in Black's Law Dictionary: "Bona fide. In or with good faith. Honestly, openly, and sincerely; without deceit or fraud. Truly; actually; without simulation or pretense. Innocently; in the attitude of trust and confidence; without notice of fraud, etc." As defined in 1 Bouv. Law Dict., Rawle's Third Revision, p. 374, bona fides means: "Good faith, honesty, as distinguished from mala fides (bad faith)." See also Words and Phrases, Perm.Ed., Vol. 5, pp. 609–614.

Thus, in determining the bona fides of a restaurant, cafe, or other public eating place, as contemplated by section 22, it would not seem that the proper method is to contrast it with a saloon—for that is to assume that the activities of dispensing liquor and food may not co-exist—but rather to contrast it with one that is sham or colorable only, a mere device where, under the guise of serving food, some other activity is actually conducted.

[8, 9] The further reason for holding erroneous the application of the "principal business" test, in determining what constitutes a bona fide public eating place, is that such a test amounts to a hard and fast rule which deprives the board of the right to exercise the discretion which has been specially conferred upon it by the Constitution: "The State Board of Equalization * * * shall have the power, *in its discretion,* to deny or revoke any specific liquor license if it shall determine for good cause * * *." (Italics added.) It is well settled that to prescribe a fixed rule is at the same time to deny discretion; and conversely where discretion has been conferred, no fixed rule may be prescribed. As stated in Gossman v. Gossman, 52 Cal.App.2d 184, 194, 195, 126 P.2d 178, quoting from Bower's Judicial Discre-

tion of Trial Courts (1931), sec. 10, pp. 14 and 15:

"It is the power of decision, exercised to the necessary end of awarding justice, and based upon reason and the law, *but for which decision there is no special governing statute or rule. * * * Discretion implies that in the absence of positive law or fixed rule, the judge is to decide by his view of expediency or of the demands of equity and justice.*" (Italics added.)

Or, as stated in 27 C.J.S. Discretion, p. 134:

"Discretion in performing an act arises when it may be performed in one of two or more ways, either of which would be lawful, and where it is left to the will or judgment of the performer to determine in which way it shall be performed, but *when a positive duty is enjoined and there is but one way in which it can be performed lawfully, then there is no discretion.*" (Italics added.)

While on page 133 of the same volume it is stated:

"Discretion * * * *the power to discriminate and determine what, under existing circumstances,* is right and proper * * *." (Italics added.)

[10] The trial court, in setting aside the findings and decision of the board and ordering the issuance of the writ prayed for, must have proceeded on one of two theories: either (1) that the action of the board was reviewable on mandamus to the same extent and in the same manner as the action of an administrative body created by the legislature and operating under statutory authority only, or (2) that the action of the board was reviewable de novo under the provisions of section 46 of the Alcoholic Beverage Control Act. We are of the opinion that neither of these theories is tenable. The fact that the parties stipulated that mandamus was the proper remedy, did not, nor could it, confer on the court any greater power than it otherwise had.

[11] The State Board of Equalization is not merely a ministerial body created by statute to which has been given limited discretion by the legislature, like the many administrative boards whose decisions are necessarily reviewable by a judicial tribunal in order to satisfy the requirements of due process. This board was created by the people of the state upon the adoption of Article XIII, section 9, of the Constitution. It has been endowed by the Constitution, not by the legislature, with "the *exclusive power* to license the manufacture, importation and sale of intoxicating liquors." (Italics added.) Const. Art. XX, sec. 22. Furthermore, by the same organic law it has been given "the power, in its discretion," to deny or revoke any specific liquor license. And by that same law it has been specifically authorized to "determine" what shall constitute "good cause" for denial or revocation. Hence, the board, being a constitutionally created body and permitted to act as a court without contravening those provisions of controlling law which prohibit the legislature from establishing a statewide court and also those provisions which prohibit the according of finality to the findings and decisions of a body other than a tribunal functioning as a court, affords to litigants due process in accordance with the Bill of Rights. Since the board is such a body invested with such powers and rights, we conclude that its decisions, deliberately arrived at after due hearing, must be deemed to be final and subject to review only to the same extent and in the same manner that decisions of other judicial tribunals exercising statewide powers may be reviewed. Additional factors fortifying the conclusion thus reached are: (1) The State Liquor Control Act of 1933, Stats.1933, p. 1697, ch. 658, sec. 23, specifically referred to in said section 22 of Article XX, provided that the decision of the board on the rehearing of an application to revoke or suspend a license "is final and effective upon the rendition thereof"; and, (2) the Alcoholic Beverage Control Act, Deering's General Laws, Act 3796, enacted pursuant to authorization by the Constitution, so far as it is not inconsistent with the provisions thereof, provides ample machinery for giving notice and conducting hearings in consonance with the mandates of due process of law.

[12, 13] Although the history of the judicial interpretation of administrative law in this state does not abound appreciably in unanimity of opinion, we may conclude that certain principles have been enunciated with more or less finality. An examination of the recent leading cases discloses that the rather extreme position taken by the majority of the Court in the case of Laisne v. State Board of Optometry, 19 Cal.2d 83, 123 P.2d 457, has been

modified somewhat by the majority opinion in the later cases of Dare v. Board of Medical Examiners, 21 Cal.2d 790, 136 P.2d 304, and Sipper v. Urban, 22 Cal.2d 138, 137 P.2d 425, 426. It now may be said that, although a reviewing court may exercise an independent judgment on both the facts and the law, the record of the administrative agency comes before such court endowed with a strong presumption in favor of its regularity; and upon him who would challenge such record is cast the burden of clearly showing to the contrary. As stated in the case last cited, it was incumbent upon the petitioner to "state a prima facie case entitling him to relief."

[14] In Hansen v. State Board of Equalization, 43 Cal.App.2d 176, 110 P.2d 453, this court, in affirming a judgment of the trial court entered after sustaining a demurrer to a petition for a writ of mandate to compel the board to issue an off-sale liquor license, quoted that portion of the opinion in Maxwell v. Civil Service Commission, 169 Cal. 336, 339, 146 P. 869, 871, wherein it was stated that "Courts should let administrative boards and officers work out their problems with as little judicial interference as possible. They may decide a particular question wrong—but it is their question." This necessarily assumes that such agencies must be accorded a wide discretion, the abuse of which must appear clearly before the courts will interfere. In the recent case of Rible v. Hughes, 24 Cal.2d 437, 445, 150 P.2d 455, 459, 154 A.L.R. 137, wherein the court referred to certain qualifications set forth in the teachers' salary schedules of the Sacramento city schools, the court stated: "If there appears to be some reasonable basis for the classification, a court will not substitute its judgment for that of the administrative body [citing cases]."

But, as previously mentioned, we are confronted with an additional element in the instant case. Here constitutional provisions—not merely legislative enactments—have invested the board with broad discretionary powers and thereby have imparted to its findings and decisions a higher degree of comparative finality. In referring to the specific constitutional provisions under discussion herein, this court, in Hansen v. State Board of Equalization, 43 Cal.App.2d 176, 180, 110 P.2d 453, 455, stated that they were "designed to give the board broad discretionary powers in the matter of granting or refusing to grant licenses of this character. Whether or not 'good cause' for the denial of the license existed was a matter for determination by the board, and not by the courts."

Therefore, unless the "principal business" yardstick which the trial court applied to the facts as disclosed by the findings and as adopted by the board can be said to be a fixed rule of law, there would appear to be no plausible basis on which the trial court could have substituted its judgment for that of the board. For, "to hold that the exercise of discretion may be reviewed by a tribunal other than that upon which it is conferred would pervert and destroy the meaning of the word." Schneider v. Hawkins, 179 Md. 21, 16 A.2d 861, 864; State v. Tindell, 112 Kan. 256, 210 P. 619, 622; Deeds v. Deeds, 108 Kan. 770, 196 P. 1109. See also, Delno v. Market St. Ry. Co., 9 Cir., 124 F.2d 965, 967.

[15, 16] Again, by said section 22 the board is specifically empowered by the Constitution to deny or revoke any specific liquor license "if it shall determine for good cause" that the granting or denying of such license would be contrary to public welfare or morals. In this regard the significant use of the phrase "if it shall determine for good cause" would appear to reflect a desire on the part of the framers of the Constitution to emphasize the power of the board to determine the critical facts. Substantiation for such conclusion is found in the case of State v. Louisiana Boxing Comm., 163 La. 418, 112 So. 31, 33, where there was presented to the court a question relative to the interpretation of a Louisiana statute which provided, "the commission may, at its discretion, issue, and for cause revoke, a license to conduct * * * boxing * * * matches." Act No. 123 of 1920, § 2. The court, in determining the question so presented, stated: "* * * we think by fair implication, when it restricts the right of revocation by the commission for cause only, it necessarily means for any cause which the commission may determine justifies such action after notice of hearing to the licensee to appear and answer any charge or complaint lodged against him." This particular language was quoted with approval in Carroll v. California Horse Racing Board, 16 Cal.2d 164, 167, 105 P.2d 110, in support of the point therein made that a statutory provision prohibiting the revocation of a license without "just cause"

requires notice and hearing. Obviously, therefore, the investment of authority to deny or revoke a license for cause necessarily implies that it be such cause as is deemed sufficient by the body upon which the authority is conferred, not some other undesignated agency.

Furthermore, it is apparent from a summary of the express provisions of section 22 of Article XX of the Constitution, and the pertinent and implementing provisions of the Alcoholic Beverage Control Act, that, under the power conferred upon it, the State Board of Equalization is empowered to administer oaths, to issue subpoenas, to take testimony, and to require that the superior court, as a matter of course, issue an order compelling compliance with the process of the board and punish a noncompliance as a contempt of court (irrespective of the inherent power of the board in this respect). Where the denial, revocation, or suspension of a license is sought, the proceedings are in substance those of a court in an action at law. A complaint in writing is filed with the board by any person, which complaint must be verified unless made by a member or employee of the board. The time and place for the hearing are fixed by the board, and a copy of the complaint (or protest), together with notice of the time and place of hearing, is sent to the licensee or the applicant for a license (as the case may be), and written notice is likewise mailed to the complaining or protesting party. After a hearing before the board or a representative, under liberal rules of evidence best calculated to disclose the rights of the parties, the representative certifies to the board his findings and recommendation, a copy of which is mailed to the parties. Written objections may be filed and a further hearing had. The board makes its decision, and the written decision, findings, recommendation, and objections are filed and open for public inspection. The board may grant a rehearing de novo. Under the State Liquor Control Act, adopted as a part of the constitutional scheme by Const. Art. XX, sec. 22, as modified in 1934, the decision of the board after submission on rehearing was expressly made "final and effective upon the rendition thereof." Stats.1933, p. 1697, ch. 658, sec. 23. By the Alcoholic Beverage Control Act of 1935 (Stats.1935, p. 1123, ch. 330, sec. 46) it was provided that the action of the board on a license complaint or protest "shall be subject to review by any court of competent jurisdiction."

It has been stated in Western Metals Supply Co. v. Pillsbury, 172 Cal. 407, 412, 413, 156 P. 491, Ann.Cas.1917E, 390, that "where the law creates a right in one person against another and vests a board with the jurisdiction to hear complaints, to issue process, to compel the attendance of witnesses, to determine conclusively the issues raised by the pleadings of contending parties, and to make a final judgment or award determining the rights of those parties," judicial power has been exercised, and that it may be safely conceded that the "power to hear and determine rights of property and of persons between private parties is judicial, and can only be conferred on the courts." The language of this case was quoted with approval in the Laisne case, supra, as illustrative of the rule that only by a special enabling provision in the Constitution, section 21 of Article XX, could judicial power be vested as it was in the Industrial Accident Commission.

[17] The circumstance that the Alcoholic Beverage Control Act omits to confer on the Board of Equalization the power to punish for contempt, conferring instead that power on the superior court, is not of itself evidence that the legislature deemed this to have been without the power of the board. It is as reasonable to assume that the legislature may have been acting merely out of an abundance of precaution. However, in any event a court has the inherent power to punish for a contempt that interferes with its own processes or proceedings. Bridges v. Superior Court, 14 Cal.2d 464, 478, 94 P.2d 983.

[18] It therefore would appear that the Board of Equalization (1) exercises judicial functions, and (2) is the fact finding body designated by organic law to determine the specific question at issue herein, whether a liquor license should or should not be granted or revoked.

In the recent case of Universal Consolidated Oil Co. v. Byram, 25 Cal.2d 353, 356 362, 153 P.2d 746, 748, the court stated that when the county board of supervisors was sitting as a board of equalization for the purpose of equalizing assessments, it was "exercising judicial functions" and that its decision upon such question "'constitutes an independent and conclusive judgment of the tribunal created by law for the determination of that question,' * * *; that such adjudication 'cannot be avoided, unless the board has proceeded "arbitrarily and in willful disregard of the law" * * *'; and that 'Mere errors in honest judgment * * * will not obviate the binding effect of the conclusion of the board.'" The court then concluded by saying: "The respective county board of equalization is the fact-finding body designated by law * * * (Cal.Const. art. XIII, § 9), and when that tribunal * * * makes its *findings on the facts*, such decision is final and conclusive." It necessarily follows that the State Board of Equalization, whose existence stems from the same constitutional provision (Art. XIII, sec. 9), is made none the less a tribunal authorized to render relatively final decisions by constitutionally giving to it the additional and "exclusive power" to license the sale of alcoholic beverages, and the power "in its discretion" to revoke the same for "good cause" as set forth in said Article XX, section 22.

Although many cases involving the Board of Equalization have been decided by our courts, as yet the question regarding the operation and effect of the findings and decision of said board as compared with those of other constitutionally created bodies has neither been presented nor decided. However, respondent strongly urges that the case of Standard Oil Co. v. State Board of Equalization, 6 Cal.2d 557, 59 P.2d 119, is determinative of this question. An examination of this case discloses that it concerned an application for a writ of review to determine the validity of an order of the board imposing on the petitioner therein an additional assessment of retail sales tax under the provisions of section 33 of the Retail Sales Act of 1933, Stats. 1933, p. 2599, as amended. The court held said section of the act to be invalid as in contravention of Article VI, section 1, of the Constitution, and dismissed the proceeding. The court therein made no mention of Article XIII, section 9, of the Constitution, creating the Board of Equalization, nor of Article XX, section 22, giving the board exclusive control over the licensing and regulation of intoxicating liquors. The rationale of that decision was thus summed up by the court (6 Cal.2d at page 559, 59 P.2d at page 119):

"Concisely stated, our conclusion that we are without authority or jurisdiction to entertain this proceeding or to issue the writ here sought is based upon the established premises that a writ of certiorari, commonly referred to as a writ of review, will lie only to review the exercise of judicial functions (section 1068, Code Civ.Proc. * * *) and that the Legislature is without power, *in the absence of constitutional provision authorizing the same*, to confer judicial functions upon a state-wide administrative agency of the character of the respondent." (Italics added.)

In addition, an examination of the transcript and briefs filed in that case discloses that nowhere was any mention made of said Article XIII, section 9, nor of said Article XX, section 22. Furthermore, it should be noted that none of the cases cited by the court in support of its ruling (except the Industrial Accident Commission cases used by way of contrast) involved a constitutionally created state-wide board. One part of the opinion deserves special notice, viz., the observation that that court had theretofore denied applications for writs of certiorari in cases involving liquor licenses, Munhollen v. State Board of Equalization, S.F. 15513, and Hendrickson v. State Board of Equalization, S.F. 15529, being the two cases specifically mentioned. See Standard Oil Co. v. State Board of Equalization, 6 Cal.2d 557, 564, 59 P.2d 119. An examination of the petitions in those two cases likewise discloses that the petitioners therein made no attempt to show that the board was a constitutionally created tribunal whose findings and decision are subject to special rules not applicable to agencies created by statute.

[19] We are thus confronted with the well established principle which declares that, where a point of law might properly have been raised by the parties or considered by the court but was not so raised or considered, the decision of the court does not constitute a judicial precedent on that point. In the case under discussion (Standard Oil Co. v. State Board of Equalization, 6 Cal.2d 557, 564, 59 P.2d 119, 122) the court stated that the petitioner therein could not rely upon a particular case, for in that case "the jurisdictional point here considered was neither urged nor discussed by the parties." See, also, Gonzales v. Superior Court, 3 Cal.2d 260, 264, 44 P.2d 320; Oakland, etc., Co. v. Whittel Realty Co., 185 Cal. 113, 119, 120, 195 P. 1058.

[20] Applying this well settled rule to the problem presented by the instant case

we may say that since the special nature of the State Board of Equalization as a constitutionally created body and the special character of its powers with respect to liquor licenses which the Constitution definitely conferred on such board, and more particularly the operation and effect of the findings and decision of such board, are questions which might have been raised and considered in the Standard Oil Company case but which were not in fact raised or considered, the decision of the court therein may not be deemed to be authority on the points now before us.

It is further to be noted that although the Standard Oil case has been cited frequently in subsequent decisions, yet never have the courts of this state purported to extend the rule therein expressed beyond the precise point decided, viz., that in the absence of a constitutional grant of power, a state board cannot exercise judicial functions, and that the legislature is powerless to confer such power upon it. Whitten v. California State Board of Optometry, 8 Cal.2d 444, 65 P.2d 1296, 115 A.L.R. 1; Bodinson Mfg. Co. v. California Employment Commission, 17 Cal.2d 321, 109 P.2d 935; Laisne v. State Board of Optometry, supra; and Dare v. Board of Medical Examiners, supra.

[21] It is readily apparent that the reason why administrative boards (other than the Industrial Accident Commission and the Railroad Commission) are deemed to be without final judicial power, is that, in the absence of a special constitutional enabling provision, the legislature cannot confer such power, being specifically precluded from doing so by Article III, section 1, and Article VI, section 1, of the Constitution and by the due process clauses of the federal and state Constitutions. Const.U.S. Amend. 14, Const.Cal. art. 1, § 13. Department of Public Works, etc., v. Superior Court, etc., 197 Cal. 215, 239 P. 1076; Laisne v. State Board, etc., supra.

From this it logically follows that in so far as the constitutionally created State Board of Equalization is concerned the reason for the rule has ceased, and, as provided in Civ.Code, § 3510: "When the reason of a rule ceases, so should the rule itself." Town of Antioch v. Williams Irrigation District, etc., 188 Cal. 451, 462, 205 P. 688; Rinaldo v. Superior Court, 15 Cal.App.2d 585, 594, 59 P.2d 868. See also 14 C.J.S., p. 346.

The final question for consideration relates to the validity of section 46 of the Alcoholic Beverage Control Act, the pertinent portions of which are as follows:

"The person affected by any ruling * * * may * * * file an action in the superior court of California in and for the county of Sacramento * * * for a review of the ruling, order, decision, or other official act of the board. Said court shall review all records on file with the board which pertain to said ruling, order, decision or other official act, and if furnished by the board, a transcript of evidence taken by the board, and said court shall take such additional relevant and competent evidence as said court may require or as may be submitted by the board or the person filing such petition for review and shall then render, according to the weight of evidence adduced before said court, judgment affirming, reversing or modifying the action of the board."

It is appellants' contention that said section is invalid as a violation of the separation of powers provision of the Constitution, that it is in direct conflict with the constitutional provision vesting discretionary powers with the board, and that it is invalid for the further reason that the legislature can neither limit the constitutionally created jurisdiction of the board nor enlarge the jurisdiction of the superior court.

[22, 23] No authorization for the enactment of section 46 can be found in the Constitution, although it is true that section 22 of Article XX declares that, "until the Legislature shall otherwise provide," the privilege of dispensing intoxicating liquors in bona fide public eating places shall be licensed and regulated under the applicable provisions of the State Liquor Control Act, Stats.1933, ch. 658, "in so far as the same are not inconsistent with the provisions hereof." It is readily apparent that the attempted limitation of the finality and conclusiveness of the board's decision, which section 46 of the Alcoholic Beverage Control Act necessarily imposes, is entirely at variance with the constitutional grant of "exclusive power" which has been previously discussed herein, and that such section, being without constitutional authorization, necessarily must fall. For, as stated in Chinn v. Superior Court, 156 Cal. 478, 480, 105 P. 580, 581, cited and quoted with approval in Laisne v. State Board of Optometry,

supra: "It is a well-recognized principle that where the judicial power of courts, either original or appellate, is fixed by constitutional provisions, the Legislature cannot either limit or extend that jurisdiction." To the same effect are Lemen v. Edmunson, 202 Cal. 760, 762, 262 P. 735; McClintock v. Abel, 21 Cal.App.2d 11, 17, 68 P.2d 273.

[24, 25] Specifically, since there is no due process or other constitutional objection such as that which prevents a recognition of the attempted conferment of discretionary judicial or legislative power on a ministerial body, the discretionary power lodged with the board by the Constitution to deny or revoke licenses for good cause must be permitted to be exercised and may not be whittled down by a proceeding which gives to another tribunal the authority to retry the issues on which the discretion was exercised or to substitute its judgment for that of the board. Obviously, the subjection of the decision of the board to a trial de novo before another body diminishes the effectiveness of the decision of the board and decreases its jurisdiction. This was the question directly at issue in the case of Saxton v. Board of Education, 206 Cal. 758, at page 768, 276 P. 998, at page 1002, and the court therein stated: "The effect of the amendment, therefore, is not to enlarge the power of the court in matters of *mandamus*, but to diminish the effectiveness of orders of boards of education and boards of trustees in dismissing teachers." To the same effect was the holding of the court in Whitten v. State Board, supra, Also, it has been held categorically in the case of Dawson v. Industrial Accident Commission, 54 Cal.App.2d 594, 599, 129 P.2d 479, that where a tribunal (in that case the Industrial Accident Commission) is authorized to and does act as a court in at least a quasi-judicial capacity, and there is no appeal from its decisions, its proceedings may not be tried de novo by a reviewing court.

Therefore, under well established rules, if section 46 attempts to give a right of appeal from a decision of the board—and we conclude it does—it is invalid as purporting to enlarge the jurisdiction of the court to which the appeal is to be taken, viz., the superior court.

As our conclusion is that the judgment of the trial court must be reversed, it becomes unnecessary to determine the remaining questions presented in this appeal.

The judgment is reversed.

THOMPSON, J., concurs.

ADAMS, Presiding Justice (dissenting).

I dissent. In my opinion the decision in Hammond v. McDonald, 49 Cal.App.2d 671, 122 P.2d 332, in which case the Supreme Court denied a hearing, is controlling here, and supports the conclusions of the trial court. In that case the court said, 49 Cal.App.2d at page 685, 122 P.2d at page 340:

"A restaurant which is kept and operated for the purpose of furnishing meals to the public, the service of intoxicating liquors therein being merely incidental to that business, is what it purports to be, and is therefore a bona fide restaurant, and may as a casual and incidental part of its business sell such liquors and allow their consumption upon the premises even without meals. But where the principal business of the restaurant becomes the sale and service of intoxicating liquors, which are consumed on the premises, with the sale and service of meals the incidental matter, or 'side-line,' such place is no longer a bona fide restaurant, but is to be regarded as a public saloon or barroom, within the intent of the constitutional provision, and the sales of such liquor therein are prohibited. Any rule more liberal to the restaurant keeper would, in effect, wipe out the prohibition of saloons, et cetera, and give the proviso complete dominance over the 'restriction' to which, by its own terms, it is subject."

The evidence in the case before us shows that the principal business of the Tom Tom Cafe was the sale and service of intoxicating liquors, and that the sale and service of meals was an incidental matter, or side-line carried on merely in an attempt to legalize the sale of intoxicating liquors. The trial court was fully justified in concluding that the Board of Equalization, in refusing to revoke the license on the evidence before it, acted arbitrarily and capriciously, and without substantial evidence; and on either of these grounds it was justified in reversing the action of the Board.

At the first hearing before the Board the licensee did not appear. Petitioner testified that the interior of the place was kept dark; that it did not have the appearance of a restaurant; that he had been there at various times of the day; that he had been there at 1:00 p.m. and at 6:00 p.m. and found no one eating; that he had been there twice at 9:00 p.m., that the bar stools were filled and there were about 60 people at tables, all drinking, and but two eating; that there were no odors of cooked food, but were odors of liquor and tobacco; that the reputation of the place was that of a saloon and that it catered to minors. Mrs. Carlson, a registered nurse, testified that she had visited the cafe about 10:30 p.m. on the preceding May 9th, that the bar was filled and a line waiting, that there were about 100 people present of whom only two were eating and drinking beer and the rest drinking; that those present were quite young and that some were definitely not twenty-one, and one girl appeared to be about sixteen. Mr. Carlson testified to being present with his wife on May 9th and corroborated her testimony; he stated that there were 105 people present and only two eating; that they were there until shortly after midnight; that the people present were in the younger age group. A. E. Esteb testified that he visited the place on May 2nd between 9:00 and 9:30 p.m.; that 24 people were sitting at tables, and 16 at the bar; that only four were being served food, and all the others liquor; that he had observed the place on other occasions and found people drinking but not eating; that they were mostly young people. Mrs. Esteb testified that she noticed several girls there that did not appear to be over eighteen years old. During the examination of Mr. Esteb counsel for the licensee stated:

"Mr. Lane, I will stipulate that they drink beer, wine, and cocktails in that establishment. It would not be necessary for him to prove it. We will stipulate that is sold there. *That is the main purpose of its existence.* I think I will stipulate to that.

"Mr. Lane: Wines and cocktails.

"Mr. Mier: I would. *It is the main purpose.* I will stipulate it is served there in connection with food." (Italics added.)

Claude Strickland testified that he had stepped into the place on the preceding May 9th about 8:45 p.m.; that there was no one eating, and all were drinking or had empty glasses before them; that it did not look like a restaurant. Roy F. Cottrell stated that he had looked into the place and had seen 12 or 14 people at the bar; that two girls who were definitely under twenty-one years of age entered, passing him and his wife.

At a subsequent hearing the licensee appeared. He testified that about 20% of his gross income (sales) was for foodstuff—dinners or sandwiches, and 80% for liquor; that he had dishes, tableware, etc., to serve 60 people; that he employed two cooks on different shifts regularly, and had an extra cook on Friday, Saturday and Sunday; that he estimated the cost of the equipment in the kitchen and of tables, chairs, etc., at close to $3000, while his equipment for the serving of cocktails or drinks cost about $1000; he included in the equipment for the service of food-stuffs four electric ice boxes, 1 Frigidaire, 1 Kelvinator, 1 General Electric, 1 Coco Cola Electric "for ice-water and for Dining Room," 1 Hobart Mixer which he said was for the mixing of potatoes, stoves, a steam table, etc.; that of the 2266 square feet of space in the cafe 480 were used mainly for the service of liquor; that he specialized in steaks and chickens; that he had "as fine a chef as there is any place in Glendale"; that he had one cook there all the time—two different shifts—and two cooks Friday, Saturday, and Sunday evenings; that the same waiters that wait on people that want liquor serve the food; that the work of serving liquor and serving food is not segregated; that he had one person there at all times to serve liquor, except on Saturday nights when he had two; that he himself generally worked at the bar on Saturday night and that he worked on a relief day here and there; that on *one* occasion he saw 22 people having dinner in the dining room at the same time; that his gross income from his whole business was a little over $100 per day.

One Albert Studebaker, who said he had been the manager of the cafe for five and one-half months, said that he would substantiate the testimony of McMillan in general as to the number of employees, value of equipment and the areas used for the service of liquors and food; that about 20% of the sales were foodstuffs, and 80% was for liquor; that liquor and food were served both in the dining-room part and in the liquor part; that he tended bar most of the time—three or four nights a week; that a neon sign on the front of the place says "Tom Tom Cafe," with the word "Cocktails" added; that they have entertainment a good deal of the time, consisting of an organ player, a piano player, also a "juke" box; that agents of the Board call "maybe once a month." One L. E. Patrick, a radio salesman and announcer employed by a Glendale station, testified that the Cafe had been advertising with his station for three or four years, off and on; that he devoted about 60% of his radio announcement to the sale of food, especially the service of chicken dinners and steaks; that in his radio copy he made no mention of the sale of liquors as that is forbidden by the Federal Communications Commission, but that he did state that refreshing drinks could be had there—that "You will find your favorite refreshment at the Tom Tom"; that he seldom went to the place; that he had been there on many occasions when the place had been fairly crowded, and thought he could say that he had seen ten tables where people were having food of some kind; that the food was excellent; that entertainment was almost continuous.

A. W. P. Taylor, a liquor control officer, testified that the place would seat about 120 persons; that he had been there about three months previously and McMillan had suggested that he see the kitchen; that he had stopped in on the day before the hearing and found a roast of beef, a baked ham, steaks and chickens ready for frying, also eggs and bacon; that he did not see anyone eating; that he had never been there in the evening.

It seems to me to be obvious from the foregoing testimony that the principal business of the cafe in question was the sale and consumption of intoxicating liquors, and that the sale of food was purely incidental; that the licensee maintained certain facilities for the service of food but that same were maintained merely for the purpose of justifying the carrying on of his main business, to wit, a saloon; and that this is apparent not only from the fact that only 20% of his sales were sales of food, but from the other testimony presented.

However, if the income from food alone is considered, plainly it was insufficient to justify either the asserted investment or the cost of operation as a restaurant. On his own showing receipts for the sale of food averaged about $20 per day, yet in order to earn this income he would have us believe that he was justified in hiring two regular cooks, with an extra one three nights a week, one being "the best chef in Glendale." We are not told what these cooks were paid, but a court can take judicial notice that at war time salaries $20 per day would scarcely suffice to pay for their services alone, to say nothing of the cost of his alleged specialties, steaks and chickens, and rent lights, entertainment, etc. Even if steak or chicken dinners were served for as little as $1 per person, the income of $20 per day demonstrates that a very limited number of such meals were sold, and it is apparent that if the licensee were not engaged in the sale of liquor he would be unable to operate. The conclusion is inescapable that the cost of maintaining the food end of licensee's business is largely paid from the profits of the liquor business and that the employment of so-called cooks is merely for the purpose of bolstering up a contention that the said cafe is a bona fide eating place and not a subterfuge. Also, the limited service of food shown by the evidence cannot be said to justify the alleged expenditures for equipment set forth above. No need for six or seven ice boxes and refrigerators or for a special mixer for "fluffed" potatoes is shown. The average housewife could serve all the meals this licensee is shown to have served and could have beaten up enough potatoes with an ordinary egg-beater.

In Guillara v. Liquor Control Commission, 121 Conn. 441, 185 A. 398, 399, 105 A.L.R. 563, the court said, regarding the liquor control act of Connecticut limiting the sale of intoxicating liquors to restaurants, that "the spirit and plain purpose of the act would be frustrated if mere possession of food and material and facilities for providing meals limited in number and content, if ordered, would render it possible for a person maintaining such a condition of readiness to qualify in respect of the serving of meals, although customers were lacking or so few in number or food requirements, or both, that the sale of liquor under the permit obtained would constitute the principal business and the sale of food a subservient incident thereto, thereby reversing the indicated policy." Also see Neubauer v. Liquor Control Commission, 128 Conn. 113, 20 A.2d 669; and In re Rydewski, 121 Pa.Super 171, 183 A. 437.

The language used in the opinions in two cases decided by county courts in the state of Pennsylvania is also applicable. In Re Bailor's License, 42 Pa. Dist. & Co. R., 411, the court said that the Beverage License Law of Pennsylvania, 47 P.S. § 84 et seq., was an act to regulate and restrain the traffic in malt, brewed and other such beverages and not an act to promote their sale; and that "If an eating place, without a license, is not a success from a financial point of view, a beverage license is not to be granted to make it pay." In re Appeal of Gerba, reported in 7 Fay.L.J., Pa., 219, Gerba applied for a restaurant liquor license, which was denied. The court in conforming the action of the Liquor Control Board said that the method to accomplish the purpose of the legislature was to confine the sale of intoxicating liquors to bona fide restaurants; that it was unable to find that the applicant had met the burden of showing that the place for which the license was applied for would be habitually and principally used for the purpose of providing food for the public. And it added:

"We cannot come to the legal conclusion that the legislative intent of promoting public welfare and protecting the health, peace and morals of a community, can be subserved by the granting of a liquor license simply for the purpose of providing the revenue by which an alleged restaurant may be made and kept a profitable venture. * * *

"The testimony of the male applicant himself * * * together with that of other witnesses called in behalf of appellants, compels the finding of fact that there is no appreciable service of the public in the supply of food in this restaurant. Its maintenance is simply a peg on which to hang a liquor license, by means of which the sale of liquor will necessarily become the principal business of the place and will, in effect, be the establishment of an open saloon. * * *"

In this connection it may be noted that section 1 of the California Alcoholic Beverage Control Act (Act 3796) asserts:

"This act shall be deemed an exercise of the police powers of the State, for the protection of the safety, welfare, health, peace and morals of the people of the State; to eliminate the evils of unlicensed and unlawful manufacture. selling and disposing of alcoholic beverages, and to promote temperance in the use and consumption of alcoholic beverages; *and it is hereby declared that the subject matter of this act involves in the highest degree the economic, social and moral well-being and the safety of the State and of all its people; and all provisions of this act shall be liberally construed for the accomplishments of these purposes.*" (Italics added.)

Appellant says in its brief that "if the licensee sold no intoxicating liquors at all but only sold food in the same amount he is now selling, under what rule of law or common sense could it be held that he, in fact, is not engaged in the sale of foods to the public? To come to that conclusion, of necessity, we would have to hold that he is engaged in the sale of food in bad faith or mala fides to the public, and the evidence in this case could not possibly be construed to support such a conclusion." It seems to me that the rule of common sense indicates that if the licensee sold only $20 worth of food per day and no liquor he would not be in business at all; and that the evidence, if considered realistically, compels the conclusion arrived at by the trial court that he is not engaged in the sale of food in good faith, but maintains facilities for so doing as a mere subterfuge, and "a peg on which to hang a liquor license."

The trial court found as follows:

"II. That the evidence before said Board showed (and there was none to the contrary), and this Court finds, that not only was the respondent McMillan operating and conducting a public saloon, within the meaning of the Alcoholic Beverage Control Act of California in which the selling of intoxicating liquors was the principal business and the selling and serving of food was a mere side-line of said public saloon, but the serving of food, such as there was, was a pretense and a sham in order to give to the said business the appearance of a restaurant.

"III. That the public saloon was conducted and run as such, and had been so conducted and run for more than a year prior to the filing before said Board of Petitioner's complaint against said McMillan, during which time the amount of intoxicating liquors sold was greater than that of the food served in a ratio of more than four to one, the ratio at the time said complaint before said Board was filed.

"IV. That for the purpose of attracting the public, and particularly young people to the place, it was known and designated as a 'cafe' while a large sign with the word 'cocktails' was displayed in front thereof; and the place was darkened, while loud and raucous sounds pealed forth from a phonograph or from musical instruments manipulated by men elevated on a platform, and at the same time men and women of varying ages, many being young and some in their teens, sat on stools at the bar or at tables, drinking intoxicating liquors.

"V. That the defendant said Board and its members acted capriciously, arbitrarily, without evidence, and without right in denying the petition of said petitioner to cancel the liquor license of said McMillan filed with it."

The evidence fully sustains such findings; and whether it be said that that court's conclusion that the Board erred in its refusal to cancel McMillan's license be based upon the ground that it acted capriciously and arbitrarily, or on the ground that the evidence does not support its conclusion, in my opinion that court did not exceed its jurisdiction nor act in excess of its powers.

It is conceded by appellant Board that the proceeding by way of mandamus was proper. In fact, the record shows that while the original complaint was based upon section 46 of the Alcoholic Beverage Control Act, that *by stipulation* it was amended to constitute a petition for a writ of mandate. It also shows that the record before the Board was introduced in evidence before the court by petitioner without objection; and appellant says in its opening brief that the sole question before this court is whether the licensee was operating a bona fide restaurant, cafe or public eating place. To be sure, in its closing brief, filed by a different deputy attorney general, other contentions are raised.

Only one of these contentions—that Covert was not a person beneficially interested and therefore was not authorized to prosecute this proceeding—appears to have been raised in the trial court. It was raised by demurrer to the amended petition and overruled on the authority of section 40 of the Alcoholic Beverage Control Act which provides that complaint may be made to the Board by any person, and on the authority of such cases as Conn v. City Council, 17 Cal.App. 705, 710, 711, 121 P. 714, 719; Felt v. Waughop, 193 Cal. 498, 225 P. 862; High's Extraordinary Legal Remedies, 3rd Ed., secs. 431, 433. Section 431 provides:

"As regards the degree of interest on the part of the relator requisite to make him a proper party on whose information the proceedings may be instituted, a distinction is taken between cases where the extraordinary aid of a mandamus is invoked merely for the purpose of enforcing or protecting a private right, unconnected with the public interest, and cases where the purpose of the application is the enforcement of a purely public right, where the people at large are the real party in interest. And while the authorities are somewhat conflicting, yet the decided weight of authority supports the proposition that, when the relief is sought merely for the protection of private rights, the relator must show some personal or special interest in the subject-matter, since he is regarded as the real party in interest and his right must clearly appear. Upon the other hand, when the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the people are regarded as the real party in interest, and the relator at whose instigation the proceedings are instituted need not show that he has any legal or special interest in the result, it being sufficient to show that he is a citizen and as such interested in the execution of the laws."

Another contention is that the trial court erred in reconsidering the evidence and in making independent findings of fact. Appellant states that "the exclusive province and only power of the court was the determination that appellant's determination was supported by substantial evidence." No authorities are cited in support of this statement. In Friedland v. Superior Court, 67 Cal.App.2d 619, 155 P.2d 90, this court had occasion to consider the power of courts to review in mandamus proceedings, the action of the Board of Equalization in such cases, and we there stated, 67 Cal.App.2d at page 626, 155 P.2d at page 94:

"The Supreme Court has held in recent decisions that in mandamus proceedings to review the decisions of state-wide administrative agencies such as the State Board of Equalization, a petitioner is entitled to present independent evidence, and to have, in effect, a trial de novo. Drummey v. State Board of Funeral Directors, 13 Cal.2d 75 [87 P.2d 848]; Laisne v. California State Board of Optometry, 19 Cal.2d 831, 123 P.2d 457; Dare v. Board of Medical Examiners, 21 Cal.2d 790, 136 P.2d 304.

"In the Drummey and Laisne cases it is held that in a mandamus proceeding the superior court has the power to exercise an independent judgment on all of the material facts relative to the issue of whether petitioner has violated the statutes as charged before the board, and that in the exercise of such judgment it is not confined to the record before the board, as otherwise it would not be exercising an independent judgment; that in such proceeding the superior court has a right to hear independent evidence and hold, in effect, a trial de novo. And while in the Dare case the scope of such a hearing as is held proper in the Drummey and Laisne cases may be somewhat delimited, the right and duty of a trial court to hold, in effect, a trial de novo of the issues before it insofar as the taking of independent evidence is concerned, is reaffirmed."

Inasmuch as the Supreme Court denied a petition for a hearing in that case we are justified in assuming that our conclusion was correct; and it is applicable here, though in this case no independent evidence was adduced, and the trial court based its decision upon the record before the Board. Furthermore, if findings of fact are superfluous they may be disregarded, as the power of the court to determine that appellant's decision was not supported by substantial evidence is conceded by appellant; and the court so determined.

Appellant also asserts in its closing brief that section 46 of the Alcoholic Beverage Control Act is inapplicable and that anyhow it is unconstitutional. But no attempt to apply that section was made by the trial court. The record shows, as hereinbefore stated, that while the original petition filed in the case was based upon that section, by stipulation it was amended so as to constitute a petition for writ of mandate; and the action then proceeded, without controversy, as such. There was no trial de novo. The validity or invalidity of section 46 is therefore not an issue in this proceeding. It is pertinent only as an expression of legislative opinion that decisions of the Board are and should be subject to judicial review. Also see Empire Vintage Co. v. Collins, 40 Cal. App.2d 612, 618, 105 P.2d 391, 394 (hearing by the Supreme Court denied), where the court said regarding findings of the Board of Equalization: "That its findings were not conclusive is true. Power to review said findings is expressly granted to any court of competent jurisdiction. (Sec. 46.)"

Another contention raised in appellant's closing brief is that the trial court sought to exercise the power and discretion vested in appellant, in that it ordered that a writ of mandate issue commanding the Board to "revoke, cancel and annul" the license issued to McMillan, and that what it should have done was to remit the matter to the board "for action not inconsistent with the court's conclusions." No such contention was made in the trial court, and in view of the fact that the trial court's judgment conformed to the relief asked for in the petition for the writ and the record shows no application for a different order, even if this contention had merit it should not be considered when raised for the first time on appeal.

It is said in 2 Cal.Jur., sec. 68, p. 237:

"It is well settled that the theory upon which a case is tried in the court below must be adhered to on appeal. To permit a party who has tried his case wholly or in part on a certain theory, which theory was acted on by the trial court, to change his position and adopt a different theory on appeal, would not only be unfair to the trial court, but manifestly unjust to the opposing litigant."

Also, sec. 74, p. 248:

"It is a well-settled rule that a party cannot urge, for the first time on appeal, objections which could have been obviated if made in the court below."

Also see Ernst v. Searle, 218 Cal. 233, 240, 241, 22 P.2d 715; Gibson Properties Co. v. City of Oakland, 12 Cal.2d 291, 299, 83 P.2d 942; Marra v. Ætna Construction Co., 15 Cal.2d 375, 379, 101 P.2d 490; LaRue v. Board of Trustees, 40 Cal.App.2d 287, 295, 296, 104 P.2d 689; Pappadatos v. Market St. Bldg. Corporation, 130 Cal.App. 62, 65, 66, 19 P.2d 517; Egilbert v. Hall, 44 Cal. App.2d 305, 311, 112 P.2d 291.

The final contention of appellant is that its determinations of fact are final and conclusive. But it concedes in its brief that its determinations are "subject to judicial review" as to questions of law one of which is "whether appellant's determination of the ultimate fact that the licensee was maintaining a bona fide restaurant is supported by substantial evidence." The trial court said that it was not so supported, and to my mind it was correct. As matter of fact the findings of the trial court are not in conflict with any findings of fact made by the Board, for the latter made no such findings. Its representative, in his purported findings, merely set forth briefly some of the testimony of some of the witnesses, and then stated: "In my opinion the evidence produced in support of the complaint does not prove a violation. If the Board considers that a food business totaling only 20% of the sales is noncompliance with the Alcoholic Beverage Control Act and the Constitution, then the licenses should be revoked or suspended indefinitely." All that the Board thereafter did was to order that the complaint be dismissed.

As for appellant's argument that the establishment is not a public saloon as matter of law, it states in its brief that "the establishment is a bona fide restaurant in fact. A fortiori it must be found to be a bona fide restaurant as matter of law." But, as above stated, the Board did not find that it was a bona fide restaurant in fact, unless such a finding is to be inferred from its refusal to cancel the license; and if Hammond v. McDonald, supra, is the law of this state, as I shall assume it to be until overruled by the Supreme Court, the establishment cannot be said to be a bona fide restaurant as matter of either fact or law.

The judgment should be affirmed.

REYNOLDS v. STATE BOARD OF EQUALIZATION.*

Civ. 7126.

District Court of Appeal, Third District, California.

Oct. 24, 1945.

Rehearing Denied Nov. 14, 1945.

Hearing Granted Dec. 20, 1945.

1. Common law 🔑9

The maxim that the greater contains the less is of general application.

2. Constitutional law 🔑18

The constitutional provision that, until Legislature shall otherwise provide, the privilege of dealing in intoxicating liquor shall be licensed and regulated under applicable provisions of the State Liquor Act insofar as the same are not inconsistent with provisions hereof, made the applicable portions of the State Liquor Control Act a part of the constitutional provision regarding regulation of intoxicating liquors. St.1933, pp. 1701, 1703, 1704, 1705, §§ 12, 19, 20, 22, 23, 25; Const. art. 20, § 22.

3. Intoxicating liquors 🔑108(9)

Under constitutional provision giving State Board of Equalization discretionary power to deny or "revoke" any specific liquor license for good cause and statutes relating to suspension, the board has power to suspend license subject to reinstatement. St.1933, pp. 1701, 1703, 1704, 1705, §§ 12, 19, 20, 22, 23, 25; Gen.Laws 1937, Act 3796; Civ.Code, § 3536; Const. art. 20, § 22.

See Words and Phrases, Permanent Edition, for all other definitions of "Revoke".

4. Intoxicating liquors 🔑69, 108(9)

The constitutional provision conferring on State Board of Equalization exclusive power to license and regulate sale of intoxicating liquors and power, in its discretion, to deny or revoke any specific liquor license if it shall determine for good cause that granting or continuance of license would be contrary to public welfare or morals, conferred judicial power. Const. art. 20, § 22.

5. Mandamus 🔑187(9)

Where there was nothing in record to show that order of State Board of Equalization reinstating liquor license, which had been suspended, was unwarranted, court would not interfere, but would assume that official duties had been properly and lawfully performed and that proper order was made by the board. Const. art. 20, § 22.

6. Intoxicating liquors 🔑109

A determination by State Board of Equalization regarding revocation or suspension of liquor license, within constitutional limits of board's authority, must be accorded a relatively high degree of finality as constituting the decision of a tribunal exercising properly delegated judicial functions. Const. art. 20, § 22.

7. Mandamus 🔑172

Where State Board of Equalization suspended liquor license on ground that intoxicating liquors were being sold for consumption on premises which were not being conducted as a bona fide public eating place, but board thereafter reinstated the license, trial court was not authorized, on mandamus seeking revocation of license, to substitute its judgment or determination for that of the board. Const. art. 20, § 22.

8. Mandamus 🔑28

Mandamus will not lie to control the discretion of a court or judicial officer or to compel its exercise in a particular manner.

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* Subsequent opinion 173 P.2d 551.

ADAMS, P. J., dissenting.

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Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Proceeding by Clifton G. Reynolds against the State Board of Equalization for a writ of mandate directing the State Board of Equalization to revoke a liquor license. From an adverse judgment, the State Board of Equalization appeals.

Reversed.

B. Grant Taylor, of Redwood City, and Edwin E. Grant, of San Francisco, for petitioner.

Robt. W. Kenny, Atty. Gen., and Allen L. Martin and J. Albert Hutchinson, Deputy Attys. Gen., for respondents.

PEEK, Justice.

This is an appeal from a judgment of the Superior Court of Sacramento County ordering the issuance of a peremptory writ of mandate directing the California State Board of Equalization to revoke the licenses of the proprietors of certain premises known as the Cupertino Cafe, located in the county of Santa Clara.

The facts in this case, substantially as agreed to by the parties but with certain additions deemed material, are as follows:

Prior to August 4, 1943, Joe Enos and Enrico O. Olcese, doing business as the Cupertino Cafe, were the holders of certain licenses issued by appellant State Board of Equalization, and by virtue thereof were permitted to and did sell intoxicating liquors in the designated premises. The licenses were issued under authority of Article XX, Section 22 of the Constitution of the State of California, and appropriate provisions of the Alcoholic Beverage Control Act of this state (Deering's General Laws, Act 3796). Respondent Clifton G. Reynolds, acting on behalf of a committee of residents of the community affected, filed a claim with the appellant board, alleging, among other things, that the licensees "have maintained a public saloon bar and barroom in said premises, selling and disposing of intoxicating liquors, other than beers, therein for consumption on the premises, when said premises and the business conducted therein were not a bona fide hotel, restaurant, cafe, cafeteria or other public eating place, in disregard and violation of Sec. 22, Article XX of the Constitution, and subdivision (m) of Sec. 2, Sec. 18, and Sec. 53 of the Control Act."

A hearing of said complaint was held on December 13, 1943, by a representative of the appellant board. The pertinent portions of his findings and the recommendation are as follows:

"The evidence shows that the premises are not being operated as a bona fide public eating place within the meaning of Section 22 of Article XX of the Constitution of the State of California. The licensees are not engaged on said premises in a bona fide business of serving meals or other food ordinarily served to the public in bona fide restaurants, cafes, dining rooms or other bona fide eating places. The evidence in this respect showed that customarily no food is served in the premises excepting sandwiches which are sold for the same price at which they are bought by licensees. * * * practically the entire business conducted on the premises is the sale of alcoholic beverages including intoxicating liquors. (It appears that the premises have been operated in this manner at least from September 18, 1943 to the date of the hearing herein.) Officers of the Board inspected the premises on December 10, 1943, at which time there was no food on the premises and none being served. Recommendation: That the licenses be suspended indefinitely."

Acting upon such recommendation, the appellant board, on February 3, 1944, ordered that said licenses be suspended indefinitely, and gave notice of its decision to the licensees. Thereupon complainant Reynolds, petitioner herein, filed with the appellant board a petition for reconsideration, which petition was denied.

On March 9, 1944, by order of the appellant board, the licenses in question were reinstated. Thereafter respondent petitioned for a writ of mandate in the Superior Court of the State of California, in and for the County of Sacramento, attacking solely the alleged failure of appellant to revoke unconditionally the licenses in question instead of suspending them indefinitely. In short, it was the contention of respondent that appellant was without authority to suspend the licenses even for an indefinite period of time and that it was the duty of appellant to revoke the licenses on the basis of the findings of fact of the board's representative which were adopted by the appellant board.

The Superior Court sustained the contention of respondent and granted a peremptory writ of mandamus, ordering appellant to revoke the licenses. From the judgment entered in favor of respondent, appellant appeals.

At the outset it further should be noted that the complaint and the findings of the board contain certain recitals relating to the proximity of the licensed premises to a church, and to an occasion of disorderly conduct on the part of the patrons of the establishment. However, an examination of the opinion of the trial court shows that these matters formed no part of the decision on which the judgment was based nor have the parties on appeal raised any issue thereon or made any reference thereto. We, therefore, assume that such issue has been waived, and accordingly we will confine our discussion to the sole theory upon which the case was tried and the disposition thereof made.

It is the contention of the appellant board that the provisions of Section 22 of Article XX of the Constitution, to-wit: "State Board of Equalization shall have the exclusive power to license the * * * sale of intoxicating liquors * * * and shall have the power, in its discretion, to deny or revoke any specific liquor license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals," is a grant of power and not an order; that under said section the board may revoke a license, but that the quoted portion thereof does not require it to do so in any given case, and that in addition thereto the legislature has seen fit to add to the power so granted the further power to suspend. Section 40, A.B.C.Act.

Respondent replies that said Section 22 of Article XX precludes the imposition of a suspension and makes revocation mandatory, and that under the facts of the present case only by absolute termination of the licenses in question could the board discharge the duty imposed upon it by the Constitution.

Therefore the only question remaining for determination on appeal is this: Where the record shows that intoxicating liquors, other than beer, are being sold for consumption on premises which bare being conducted not as a bona fide restaurant, cafe, or other public eating place, as these terms are used in the Constitution, but as a public saloon or public bar, has the State Board of Equalization the power or right to suspend licenses subject to reinstatement, or is the board compelled by said constitutional provision to revoke such licenses absolutely? Although the question so presented, insofar as the specific facts are concerned, is one of first impression in this state, an examination of the adjudicated cases in comparable situations appears to substantiate appellant's position.

In the case of Bar Ass'n, etc. v. Cantrell, 53 Cal.App. 758, 760, 200 P. 968, the district court had before it a question relative to the disbarment of an attorney under the provisions of the Code of Civil Procedure, section 289 et seq., as it then read, and the court stated: "The difference between a judgment of disbarment and one of suspension is a difference of degree only * * *" and that "* * * it is an axiom of the law that 'the greater (disbarment) includes the less (suspension'." Citing Civil Code, § 3536.

Again in the case of Klatt v. Guaranteed Bond Co., 213 Wis. 12, 250 N.W. 825, 830, the court, in passing upon a provision of the statute of that state, giving to the Securities Commission of Wisconsin the power for cause to terminate any broker's right to proceed under the statute, stated that "the power to suspend is certainly included in the power to terminate."

A comparable use of terminology is found in the case of Schnitzler v. Yellowley, D. C. N.Y., 290 F. 849, 852–853. It there appears that the provisions in the National Prohibition Act, Title 2, Sections 6 and 9, 27 U.S.C.A. §§ 16, 21, required every permit to limit the acts that might be performed thereunder and further provided that the official charged with the duty of administering the act might, for cause therein provided, revoke the permit. Upon the contention that in limiting a license under said act rather than revoking the same the Commissioner exceeded his power, the court therein stated: "By statute the Commissioner had the right, on granting the permit, to limit the acts of the permittee, and for cause to revoke the permit, and therefore the greater would include the lesser, and, instead of revoking, he could, if he saw fit, limit the acts allowed under the permit."

A previous decision of this court likewise is in point, Goldsmith v. Board of Education, 66 Cal.App. 157, 163, 164, 225 P. 783, 785. There a permanent teacher in the Sacramento city schools, who participated in certain political activities, was found to be guilty of unprofessional conduct within the meaning of section 1672 of the Political Code, which then provided that a permanent teacher guilty of unprofessional conduct within the meaning of said section was subject to dismissal. The section did not provide that a teacher found to be guilty of such conduct could either be suspended or temporarily dismissed. However, the school board suspended her for ten days. In disposing of the contention of appellant therein that, as the provision provided for dismissal, the judgment of suspension was void because it was not within the expressed words of the section, this court upon the issue so presented stated:

"We are of the opinion, however, that the word 'dismiss', as used in the section in question, could not have been intended by the Legislature so to restrict the power of the board as to require it in all cases of guilt under said section to impose as a punishment the permanent dismissal of the offending teacher. * * * To hold that the meaning of the word 'dismiss', as used in said section was intended to limit the power of the board to the imposition of no other punishment than that of permanent dismissal in any and all cases arising thereunder, regardless of whether the particular offense charged is of sufficient gravity to warrant such a penalty, would give to the section a construction which, in its application to conceivable cases, would be so unreasonable as that the courts might be justified in declaring it to be void. * * * Colloquially, or as used in common vernacular, the word 'dismiss' is often used interchangeably with the word 'suspend,' and it is clear that the interpretation of that word as so used is the only one that may be given it to relieve the section from the imputation of being absurd or of authorizing, when applied in certain cases, unjust and, in truth, nonsensical consequences. * * * The established legal maxim, 'The greater contains the less' (section 3536 Civ.Code), should be applied in this instance, and that therefore the word 'suspend' should be held to have been intended by the Legislature to be included within the word 'dismiss' * * *."

[1] The maxim therein quoted and relied upon, that the "greater contains the less", is of such universal application as not to warrant extensive citation of cases. Illustrative authorities are 46 Corpus Juris, 1090; Cavanaugh v. Wholey, 143 Cal. 164, 168, 76 P. 979; Carpenter v. Webster, 27 Cal. 524, 553; La Mar v. City Council, etc., 53 Cal.App.2d 387, 390, 127 P.2d 1022; Williams v. Hawkins, 20 Cal. App. 161, 163, 128 P. 754.

[2] In addition to the principle just discussed, the obvious purport of the language contained in the latter part of said section 22 of Article XX, that, "Until the Legislature shall otherwise provide, the privilege [of dealing in intoxicating liquors] shall be licensed and regulated under the applicable provisions of the so-called State Liquor Control Act, California Statutes 1933, Chapter 658, in so far as the same are not inconsistent with the provisions hereof * * *," confirms the conclusion herein reached. By this reference, the applicable portions of the State Liquor Control Act were incorporated into and made a part of said section 22; and an examination of that Act discloses that the power of the board to suspend a license is mentioned specifically in sections 12, 19, 20, 22, 23 and 25 thereof. That these sections, expressly authorizing the exercise of the right of suspension, were not inconsistent with the provisions of section 22, appears to have been the deliberate conclusion of the subsequent legislatures which enacted the present Alcoholic Beverage Control Act and the amendments thereto. For those succeeding legislatures enacted, in much the same form as they existed before, the provisions conferring on the board the power to suspend alcoholic beverage licenses. See Sections 6(c), 38e, 48 and 48.6 of the A.B.C.Act, Deering's General Laws, Act 3796, Stats.1935, p. 1123, as amended. So that, even if it may be said that section 3536 of the Civil Code is not controlling in this case and that there is still a doubt as to the interpretation to be given the mooted portion of said section 22, yet by reason of the incorporation therein of those portions of the Liquor Control Act relative to suspension, such question finds complete answer in the case of City and

County of San Francisco v. Industrial Accident Comm., 183 Cal. 273, 279, 191 P. 26, 28. There the Supreme Court stated:

"In such a situation, where a constitutional provision may well have either of two meanings, it is a fundamental rule of constitutional construction that, if the Legislature has by statute adopted one, its action in this respect is well-nigh, if not completely, controlling. When the Legislature has once construed the Constitution, for the courts then to place a different construction upon it means that they must declare void the action of the Legislature. It is no small matter for one branch of the government to annul the formal exercise by another and coordinate branch of power committed to the latter, and the courts should not and must not annul, as contrary to the Constitution, a statute passed by the Legislature, unless it can be said of the statute that it positively and certainly is opposed to the Constitution. This is elementary. But plainly this cannot be said of a statute which merely adopts one of two reasonable and possible constructions of the Constitution."

[3] Complainant, however, further argues that the suspension of the license herein amounted to a continuance thereof, in disregard of the prohibition against saloons. But it is to be noticed that section 40, subdivision 1, of the Alcoholic Beverage Control Act specifically provides that a ground exists for the suspension of a license "When the continuance of such license would be contrary to public welfare or morals"—thereby in effect saying that the suspension of a license is a discontinuance thereof.

This is in accord with the literal meaning and significance of the word "suspend" which primarily means "to cause to cease", temporarily or for a time prescribed. Vol. 40 Words and Phrases, Perm.Ed. p. 918, and pocket part. Such is the meaning commonly ascribed to the term "suspend." Derrick v. City of Vallejo, 4 Cal.App.2d 25, 27, 40 P.2d 949, quoting from Webster's New International Dictionary.

By the rules and regulations promulgated by the board all business operations must cease when an order of suspension is served on a licensee. Said rules provide in part that prominent notices of the suspension must be posted in conspicuous places both on the exterior and interior of the premises, for the duration of the suspension; and they forbid the licensee from advertising or posting signs to the effect that the premises have been closed or business has been suspended for any reason other than by order of the board suspending alcoholic beverage licenses. The rules also require that the board notify all licensed manufacturers, manufacturers' agents, rectifiers and wholesalers of the names and license numbers of the licensees whose licenses have been suspended.

In support of his argument in this regard, complainant relies strongly on the case of Board of Trustees, etc. v. State Board of Equalization (decided Nov. 2, 1934), 1 Cal.2d 784, 787, 37 P.2d 84, 85, 96 A.L.R. 775. That case involved an application for a writ of review to cancel and annul a license to sell intoxicating liquors, which license had been granted to the California Avenue Pharmacy at Palo Alto over the protest of the petitioner therein. The ground for the protest and petition was the contention that the issuance of the license was in direct violation of Penal Code, § 172a, which prohibited the sale of intoxicating liquors within one and one-half miles of the grounds or campus of a university having a designated number of students, where the principal business offices of the university were located on such grounds or campus. After determining that the pharmacy was within the prohibited zone, the court further pointed out that the rules of the State Board of Equalization also expressly forbade the issuance of a license in a case where the premises in question were located within an area in which the establishment was prohibited by law. The decision of the court in this respect was thus summarized:

"As the licensed place of business in this case is located in territory in which the sale of intoxicating liquor is prohibited by law, the respondent Board of Equalization granted an illegal and void license. * * * (Citing cases.) It is therefore the duty of the Board of Equalization to cancel and annul the license."

[4] First of all it is to be noted, as stated by the court in the previous quotation, the granting of the license by the board was in direct violation of an express statutory prohibition. Such is not the situation in the case at bar. Section 13 of the Alcoholic Beverage Control Act

merely provides that: "The board is specifically authorized to refuse the issuance of on-sale retail licenses for premises located within the immediate vicinity of churches, * * *." Secondly, the Stanford case was decided prior to the amendment to Article XX, section 22 of the Constitution, adopted November 6, 1934, and hence is inapplicable to the case at bar. Said constitutional amendment confers on the State Board of Equalization the exclusive power to license and regulate the sale of intoxicating liquors, and the power, in its discretion, to deny or revoke any specific liquor license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals. This conferment of power, we have held in the case of Covert v. State Board of Equalization, Cal.App., 162 P.2d 717, this day decided, comprehends the exercise by the board of judicial—not merely ministerial—functions. Thirdly, in the Stanford case no issue was made as to suspension or revocation, or as to the kind of relief to be granted if the order of the board was based on erroneous findings and conclusions and was to be set aside for that reason. In the case at bar the findings and conclusions were sustained; only the character of the order made thereon is attacked. Lastly, the Stanford case is one where there was no reason to believe that the conditions which made the issuance of the license unlawful could or would change. There was no reason for terminating the privileges of the licensee for an indefinite period only, when nothing but a repeal of the law or a change in the boundaries of the university could warrant a reinstatement of the license.

[5] In the case at bar the findings and judgment show that as a matter of fact within a few weeks after the original hearing on respondent's petition and the suspension of the licenses the board ordered the reinstatement thereof. There is nothing in the record to show that said order of reinstatement was unwarranted, and its validity is not questioned on appeal. In the absence of any showing to the contrary "a court will not interfere * * * but will assume that official duty has been properly and lawfully performed", Goytino v. McAleer, 4 Cal.App. 655, 658, 659, 88 P. 991, 992, and "that a proper order * * * was in fact made and entered" by the board. San Francisco Breweries, Ltd. v. Superior Court, 80 Cal. App. 433, 439, 251 P. 935, 937. See also subsection 15, section 1963, C.C.P., and 16 Cal.Jur. p. 869, sec. 67.

[6-8] If, then, the State Board of Equalization has been invested with the power in its discretion to determine whether, in a particular case, the penalty of revocation or suspension should be imposed, and if a determination by such board within constitutional limits must be accorded a relatively high degree of finality and conclusiveness as constituting the decision of a tribunal exercising properly delegated judicial functions, as we have held this day in the case of Covert v. State Board of Equalization, Cal.App., 162 P.2d 717, it inevitably follows that the trial court was not authorized on mandamus to substitute its own determination or judgment for that of the board. As stated in Hilmer v. Superior Court, 1934, 220 Cal. 71, 73, 29 P.2d 175, 176:

"It is well settled that *mandamus* will not lie to control the discretion of a court or judicial officer or to compel its exercise in a particular manner, except in those rare instances when under the facts it can be legally exercised in but one way."

In Lincoln v. Superior Court, 22 Cal.2d 304, 313, 139 P.2d 13, 18, the reviewing court, in discussing the rule as stated in the Hilmer case, observed:

"Such statement approaches being paradoxical in its implication that any area of discretion remains when 'it can be legally exercised in but one way.' The quoted statement is followed by the court's interpretation of its own language, 'Stated differently, a court can be compelled to act, but, having acted, its act cannot be reviewed on mandamus.'"

This rule was subsequently followed by this court in the case of Friedland v. Superior Court, 67 Cal.App.2d 619, 155 P.2d 90.

The judgment appealed from is reversed.

THOMPSON, J., concurs.

ADAMS, Presiding Justice (dissenting).

I dissent. The findings of the Board filed on or about December 21, 1943, were as follows:

"Findings: The complaint alleged that the premises have been operated in a manner contrary to public welfare and morals; that the licensees misrepresented material facts in making the application for said licenses; that the premises are near a church; and that the premises are not operated as a bona fide public eating place. The evidence shows that the premises and the church in question are located on opposite sides of the Saratoga-Sunnyvale Road; the church property is slightly farther south than the licensees' premises; the two buildings are about 160 feet apart.

"The evidence shows that there have been occasional incidents in which patrons of the premises have engaged in conduct which disturbed the neighborhood although the premises appear to be operated in an orderly manner excepting on those few occasions. These incidents involved intoxicated persons who made nuisances of themselves. The evidence shows that the premises are not being operated as a bona fide public eating place within the meaning of section 22 of Article XX of the Constitution of the State of California. The licensees are not engaged on said premises in a bona fide business of serving meals or other food ordinarily served to the public in bona fide restaurants, cafes, dining rooms or other bona fide eating places. The evidence in this respect showed that customarily no food is served in the premises excepting sandwiches which are sold for the same price at which they are bought by licensees. The licensees have been selling on an average of about 30 sandwiches a week which sales bring in about $4.50 in receipts; the receipts for the sales of alcoholic beverages for corresponding periods is in excess of $200.00. It therefore appears that the sale of the sandwiches amounts to nothing more than a 'side-line' of insignificant proportions, involving no profit, so that practically the entire business conducted on the premises is the sale of alcoholic beverages including intoxicating liquors. It appears that the premises have been operated in this manner at least from September 18, 1943, to the date of the hearing herein. Officers of the Board inspected the premises on December 10, 1943, at which time there was no food on the premises and none being served."

On these findings the licenses were, on February 3, 1944, "suspended indefinitely."

On March 9, 1944, a rehearing before the Board was denied, and at that time the licenses were "reinstated." There is nothing in the record to show upon what grounds reinstatement was ordered or that the premises in controversy had during the short intervening period ceased to be near a church (Alcoholic Beverage Control Act, sec. 13) or had become a bona fide eating place. The opinion filed by the trial court, to my mind, correctly decided the issues presented when it stated as follows:

"A hearing was had before a referee of the Board who, after a full investigation reported that 'the evidence shows that the premises are not being operated as a bona fide public eating place within the meaning of Section 22 of Article XX of the Constitution of the State of California. The licensees are not engaged on said premises in a bona fide business of serving meals or other food ordinarily served to the public in bona fide restaurants, cafes, dining rooms or other bona fide eating places.'

"Upon this finding and report the complainant demanded the revocation of the respondents' license, but the Board upon the recommendation of the referee merely suspended the license which within a short time it restored.

"The Plaintiff herein, complainant in the matter before the Board asks in this action that the Board be required to perform what he claims is its constitutional duty, to revoke the license of the parties to whom it has been issued. To this relief he is clearly entitled. The Constitution states that 'intoxicating liquors, other than beers, shall not be consumed, bought, sold, or otherwise disposed of for consumption on the premises in any public saloon, public bar, or public bar-room within the State.'

"As shown by the report of the referee or representative of the Board of Equalization the business of the licensees was purely that of a saloon and bar-room. There is just one exception to this restriction and that is as specified by the Constitution that 'intoxicating liquors may be kept and may be bought, sold, served, consumed and otherwise disposed of in any bona fide hotel, restaurant, cafe * * * or other public eating place.'

"As the premises of the licensees was not a bona fide eating place, the sale of intoxicating liquors there was unlawful. Under no conception of the law can a man be given or permitted to hold a license to do an unlawful thing. It will be noted that the Constitution by positive averment declares that intoxicating liquors, other than beers, cannot be sold for consumption on the premises in any saloon or bar-room in this State. The sole exception that such liquors may be sold in a bona fide restaurant or eating house has no application here as the premises involved are not operated as such a place. So we find the licensees here holding a license to sell intoxicating liquors in a manner prohibited by the Constitution.

"If the license had been procured in disregard of the requirement that it should have been issued only to persons conducting a restaurant or eating house it would be 'the duty of the Board of Equalization to cancel and annul' it. Board of Trustees, etc. v. State Board of Equalization, 1 Cal. 2d 784, 37 P.2d 84, 96 A.L.R. 775.

"I can see no difference between a case where a license is granted in the absence of an indispensable condition and one where after a license has been granted an indispensable condition to its valid existence ceases to exist. When the licensees here discontinued their food service and ceased to conduct the restaurant or cafe through the existence of which they were enabled to obtain their license their premises became a barroom and their business a saloon. Thereafter every use they made of their license was illegal. How can it be contended that a license under such circumstances did not become invalid, the only thing which supported it or gave it validity having ceased to exist?

"When the fact was found there remained nothing for the Board to do but to declare the license forfeited and order it to be revoked. Instead of doing this the Board attempted to *suspend* the license. To suspend means to 'cease for a time', 'to postpone,' to 'interrupt,' to 'delay' to 'hold undetermined'. Words and Phrases.

"To attempt the suspension of an illegal license was to assume that there was something to suspend. When persons to whom a liquor license has been given so re-arrange their business that they discontinue Constitutional requirements and proceed to use the licensed premises as a saloon or barroom and to sell liquor there in a way which the Constitution says they 'shall not' be permitted to do, can the Board say to them that they must 'delay' such sales, that they must 'postpone' them, that they must 'cease for a time' to conduct their unlawful business?

"The only thing that could have been said to them would have been that their business was at an end, that it must 'cease' not for a time but for all time.

"If these licensees later were to begin the business of selling food in some genuine restaurant or cafe and thus qualify for a license it might properly be given to them, but that would be a matter of an application in the nature of an entirely new proceeding.

"Counsel for respondent calls attention to the fact that the Constitution (Art. XX, Sec. 22) gives the Board 'discretion' to revoke, which probably includes the lesser power to suspend, a license for certain causes. It will be observed however, that the discretionary power thus given to the Board is limited, and does not even suggest that it has any power to dispense with or to qualify a fundamental constitutional requirement."

Assuming, but not deciding, that the legislature may authorize the Board to suspend a valid license for the sale of intoxicating liquors in a bona fide restaurant or eating place, for violations of valid provisions of the Alcoholic Beverage Control Act, where, as here, the business carried on is that of a saloon, in violation of the constitutional provision itself, a different situation is presented and the Board is without authority to license same or to continue in existence a license already issued.

The judgment should be affirmed.

Rehearing denied; ADAMS, P. J., dissenting.

71 Cal.App.2d Supp. 849

PEOPLE v. STOLZOFF.

SAME v. CASTRO.

SAME v. MAXWELL.

Nos. 126117, 126115, 126116.

Appellate Department, Superior Court,
San Diego County, California.
Oct. 10, 1945,

Rehearing Denied Oct. 18, 1945.

1. Automobiles 🔑77, 97

The requirement that carrier of passengers for hire obtain license from Board of Equalization is for purpose of revenue, whereas the requirement of a certificate from Railroad Commission is a regulatory measure, and possession of a license from Board of Equalization is not exclusive of necessity of securing certificate from Railroad Commission in cases where such certificates are required by Public Utilities Act. Gen. Laws 1937, Act 6386, § 50¼; St.1941 pp. 592, 604, §§ 9701, 10501.

2. Automobiles 🔑76

Under statute requiring passenger stage corporations acting as common carriers to obtain a certificate from the Railroad Commission, the term "common carrier" must be given its ordinary dictionary definition in the absence of any clear definition in the statute itself. Gen.Laws 1937, Act 6386, §§ 2¼(a–d), 2¾.

See Words and Phrases, Permanent Edition, for all other definitions of "Common Carrier".

3. Carriers 🔑235

"Common carriers" of passengers are such as undertake for hire to carry all persons indefinitely who may apply for passage so long as there is room and there is no legal excuse for refusing.

4. Automobiles 🔑353

Provision of Public Utilities Act, making proof of one trip between given points with passengers who are charged individual fares evidence of a practice of making such trips, should be given effect in prosecution against passenger stage corporation for failure to obtain the necessary certificate. Gen.Laws 1937, Act 6386, § 50¼.

5. Criminal law 🔑324

The presumption of innocence may be rebutted by any competent evidence, including direct or indirect evidence and presumptions.

6. Automobiles 🔑356, 360

In prosecution for violating Public Utilities Act requiring passenger stage corporation transporting passengers between fixed termini to obtain certificate from railroad commission, whether transportation of passengers from Camp Elliott to San Diego was a sufficient designation of fixed termini was question for the trial court which would not be disturbed when not arbitrary or unreasonable. Gen.Laws 1937, Act 6386, § 50¼.

7. Automobiles 🔑63

The absence of a determination by Railroad Commission that certain operations of a carrier of passengers were such as to require a certificate from Railroad Commission did not prevent the court in a criminal prosecution against carrier from determining whether operations of carrier constituted a violation of Public Utilities Act requiring passenger stage corporation carrying passenger between fixed termini to obtain a certificate. Gen.Laws 1937, Act 6386, § 50¼.

BURCH, J., dissenting.

◆

Appeals from Municipal Court of City of San Diego; A. F. Molina, Judge.

Abram Stolzoff, Rudolf Castro, and Robert J. Maxwell were convicted of violating a provision of the Public Utilities Act requiring a certificate of public convenience and necessity to operate as a common carrier, and they appeal.

Affirmed.

Edgar Langford, of San Diego, for appellants.

Thomas Whelan, Dist. Atty., of San Diego, by A. D. Orme, Deputy Dist. Atty., of Pasadena, for respondent.

HAINES, Presiding Judge.

The three cases of The People versus Stolzoff, The People versus Castro and The People versus Maxwell are so similar in all of their essentials that they have been argued and submitted together and a rehearing having been granted, are now before this Court.

The facts established by the evidence, so far as Stolzoff is concerned, were in brief that on the day involved he had an automobile, described as a station wagon, in front of the gate at Camp Elliott, a cantonment outside the corporate limits of the City of San Diego, that he accepted passengers for transportation to San Diego, waiting until he had a full load, which included three sailors, two "waves," and a soldier; that he proceeded with them into the city and had gotten to the neighborhood of Sixth Avenue and Date Street, when he was stopped by two policemen who required his passengers to alight; that from each passenger he at that time asked and received a fare of $1. He had a license issued by the State Board of Equalization under Section 9701 (see also Section 10501) of the Revenue and Taxation Code, St.1941, p. 592, to transport passengers for hire upon public highways in this State but had neither applied for nor obtained a certificate of public convenience from the Railroad Commission. He was placed under arrest and the present prosecution instituted. We presumably can take judicial notice that the direct route between Camp Elliott and the central areas of the City of San Diego is over Highway 395, referred to in the complaint.

[1] It is not claimed, nor can it be, that the possession of such a license from the State Board of Equalization is exclusive of the necessity of securing also from the Railroad Commission a certificate of public convenience in cases where such certificates are required by the Public Utilities Act. The requirement of the license from the Board of Equalization is for purposes of revenue, whereas the requirement of the certificate of public convenience is a regulatory measure. Motor Transit Co. v. Railroad Commission, 189 Cal. 573, 580, 209 P. 586; In re Bush, 6 Cal.2d 43, 51, 56 P.2d 511. See also In re Galic, 40 C.R.C. 555, 563.

In the Stolzoff case it is charged that "the crime of violation of Act 6386 of the General Laws 1937 of the State of California and particularly Section 50¼ thereof has been committed by the defendant as follows: That said Abram Stolzoff on or about the 21st day of April 1945, in San Diego Township in the said County of San Diego, State of California, and before the making or filing of this complaint, did then and there wilfully and unlawfully engage in the transportation of passengers as a passenger stage corporation upon a public highway of the County of San Diego, State of California, to wit: Highway 395, without first having obtained from the Railroad Commission of the State of California a certificate declaring that the public convenience and necessity require such operation, as provided in Section 50¼ of said Act."

Manifestly, the first inquiry necessary in measuring the defendant's acts by the statute is to determine what is meant by a "passenger stage corporation." According to Section 2¼(a) of the Act, the term "passenger stage" includes "every stage * * * or other motor vehicle, used in the transportation of persons, or persons and their baggage or express, or persons or baggage or express, when such baggage or express is transported incidental to the transportation of passengers." "Passenger stage corporation" is defined by Section 2¼ (b) of the Act to include "every corporation, or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever engaged as a common carrier, for compensation, in the ownership, control, operation or management of any passenger stage over any public highway in this state between fixed termini or over a regular route; provided, however, that this term shall not include those whose operations are exclusively within the limits of a single incorporated city, town or city and county, or whose operations consist solely in the transportation of bona fide pupils attending an institution of learning between their homes and such institution of learning."

According to Section 2¼(c) of the Act:

"The words 'between fixed termini or over a regular route,' * * * mean the termini or route between or over which any passenger stage corporation usually or ordinarily operates any passenger stage, even though there may be departures from said termini or route, or such departures be periodical or irregular."

[2, 3] It will be noted that to constitute a "passenger stage corporation," the corporation, person or other agency involved must be acting as a "common carrier." Section 2¼(d) of the Act purports to define the term "common carrier" as including "in addition to the definition herein otherwise given" every "passenger stage corporation." To say, however, that certain activities "as a common carrier" constitute one "a passenger stage corporation" and in the same breath to define the term "common carrier" as being a "passenger stage corporation," is merely to proceed

in a circle. Nor is any "definition herein," that is in the Act, "otherwise given" applicable. Certain other activities are in Section 2(*1*) and again in Section 2¾ of the Act described as constituting those who engage in them "common carriers" but the situations there specified are different from any in which passenger stages are involved. It must, however, be assumed that the legislature intended the term "common carrier" as employed in Section 2¼(b) to have some meaning and for want of any clear definition in the Act itself of what, in this particular connection, it does mean, it would appear proper to turn to dictionary definitions. "Common carriers" of passengers are defined in Black's Law Dictionary (3rd Ed., p. 283 under "Carriers") as:

> "Such as undertake for hire to carry all persons indefinitely who may apply for passage so long as there is room, and there is no legal excuse for refusing."

If this definition, then, be applied to the use of the expression "common carrier" as employed in Section 2¼(b) of the Act, the result is, for the purpose of the present discussion, to render intelligible the definition given in the section of the term "passenger stage corporation."

Turning now to the specific section of the Act which the defendant is charged with violating, to wit, Section 50¼, it appears that, with certain exceptions not material here, passenger stage corporations are forbidden to operate over the public highways without having obtained certificates of public convenience from the Railroad Commission.

This leaves to be decided in the Stolzoff case the question whether proof of the facts recited establishes any violation of Section 50¼ of the Public Utilities Act; in other words, whether the activities shown on the part of the defendant Stolzoff amount to acting as a passenger stage corporation, and, if so, were such as were forbidden in the absence of any certificate of public convenience. There are three arguable standpoints from which this question may be discussed, namely, the position taken by The People, that taken by counsel for the defendant, and a position intermediate between the two.

Counsel for The People direct our attention to the circumstance that by Section 50⅓ of the Public Utilities Act, a violation of Section 50¼ thereof by a passenger stage corporation is made a public offense, punishable by fine or imprisonment, or both; that the general jurisdiction over public offenses and, except in the case of certain contempts, the only jurisdiction to impose penalties by way of fine or imprisonment therefor, rests in the Courts; and as respects the sufficiency of the proof, that it is provided by Section 50¼ of the Act that:

> "Any act of transporting or attempting to transport any person or persons by stage, auto stage, or other motor vehicles, upon a public highway of this state between two or more points not both within the limits of a single incorporated city, town or city and county, where the rate, charge or fare for such transportation is computed, collected or demanded on an individual fare basis, shall be presumed to be an act of operating as a passenger stage corporation within the meaning of this Act."

As respects the matter of fixed termini, it is urged that Camp Elliott is shown to have been the one terminus of the transportation furnished by Stolzoff and the City of San Diego the other, and that this is a sufficient designation of termini and that it is unnecessary that any depot or other more specific place within the City of San Diego should have been designated as a terminus. To that effect reliance is placed on the case of State v. Mercer, 215 Iowa 611, 246 N.W. 406, in which transportation by motor truck between the cities of Burlington and Keokuk, both in the State of Iowa, was held by the Supreme Court of that state to have been transportation between fixed termini; and various determinations of the Railroad Commission of California have been cited in which cities as such, rather than points within given cities, were, though without any specific discussion of the point, treated as being fixed termini within the meaning of the Public Utilities Act. See e. g. Allen et al. v. Moyles et al., 22 C.R.C. 564; Richardson v. McKelverry et al., 22 C.R.C. 584 and McConnaha v. Willhite, 24 C.R.C. 579. A contention that operations between two cities, in neither of which was any depot maintained, were not between fixed termini was rejected in Holmes v. Railroad Commission, 197 Cal. 627, 639-641, 242 P. 486.

It is claimed, therefore, that the showing made, even though only one trip between the termini involved was actually proved, amounts to a complete justification of the action of the Municipal Court in finding Stolzoff guilty of the offense charged.

The argument evoked a discussion of the provisions of Section 50¼ of the Act to the effect that upon the filing with the Commission of a complaint that, in violation of the Act, any passenger stage is being operated without a certificate of public convenience and necessity, the Commission may order the operator to desist from so doing until a decision shall have been made upon the complaint or until the Commission's further order and of the further provision of the same section that:

"Whether or not any stage, auto stage, or other motor vehicle is being, or is proposed to be operated as a passenger stage corporation 'between fixed termini or over a regular route' within the meaning of this act shall be a question of fact, and the finding of the railroad commission thereon shall be final and shall not be subject to review."

The position of counsel for The People as to these provisions was that the powers with which the Commission is thus invested are not exclusive, that the question whether the operator of any stage or other motor vehicle is operating the same as a "passenger stage corporation 'between fixed termini or over a regular route'" within the meaning of the Act may properly be a subject of plenary investigation in a criminal case before the Courts, or, in the alternative, in an investigation between the Railroad Commission under the power conferred by the above provisions of Section 50¼ of the Public Utilities Act, or, independently, both by the Courts and by the Commission; that in case the prosecution is instituted in the Courts it is their duty to determine this question themselves without awaiting or regarding any determination of it by the Commission; whereas, if, in the alternative, an investigation of it as an administrative matter is instituted by or before the Commission, then and then only does the situation arise in which the finding of the Commission is final and not subject to review and that, even so, such finality only exists for the purpose of such administrative determination. We understand counsel to go so far as to claim that if both criminal proceedings before the Courts and administrative proceedings before the Commission are instituted, the determination of neither tribunal is binding on the other and that even though different conclusions are reached, such diverse results are no grounds for complaint.

By contrast the positions taken by counsel for the defendant are two, first, that the provisions last referred to of Section 50¼ of the Act give to the Commission the exclusive power to determine whether or not a corporation, natural person or other agency, is in fact operating a stage or other motor vehicle "as a passenger stage corporation 'between fixed termini or over a regular route'"; that until the Commission has acted on the matter and affirmatively found such operation as a fact and directed that the operator desist therefrom, no criminal prosecution lies therefor in the Courts, and, second, that the question of what are fixed termini depends upon a reasonable appraisement of the facts in any given case, and that, while in long distance transportation, as e. g., between San Francisco and Los Angeles, it may be reasonable to treat the designation of the respective cities as designations of fixed termini, yet when the city is a large one and the transportation involved is in its nature local, as from some nearby point outside the city limits as one terminus, it should be held insufficient to merely designate the city, without specifying any particular point within the city as the other terminus. Of these two contentions it may be observed that the first, if carried to its logical conclusion, would amount to claiming that the complaint here fails to state a public offense at all, in that it fails to state that the Commission has adjudged the case to be one in which a certificate of public convenience is required and fails to state that the Commission has required the defendant to desist from his operations until such certificate shall be granted.

The third position, intermediate between that taken for The People and that taken for the defendant, would be that the jurisdiction of the Commission over the subject is not necessarily exclusive; that the Courts may entertain criminal proceedings based on operations alleged to be by passenger stage corporations contrary to the terms of the Act, and at least until the Commission has, pursuant to the authority given under Section 50¼ of the Act, determined in a particular case that an operator of a motor vehicle is not acting as a passenger stage corporation, or at all events until the Commission has before it some proceeding involving the question, that the Courts may investigate independently all questions of fact necessary to the determination of complaints before them. There would be, in this view of the situation, nothing inconsistent with the conclusion reached by the Municipal Court here, though it would still leave open for decision such questions, for example, as whether or not the Courts are bound by the presumption from one act of transportation that an operator is regularly engaged therein, and whether or not the designation of the City as a terminus is necessarily or, in a given case, sufficient.

[4, 5] In two, at least, of its features the position taken by counsel for The People appears to be well supported. There seems to be no reason why the presumption above quoted from Section 50¼ of the Public Utilities Act making proof of one trip between given points with passengers who are charged individual fares, evidence of a practice of making such trips, should not be given effect. True, the presumption of innocence is often said to be the strongest presumption known to the law. That can hardly be an accurate statement, however, for there are conclusion presumption and the presumption of innocence is not one of them, but is not only rebuttable but actually rebutted each time there is a valid conviction after a plea of not guilty. It being, then, a rebuttable presumption, it is clear that it may be rebutted by any competent evidence. Competent evidence may be direct or indirect, the latter of which classes includes presumptions. While ordinarily the presumption of innocence prevails over other rebuttable presumptions (see 10 Cal.Juris. 754, 755 and cases cited) the presumption of sanity has been held to prevail over that of innocence. People v. Le Doux, 155 Cal. 535, 553, 102 P. 517. It is, moreover, not unusual for legislation to declare that the proof of certain facts shall be evidence of other facts even though the latter, when established, amount to crimes. For example, in People v. Scott, 24 Cal.2d 774, 151 P.2d 517, there was involved a provision of the "Dangerous Weapons' Control Law of 1923" (Stats. 1923, p. 702, Deerings General Laws 1937, Act. 1970) making possession of a firearm, the marks of identification whereof have been tampered with, prima facie evidence that the tampering, which is a public offense, was done by the possessor. Whether the creation and using of such a presumption, in view of the provisions of the 14th amendment to the Federal Constitution, is permissible on the one hand, or amounts to a violation of the due process clause thereof on the other, is held to depend ultimately on the question whether there is, in a given instance, a rational connection between the fact proved and the fact presumed. An extended discussion of the subject will be found in People v. Scott, supra, 24 Cal.2d at pages 774, 779–783, 151 P.2d at pages 517, 519–522. We deem it unnecessary to enlarge further upon that feature of the case except to observe that we are unable to say that there is no rational connection between the making of one trip in which passengers are charged individual fares, and the likelihood that such trip is one of a series. It may, however, be added, that in the instant case in addition to proof of making the trip, giving rise under the statute to the presumption, there is added the fact that defendant did have the license from the Board of Equalization referred to, from which it might at least be legitimately inferred that he was transporting passengers as a business.

[6] As to the question whether the designation of Camp Elliott on the one hand and San Diego on the other is a sufficient designation of fixed termini, it being conceded by defendant's counsel that all which is required is a designation, reasonable in the circumstances of a particular case, it would seem that the sufficiency of a particular designation is primarily for the trial court and that, unless its determination of the matter is manifestly an arbitrary and unreasonable one, it is not our function to interfere with it. The Municipal Court may here have legitimately concluded that, in offering to transport passengers to San Diego, the defendant meant to offer and was understood to be offering to transport them to the general area constituting the central part of the city, and that that designation was enough. There would seem to be no sufficient reason for disturbing its conclusion on that subject.

This leaves for determination only the central question in the case, going to the respective functions of the Courts and the Commission. It must be apparent that the contention of counsel for The People in its extreme form cannot be upheld. The idea that there can be two parallel and continuing jurisdictions, one in the Courts of law, and the other in the Commission administering a separate and distinct droit administratif and that such jurisdictions can be, not only different in their processes, but potentially in their results, with neither under any obligation to submit to the determinations of the other, and each oblivious of positions taken by the other, can hardly have been contemplated either by the State Constitution or in the Public Utilities Act. Whatever the basis of coordination between the jurisdictions may be, it is apparent that there must be one.

If this construction of the statute be rejected, then, is the alternative suggested by counsel for the defendant to be adopted? It presents obvious difficulties. Let it be supposed that in some particular case the facts are actually such as to bring the operator of a passenger stage within the meaning of the term "passenger stage corporation"; also that he in fact is operating stages upon the public highways of the State and is not within any of the exceptions to the inhibition contained in Section 50¼ of the Public Utilities Act against so operating without a certificate of public convenience and that he has no such certificate. He would then appear, if we have reference only to the first paragraph of said Section 50¼ to be an undoubted violator of the provisions thereof and any such violation by a "passenger stage corporation," which, as we saw may be an individual and need not necessarily be a body corporate, is by Section 50⅓ specifically made a crime. For all of that, it must follow, from the position of defendant's counsel, that such conduct on the part of such operator, although apparently denounced in terms by the Act, cannot be punished as a crime until or unless the Commission has specifically forbidden its continuance either tentatively or by a final decision. In other words, it is not a crime until the Commission has in effect declared it such or, if it is a crime, then it is a crime which, until the Commission has in effect declared it such, no court is competent to punish. Until and unless the Commission deals with the case, according to counsel's contention, the operator can continue with impunity without fear of punishment, however flagrant and repeated may be his seeming transgressions of the terms of the act.

[7] It seems patent that such an interpretation also must be rejected and that the solution must be sought in some via media. We are not, however, called upon in the instant case, to decide what the effect on the present prosecutions would have been had the Commission's jurisdiction been invoked by complaints filed with it against the defendants prior to the trials in the Municipal Court, or had it, on its own motion, taken jurisdiction, or had it, either on such complaints or on its own investigation, specifically determined that the defendant's status and conduct either were or were not such as to bring them within the inhibitions of the Public Utilities Act. In the instant case it does not appear that the Commission has acted or entered upon any investigation or, if indeed its determination has been sought, that any formal complaint has been filed with it. In these circumstances all we need to decide is whether or not, in the absence of any proceeding before it or action by it, any impediment exists to the full determination in the Courts of criminal charges initiated by complaints filed with them alleging violations of the Act and specifically the doing of what is forbidden in the first paragraph of Section 50¼ thereof.

Section 72 of the Act makes it the duty of the Commission to see that the violations of the Act are "promptly prosecuted" and goes on to provide that:

"Upon the request of the commission, it shall be the duty of the attorney general or the district attorney of the proper county or city and county to aid in any investigation, hearing or trial had under the provisions of this act, and to institute and prosecute actions or proceedings for the enforcement of the provisions of the constitution and statutes of this state affecting public utilities and for the punishment of all violations thereof."

Manifestly this contemplates the institution and prosecution of such proceedings in the Courts.

Section 75 of the Act in terms authorizes the Commission to itself bring either mandamus proceedings or equity suits in the Superior Courts to remedy or prevent violations, actual or threatened, of the Act or of its own orders and the right of the Courts to entertain such suits and afford the relief sought was sustained by the Supreme Court in Motor Transit Co. v. Railroad Commission, 189 Cal. 573, 209 P. 586.

Not only, however, is it thus competent for law enforcement officers, under the direction of the Commission (pursuant to Section 72), to maintain in the courts proceedings, either criminal or civil, for the enforcement of the Public Utilities Act and other provisions of law affecting utilities which are subject to the Commission's regulations; and for the Commission in its own name (pursuant to Section 75) to maintain in the courts civil actions for that purpose; but both civil and criminal proceedings in the courts against those accused of violating the Act or of violating cognate acts have been sustained in the absence of any direction or action by the Commission. See e. g. with respect to civil suits, Truck Owners', etc., Incorporated, v. Superior Court, 194 Cal. 146, 228 P. 19, involving violation of the Auto Stage Transportation Act, Stats.1917, p. 330, and Miller v. Railroad Commission, 9 Cal.2d 190, 70 P.2d 164, 112 A.L.R. 221, involving the Public Utilities Act. As respects criminal proceedings, the leading case in this state is In re Mariott, 218 Cal. 179, 22 P.2d 692, 693. There the petitioner was confined upon certain criminal complaints in one of which he was charged with operating a passenger stage, as a passenger stage corporation, over the public highways without having obtained a certificate of public convenience from the Railroad Commission, in violation of Section 50¼ of the Act. There is no suggestion in the decision that the case had ever been before the Railroad Commission or that the Commission had decided that the petitioner was in fact operating as a passenger stage corporation or had either granted or refused a certificate of public convenience. He sued out a writ of habeas corpus claiming that even though he were so operating, since the punishment denounced for the violation of the Act by a corporation was, according to Section 76(a) of the Act, only a fine (the prosecution having apparently been instituted prior to the effective date of the present Section 50⅓), that he was subject only to the penalty of a fine "collectible in a civil action * * * conducted by the railroad commission in the exercise of its exclusive jurisdiction of the regulation of public utilities." The Supreme Court, however, said (218 Cal. at page 181, 22 P.2d at page 693):

"There is no merit in this contention. The commission has jurisdiction to issue, cease, and desist orders, institute contempt proceedings, collect fines pursuant to section 80, and to otherwise exercise the authority conferred upon it by said act. But, in addition, the express terms of respective sections make the violation thereof a criminal offense, such as a misdemeanor (section 28(d) or a felony (section 52(f). The concluding sections of the act, general in scope, provide penalties in all cases not covered by prior provisions (section 76 et seq.). Thus the sections relied upon by petitioner furnish the procedure for penalizing a public utility through imposition of a fine (section 76), which may be collected in a civil action by the attorney for the commission in the name of the people of the state (section 80). Similarly, section 78 applies to corporations other than public utilities Section 77, however, applies to individuals and provides: 'Every officer, agent or employee of any public utility, who violates * * * this act * * * is guilty of a misdemeanor * * * punishable by * * * fine * * * or * * * imprisonment * * * or * * * both * * *.' We see no reason why the complaints here in question do not properly state a criminal offense punishable under the above section."

As has been observed, Section 50⅓ of the Public Utilities Act now (since its enactment in 1933) in specific terms makes the violation of Section 50¼ a crime.

Authorities from other states in which the courts have taken jurisdiction in proceedings, sometimes civil and sometimes criminal, to deal with violation of Acts analogous to our Public Utilities Act, in advance of action by the regulatory body to which the enforcement of the Act has been primarily confided, are, in Virginia, Turner v. Hicks, 164 Va. 612, 180 S.E. 543, and in New York, Brooklyn City Railway Co. v. Whalen, 191 App.Div. 737, 182 N.Y.S. 283; People ex rel. Weatherwax v. Watt 115 Misc. 120, 188 N.Y.S. 559, and People v. Speciale, 249 App.Div. 766, 292 N.Y.S. 23, reversed on other grounds in 273 N.Y. 413, 7 N.E.2d 840.

There is in California a fairly large body of expression concerning the respective functions of the Courts and the Commission in the enforcement of the Public Utilities Act. See inter alia in addition to the cases above cited, Stratton v. Railroad Commission, 186 Cal. 119, 198 P. 1051; Holmes v. Railroad Commission, 197 Cal. 627, 242 P. 486; Haynes v. MacFarlane, 207 Cal. 529, 279 P. 436; Motor Freight Terminal Co. v. Bray, 217 Cal. 242, 18 P.2d 62; and City of Oakland v. Key System, 64 Cal.App.2d 427, 149 P.2d 195. Suffice it here to say that none of these decisions, when considered in connection with the facts involved in them, afford any reason to doubt the jurisdiction of the Municipal Court in such cases as those before us now. The two cases entitled Ex parte Martinez, 22 Cal.2d 259, 138 P.2d 10, and 56 Cal.App.2d 473, 477, 132 P.2d 901, involving taxicabs have been relied on by appellants here as indicating that their obligations are wholly outside the purview of the Public Utilities Act, but the activities involved in them were wholly within the limits of a single incorporated city and accordingly the operators were expressly excluded from the category of passenger stage corporations by subdivision b of Section 2¼ of the Act itself. These cases therefore are not here in point.

The development of administrative law in recent years both in the several states and even more particularly in the field of Federal Jurisprudence, has undoubtedly been one of the most notable phenomena of government. It has been implemented by many statutes purporting to invest administrative bodies with fact finding powers and to make such determinations of fact when made by them final. There are many judicial expressions such, e. t., as that by **Mr.** Justice Douglas, in Sunshine, etc., Coal Co. v. Adkins, 310 U.S. 381, 60 S. Ct. 907, 917, 84 L.Ed. 1263, to the effect that "where * * * Congress has created a special administrative procedure for the determination of the status of persons or companies under a regulatory act and has prescribed a procedure which meets all the requirements of due process, that remedy is exclusive." All such expressions, however, must be understood in connection with the facts which lead to their utterance. Our attention has not been directed to any case, State or Federal, wherein, in circumstances similar to those of the cases at bar the Courts have been held incompetent to entertain criminal complaints.

In the foregoing discussion the Stolzoff case has been specifically dealt with as typical of all three before us. As respects the question of fixed termini, we may add, as applicable to the Castro and Maxwell cases, the remark that in Sutherland v. Kitto, 33 C.R.C. 58, the Railroad Commission held that the operation of stages between San Ysidro and the International Boundary line, which are the same limits involved in the Castro and Maxwell cases, amounted to an operation between fixed termini.

The judgment is affirmed.

THOMPSON, J., concurs.

BURCH, Judge (dissenting).

I dissent. I think the conviction of the defendants should be reversed, as was decided by the Court on the original hearing. I will say a few words in amplification of the opinion there rendered.

The majority opinion on rehearing sufficiently and correctly sets out the facts. I agree, too, that the first inquiry is to measure the defendants' acts by the appropriate statutes and to this end we should discover the meaning of the term "passenger stage corporation." I wholly disagree with the reasoning and the construction adopted by the majority to this end. It is true that the term was brought into the statutes by the 1927 amendments to the Public Utilities Act, that is, Sections 2¼ and 50¼ thereof, but a little history will demonstrate that though the name is new, the subject is old. I hope to show that the phrase "passenger stage corporation" is the "transportation company" referred to in Section 22 of Article XII of the Constitution of 1879, again referred to in the amendments of 1911, the two constitutional provisions in that regard being identical, that is to say, the Railroad Commission was given the power and the duty to establish rates of charges "for the transportation of passengers and freight by railroads and *other transportation companies.*" The case of the Board of Railroad Commissioners v. Market Street Railway Co., 132 Cal. 677, 64 P. 1065, decided that the Commissioners were without jurisdiction over the street railways operated in a municipality. The holding of the Supreme Court was that "a street-railway company is not a 'transportation company' within the meaning of section 22 of article XII of the constitution defining the powers and duties of the board of railroad commissioners which are intended to be confined to corporations carrying freight and passengers from one portion of the state to another * * * and not to include local street-railways carrying passengers only within the limits of a city." The case further held, which is important to us, that "although the legislature cannot authoritatively fix the meaning of the constitution, yet, where the meaning of the constitution is doubtful, the contemporaneous and long-continued construction thereof by the legislature is entitled to the greatest deference, and may be supposed to reflect the same views, policy and modes of reasoning which prevailed among the framers of the constitution."

The next case in our short history is Western Association, etc., Railroad Cos. v. Railroad Commission, 173 Cal. 802, 162 P. 391, 1 A.L.R. 1455. This case, decided in December, 1916, held that it was not within the power of the legislature either by its silence or by direct enactment to modify, curtail or abridge the constitutional grant of power to the Railroad Commission over transportation companies and further, that Section 22 of Article XII of the Constitution as amended in 1911 granted power to the Railroad Commission to establish rates of charges for the transportation of passengers and freight by railroads and "other transportation companies" and that that section confers regulatory powers on the Commission over companies transporting freight or passengers for hire on the public highways by means of auto trucks or automobile stages along routes not exclusively within the limits of the municipality.

We will next consider for present purposes the case of Franchise Motor Freight Association v. Seavey, 196 Cal. 77, 235 P. 1000, 1001. This case narrates the history of the development of the law to the year 1925 insofar as it was regulatory of common carriers of freight and passengers by motor truck. This stated:

"In December, 1916, this court held that under section 22 of article 12 of the constitution, as amended in 1911, the Railroad Commission was vested with the jurisdiction and the duty to regulate rates and charges of such carriers of freight and passengers by motor-truck; that this provision of the constitution could not be rendered nugatory by the omission of the Legislature to prescribe procedural provisions for the carrying out thereof; and a peremptory writ of mandate was issued requiring the railroad commission to assume and exercise its jurisdiction over such carriers (Western Association of Short Line Railroads v. Railroad Comm., 173 Cal. 802, 162 P. 391, 1 A.L.R. 1455). Thereupon the Auto Stage and Truck Transportation Act was enacted by the Legislature to provide the procedural rules for the exercise of such jurisdiction. Stats.1917, p. 330. The title of this act and certain sections thereof were amended in 1919 (Stats.1919, p. 457). The term 'transportation company' as used in the act is defined in section 1 thereof to include 'Every corporation or person * * * owning, controlling, operating or managing, any automobile, jitney bus, auto truck, stage or auto stage used in the business of transportation of persons or property, or as a common carrier, for compensation, over any public highway in this state between fixed termini or over a regular route, and not operating exclusively within the limits of an incorporated city or town or of a city and county.' (With certain exceptions not pertinent herein.)"

The words I have put in parentheses were the additions of the amendment of 1919 to the Auto Stage and Truck Transportation Act, St.1919, p. 457. The quotation without these words in parentheses states the section as enacted in 1917, St.1917, p. 330. At this point we may properly turn to the 1927 additions of Sections 2¼ and 50¼ of the Public Utilities Act. Section 2¼ thereof in its various subdivisions, a, b, c and d, defines our old friend, the "transportation company" under a new name, "passenger stage corporation" with this possible exception: a "passenger stage corporation" emphasizes the carrying of passengers and express or baggage, whereas the Constitution in 1879, again in 1911, and the Transportation Act of 1917 adheres to the term "transportation of passengers and freight." All of them, however, refer to common carrier operation upon the public highways of the state of a character as pointed out in the case of the Market Street Railway Company, supra, which was of statewide concern.

One more point must be clarified. The legislation of 1917 was deemed to be valid and as I have indicated, it was nothing more than the legislative provision of procedural rules for the exercise of jurisdiction granted the Commission by the Constitution. Western Association of Short Line Railroads v. Railroad Commission, supra. That is to say, it afforded the operative machinery for the exercise of the Commission's powers over common carriers upon the highways by motor vehicle. The amendment of 1919 undertook to regulate and supervise the business of transportation on the highways other and in addition to that transacted by common carriers. The Supreme Court of the United States in Frost v. Railroad Commission, 271 U.S. 583, 589, 46 S.Ct. 605, 70 L.Ed. 1101, 47 A.L.R. 457, holding that the use of the highways was a constitutional privilege of the citizens and in the case of the private carrier not subject to regulation as a public utility, decided that the Auto Stage and Truck Transportation Act as amended in 1919 was repugnant to the 14th Amendment to the Federal Constitution. This decision was rendered in 1926. Such was the situation which faced the Legislature when Sections 2¼ and 50¼ were added in 1927 to the Public Utilities Act. This short history explains the enactment of

Sections 2¼(d) and 2¼(b) and shows why a public utility now for the first time called a "passenger stage corporation" is a common carrier. In the light of the above considerations, then, Section 2¼ by its own terms renders intelligible the definition given in the section of the term "passenger stage corporation." Common carriers operate some on water, some on railroad tracks, some in the air and some on highways. The jurisdiction of the Commission is limited to common carriers. The scope and purpose of Sections 2¼ and 50¼ is the regulation of those common carriers operating by motor vehicle upon the highways carrying passengers and baggage.

In the light of these considerations it further appears that the passenger stage corporation is a public utility; is a common carrier and is in fact a transportation company under the regulatory power of the Railroad Commission by virtue of the State Constitution but it is also apparent that the Legislature in the 1927 enactment has not seen fit to incorporate in the Public Utilities Act the common carriers of freight, but as I have indicated, concerned itself only with such freight as was incident to the transportation of passengers.

Now we may consider what the "passenger stage corporation" is not. It is not a taxicab. Ex parte Martinez, 22 Cal.2d 259, 138 P.2d 10. It is not a transportation company of purely local interest. Board of Railroad Commissioners v. Market Street Railway Company, 132 Cal. 677, 64 P. 1065. It is not a private carrier. In a word it is a public utility transporting passengers on the highways in a manner intended by Sections 22 and 23 of Article XII of the Constitution for regulation as of statewide concern. Section 23 of Article XII grants to the Legislature authority to confer powers upon the Commission in addition to the direct constitutional grant, which conferred powers are consistent with those constitutionally granted. This brings us to the third paragraph of Section 50¼ of the Public Utilities Act, the same substantially as Section 1 of the 1917 legislation creating the Auto Stage and Truck Transportation Act. That is to say, the Legislature has by the second and third paragraphs conferred powers upon the Commission to make findings of fact which are conclusive as to what common carriers operating by motor vehicle upon the highways in the transportation of passengers as common carriers are in fact common carriers, and also has provided it with all the requirements of due process as in according a fair hearing and acting upon evidence and not arbitrarily but only in a limited and confined field. In so doing the Legislature is making a proper exercise of its own powers. This will appear from a quotation from Southern Pacific Company v. Railroad Commission, 13 Cal.2d 89, at page 108, 87 P.2d 1055, at page 1065, as follows:

"In the case entitled American Toll Bridge Co. v. Railroad Commission, 12 Cal.2d. 184, 83 P.2d 1, this Court quoted from the case of St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 56 S.Ct. 720, 80 L.Ed. 1033, wherein it was said: '* * * Exercising its rate-making authority, the Legislature has a broad discretion. It may exercise that authority directly, or through the agency it creates or appoints to act for that purpose in accordance with appropriate standards. * * * When the Legislature itself acts within the broad field of legislative discretion, its determinations are conclusive. When the Legislature appoints an agent to act within that sphere of legislative authority, it may endow the agent with power to make findings of fact which are conclusive, provided the requirements of due process which are specially applicable to such an agency are met, as in according a fair hearing and acting upon the evidence and not arbitrarily. * * *'"

This states a general rule of legislative authority in keeping with modern conditions of commerce. Our own legislature has its specific authority which it has enjoyed at least since 1911 by special provision of the Constitution itself. From this I conclude that a passenger stage corporation is nothing other than a certain type of common carrier over which the Railroad Commission, without any legislative enactment, must exercise its regulatory power solely by virtue of Section 22 of Article XII.

From these considerations also it appears conclusive to me that operations such as those conducted by the defendant Stolzoff are not such as to be regulated under the constitutional provision, but were local and partook of the nature of private business. As indicated in Allen v. Railroad Commission, 179 Cal. 68, 175 P. 466, 8 A.L.R. 249, by Justice Shaw and by Justice

Olney in Van Hoosear v. Railroad Commission of California, 184 Cal. 553, 194 P. 1003, the dedication of private property to public use is not a trifling matter and shall not be presumed in the absence of an intent and an intent shall not be presumed. The decisions I have cited, the framing of the particular constitutional provisions, the care and caution exercised by the Legislature in conferring additional powers upon the Commission, the care with which the Commission itself used over a long course of years not to usurp jurisdiction, are all circumstances which should warn this Court of the neighborhood of principles fundamental to a free people. We are dealing here with public and not private law. I readily concede that the Superior Court in the exercise of its equitable jurisdiction may and should consider policy given expression in public law in suits between private litigants. Such I understand to be the decisions in Miller v. Railroad Commission, 9 Cal.2d 190, 70 P.2d 164, 112 A.L.R. 221, and Truck Owners Incorporated v. Superior Court, 194 Cal. 146, 228 P. 19, both cited by the majority.

One word more. A rehearing was granted herein to give consideration to In re Marriott, 218 Cal. 179, 22 P.2d 692. So far as we are interested now, that case decided three things. (1) Section 77 of the Act will support a criminal complaint against the employee, agent or officer of a public utility where it is conceded that Section 50¼ was violated. (It may, however, be noted that even so, the decision predated the effective date of Section 50⅓.) (2) That if petitioner was a private carrier as a matter of fact this would constitute a complete defense, but in a habeas corpus proceeding the Court would not examine the merits, and (3) That Section 50¼ is not discriminatory, and is a valid exercise of regulatory power conferred by the State upon the Railroad Commission.

In conclusion, the convictions should be reversed upon the above considerations: (1) Because the defendants' operations are not of the type which the State has undertaken to supervise and regulate inasmuch as they were local in character, are indistinguishable from those of a taxi service, and were but temporary and incidental to the war emergency, and quite similar to the "share the ride" practice of all patriotic citizens at the time. (2) Because until the Railroad Commission in the proper exercise of the powers conferred upon it has a hearing and determines that the operations are of the class which is regulated, they could not be violators of Section 50¼.

It is the constitutional right of the defendants not to be convicted of violating, that is to say, of transgressing, the provisions of Section 50¼ by operating as passenger stage corporations unless they be, in fact, such utilities subject to regulation and control by the Commission. In my opinion, the essential proof requires a showing that their status for regulation shall have been determined by the Commission. I am driven to this conclusion by the provisions of the third paragraph of Section 50¼ which reads in so far as material:

> "Whether or not any stage, auto stage, or other motor vehicle is being * * * operated as a passenger stage corporation 'between fixed termini or over a regular route' *within the meaning of this act* shall be a question of fact, and the finding of the railroad commission thereon shall be final and shall not be subject to review." (Emphasis added.)

The privilege of trial of this all important fact by the lawfully designated tribunal is too valuable to be sacrificed by a construction of Section 50¼ wholly at variance with Section 1858, Code of Civil Procedure.

NELSON v. ABRAHAM.*

Civ. 12878.

District Court of Appeal, First District, Division 1, California.

Oct. 30, 1945.

As Corrected Nov. 21, 1945.

Rehearing Granted Nov. 29, 1945.

1. Appeal and error 🔑1011(1)

Where testimony as to existence of partnership was conflicting, trial court's acceptance of negative version was controlling.

2. Judgment 🔑250

Where plaintiff sues for accounting upon theory of existence of partnership and fails to establish that fact, he is nevertheless entitled to accounting if evidence show that parties were joint adventurers or were doing business under a profit-sharing agreement.

3. Master and servant 🔑81

Where action for accounting is based on erroneous theory of existence of partnership and profit-sharing agreement is involved, plaintiff is entitled to accounting even though relationship of parties is that of employer and employee.

4. Judgment 🔑250

If plaintiff has a cause of action of which court has jurisdiction, and accounting is necessary to determine his rights, accounting will be ordered regardless of erroneous legal theory upon which the action is based.

5. Joint adventures 🔑1

A "joint adventure" is a joint association of persons in a common enterprise for profit, falling short of a partnership.

See Words and Phrases, Permanent Edition, for all other definitions of "Joint Adventure".

6. Joint adventures 🔑1

Rights of joint adventurers, as between themselves, are governed by practically the same rules that govern the relationship of partners, and hence there must be community of interest as well as sharing of profits.

7. Joint adventures 🔑1

To bring a contract within designation of "joint adventure" it must be shown that the parties are joint owners of the property belonging to the association.

8. Appeal and error 🔑1010(1)

Evidence did not establish as matter of law that former employer and employee became joint adventurers in opening new branch of original ice business, but did establish a binding profit-sharing agreement under which former employee was entitled to accounting for profits up to and including former employer's sale of the new business.

9. Appeal and error 🔑842(1)

Whether profit-sharing agreement between former employer and employee was intended to include former employee's right to share in profits from sale of the business was a question of fact rather than of law, which should be determined by trial court at time of settlement of accounts, not by reviewing court.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Julius Nelson against Isaac Abraham for dissolution of partnership, accounting, and general relief. From a judgment for defendant, plaintiff appeals.

Reversed.

Hardin, Rank, Metzler & Fletcher, of Oakland, for appellant.

Raymond Salisbury, of Oakland, for respondent.

KNIGHT, Justice.

Plaintiff has appealed from a judgment for defendant in an action for the dissolution of an alleged partnership, an accounting, and general relief.

It was alleged in the amended complaint, in substance, that plaintiff and defendant formed the partnership by oral agreement to engage in the business of selling ice at wholesale and retail in San Francisco under the firm name of Independent Ice Company; that after the business had been carried on for more than a year defendant, without the knowledge or consent of plaintiff, sold the business and "diverted all of said consideration so received upon the sale solely and entirely to his own individual purposes"; that the assets of the business consisted of the good will, furniture, fixtures and equipment, and accounts receivable. It was then alleged on information and belief that all partnership liabilities had not been liquidated, although the considera-

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* Subsequent opinion 167 P.2d 801.

tion received from the sale of the business was ample to pay the same; that there was a net profit from the operation of the business and the sale of the assets; and that defendant refused to account to plaintiff, or to turn over to him his share of the net profits from the business or the sale thereof. Plaintiff therefore asked for an accounting, for the dissolution of the partnership, and general relief. The trial court found that the allegations relating to the sale of the business by defendant, the retention by him of the entire consideration, and his refusal to account, were true; but it further found that the evidence failed to establish a partnership, that plaintiff had no interest in the business or the assets thereof, and that he was not entitled to any of the profits derived from the operation or sale of the business. Judgment was entered accordingly, that plaintiff take nothing by his action.

[1] Plaintiff's first point is directed against the soundness of the negative finding as to the existence of the partnership, the basis of his contention being that the existence thereof was clearly established by various transactions which took place when the business was started and during its operation; also by the undenied admissions and declarations made by defendant before the business was sold. While the evidence introduced by plaintiff relating to those matters presented a substantial case in plaintiff's favor, the record shows, as will be hereinafter pointed out, that the testimony given by the parties as to what was actually said and understood at the time the business was started, is conflicting. Therefore, since the trial court saw fit to accept defendant's version, its conclusion is controlling on the issue as to the existence of the partnership.

[2-4] It is well settled, however, that where a party brings an action for an accounting upon the theory of the existence of a partnership and he fails to establish that fact, he is entitled, nevertheless, to an accounting if the evidence shows that the relationship of the parties was that of joint adventurers or that they were doing business under a profit sharing agreement, Hauret v. Pedelaborde, 77 Cal.App. 187, 246 P. 134; Champagne v. Passons, 95 Cal. App. 15, 272 P. 353; Butler v. Union Trust Co., 178 Cal. 195, 172 P. 601; furthermore, that where a profit sharing agreement is involved and the action for an accounting is based on an erroneous theory of the existence of a partnership, the plaintiff is entitled to an accounting even though it is found that the relationship of the parties is that of employer and employee. Coward v. Clanton, 122 Cal. 451, 55 P. 147; see, also, cases cited and analyzed in Note in 137 A.L.R., p. 169, et seq. In other words, as pointed out in all the above-cited cases, if the plaintiff has a cause of action of which the court has jurisdiction and it is necessary to have an accounting to determine his rights, it will be done, regardless of the erroneous legal theory upon which the action is based.

And in connection with the foregoing doctrines plaintiff contends that where a party brings an action for an accounting based upon the erroneous theory that there was a partnership, and there is evidence tending to show that the relationship of the parties was that of joint adventurers, and the trial court makes no finding as to the existence of a joint adventure, the appellate court will review all the evidence and determine whether such relationship did exist, and if it finds that it did, an accounting will be ordered. Defendant concedes such to be the law. On page 6 of his brief he states: "In subdivisions II and III, appellant's brief, page 23, it is contended that appellant is not denied an accounting because he alleges the existence of a partnership, and the proof shows a joint venture. With this we agree. Appellant also contends that upon an action for dissolution of a partnership and accounting where the Court does not make a finding upon the existence of a joint venture, the Appellate Court should review all the testimony to ascertain whether or not a joint venture existed, and if it did exist order an accounting. With this we partially agree, that is to say, the Appellate Court should review the testimony and if a joint venture is found to exist an accounting should be ordered."

Here there is an absence of any finding on the question of a joint venture. There were certain general findings to the effect that plaintiff was not entitled to any of the assets of the business or to any of the profits derived from its operation or sale; but those general findings amount to nothing more than legal conclusions based upon the ultimate negative finding as to the existence of a partnership. In any event, whether taken singly or together, they are not sufficiently specific in form to constitute a negative finding on the question of joint venture. Turning then to the record in the case, we find the essential facts disclosed thereby to be as follows: For many years the defendant, Isaac Abraham, had been engaged in the business of manufacturing and selling ice at wholesale in Oakland, under the firm name of Independent Ice Company; and for about six years the plaintiff, Julius Nelson, had been in his employ as salesman. Early in 1940, they held several conferences with the view to starting a place of business in San Francisco, to be operated by plaintiff; and defendant at that time told plaintiff that if he would take over the operation of such business defendant "would take care of him." In the latter part of October, 1940, as the result of such conferences, an office was opened in a downtown building in San Francisco, under the name Independent Ice Company, and plaintiff and an ice-wagon driver employed by defendant started an ice route in that city, the ice being shipped to them from the Oakland plant. All moneys collected in the operation of the business were turned over to the Oakland office, and all accounts payable by the San Francisco operations were paid out of the Oakland office. Although separate books of account were kept in the Oakland office for the San Francisco business, the money received from the San Francisco office was merged with that received from the Oakland business; and plaintiff received a monthly check for his services from the Oakland office for the same amount he had received prior to the opening of the San Francisco office.

Through the efforts of plaintiff, the San Francisco business rapidly increased, so much so that about September 1, 1941, defendant leased a lot and moved a building thereon, following which the downtown office was discontinued and the building was used for storage and office purposes. However, shortly prior to September 1, 1941, plaintiff held several conversations with defendant in which he demanded that a definite understanding be had as to what his future status in the company was going to be; and they finally agreed that the net profits from the business would be divided between them in the proportions of one-third to plaintiff and two-thirds to defendant. Defendant's testimony regarding the making of such agreement was as follows: "He [plaintiff] said, 'Now, before I go any further I would like to know what my part is going to be in this business.' * * * I told him 'I will give you one-third of the net profits from the operation of the business.' I explained, 'If I made $3,000 net profits out of the San Francisco operation, $1,000 is yours.' I asked him if that was satisfactory, and he said, yes. I told him, 'You understand now, you will not have any interest in the business whatsoever,' and I asked him whether he wanted to go in the office and verify that with his wife. He said, 'No, it isn't necessary.' So he went to his business in San Francisco." Plaintiff's version of the conversation was as follow: "I said, 'Ike, I would like to know, you told me when we started in over here before we started, you would take care of me, and I would like to have that clarified and tell me exactly what you meant and what your intentions are.' And Mr. Abraham said, 'Well, what do you think would be an equitable share?' To which I replied, 'Well, would you think a one-third interest would be asking too much?' To which Mr. Abraham said, 'Well, I think that's fair,' and the conversation ended there." (Plaintiff denied that defendant had at any time told him that he would "not have any interest in the business.")

On September 1, 1941, pursuant to the agreement so made, plaintiff took complete charge of the San Francisco business, and it was thereafter operated by him as a separate enterprise, entirely distinct from the Oakland business. He opened and kept a complete set of books, and he also opened a bank account wherein he deposited all receipts from the business, and all accounts were paid by him by checks drawn thereon and signed by him as follows: "Independent Ice Company By: Julius Nelson." In order to carry on the business it became necessary to obtain a retail sales tax permit from the State Board of Equalization, and the application therefor was signed by plaintiff and defendant as partners doing business under the firm name and style of Independent Ice Company. The San Francisco company bought its ice from the Oakland plant, paying regular platform price therefor, plus hauling charges; and the ice was billed to the San Francisco company by the Oakland office in the same manner that the latter dealt with its other customers. Plaintiff hired and fired the personnel, fixed prices, and handled all credits and collections, etc.; and as the result of his management the business continued expanding in size and the volume of business increased.

It appears, however, that for some time prior to March 31, 1942, defendant, without the knowledge of plaintiff, had been carrying on negotiations with representatives of the Union Ice Company and the City Ice Company for the sale of the San Francisco business; and shortly before the sale was consummated plaintiff learned that defendant was going to meet the representatives of those two companies to discuss the terms of the proposed sale. While the meeting was in progress in the office of the Union Ice Company, plaintiff entered and asserted that he was the owner of one-third of the business and therefore was entitled to sit in the meeting. The representatives of the two companies asked defendant if plaintiff's statement was true, and defendant made no denial thereof. Thereupon plaintiff was permitted to remain during the discussions. Thereafter and on March 31, 1942, without consulting plaintiff, defendant sold the business to the City Ice Company for a consideration of $14,000 in cash, five ice routes in Oakland, and a contract calling for the sale to a customer of minimum of 2500 tons of ice a year from the Oakland plant for a period of not less than five years. On April 7, 1942, plaintiff asked defendant for an accounting, but defendant replied that the profit and loss statement of the business showed a loss of $2,090, and he refused to give any accounting.

In addition to the facts above narrated, the evidence shows that defendant supplied the necessary equipment from his Oakland plant to start the San Francisco enterprise; and that plaintiff furnished no capital to start or carry on the business; furthermore, that during the period of time from September 1, 1941, to the date of sale on March 31, 1942, plaintiff drew from the San Francisco business the same semi-monthly payments he had been receiving prior thereto from the Oakland business; that such payments were made by check, and that although deductions were made therefrom for social security and old age benefits, the evidence also shows that subsequent to September 1, 1941, plaintiff was not covered by workmen's compensation insurance.

[5-7] "A joint adventure may be defined to be a joint association of persons in a common enterprise for profit, but falling short of a partnership." 14 Cal.Jur. 760. And since the two relationships are similar, the rights and obligations of the joint adventurers, as between themselves, are governed by practically the same rules that govern the relationship of partners; consequently, as in the cases of partnerships, there must be a community of interest as well as sharing the profits. 14 Cal.Jur. 761; see, also, cases cited in 7 Cal.Jur. 10-Yr. Supp. 211. It is held, therefore, that in order to bring a contract within the legal designation of a joint adventure it must be shown that the parties are joint owners of the property belonging to the association. Dempsey-Kearns Theatrical & Motion Picture Enterprises, Inc. v. Pantages, 91 Cal.App. 677, 267 P. 550.

[8] In the present case the evidence establishes most of the factors which go to make up a joint venture; but, as pointed out, there is a sharp conflict in the testimony bearing upon the important issue of whether there was a community interest in the property used in carrying on the enterprise, and that being so we are not prepared to hold as a matter of law that the relationship of the parties fell within the legal status of joint adventurers.

However, the evidence definitely shows, without conflict, that the parties entered into a binding profit sharing agreement, and therefore under the legal doctrine laid down by the cases hereinabove cited plaintiff was and is clearly entitled to a full and complete accounting from and after September 1, 1941, up to and including the sale of the business by defendant, regardless of whether his legal status was that of a joint adventurer or an employee.

[9] The question of whether the profit sharing agreement was intended to include the right of plaintiff to share in the profits derived from sale of the business is, in our opinion, more of a question of fact than of law, and therefore properly should be determined by the trial court at the time of the settlement of accounts, after receiving such additional evidence on that issue as the respective parties may see fit to introduce.

In accordance with the views above expressed, the judgment that plaintiff take nothing by his action is reversed; and an accounting is ordered. Plaintiff will receive his costs of appeal.

PETERS, P. J., and WARD, J., concur.

71 Cal.App.2d 152

PEOPLE v. CRINOS.

Cr. 2356.

District Court of Appeal, First District, Division 2, California.

Oct. 23, 1945.

Hearing Denied Nov. 5, 1945.

Criminal law ⇨1133

Where accused failed to appear on date set and failed to request continuance of hearing, and within eight days thereafter he filed petition for rehearing consisting of 59 pages which was in nature of a brief on the evidence, and failure to prosecute appeal was chargeable wholly to dilatory tactics of accused's counsel, petition for rehearing of affirmance of conviction would be denied.

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Appeal from Superior Court, City and County of San Francisco; Herbert C. Kaufman, Judge.

On petition for rehearing.

Petition denied.

Prior opinion 162 P.2d 64.

Elizabeth Cassidy, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

The appellant has filed a petition for rehearing herein through substituted counsel in which complaint is made that he was not given proper consideration of his appeal. As we stated in the opinion on file herein, full opportunity was given appellant to file a brief in support of the appeal but his failure to do so was inexcusable and such failure is not excused by anything appearing in the petition for rehearing.

In addition to what was said in the opinion it should be added that on September 17, 1945, written notice was given appellant that the cause would be called for hearing and argument on October 8, 1945, but notwithstanding said notice, and a subsequent notice by telephone, the appellant failed to appear on the date set and failed to request a continuance of the hearing. Within eight days thereafter he filed his petition for a rehearing consisting of fifty nine pages which is in the nature of a brief on the evidence. The failure to prosecute the appeal is chargeable wholly to the dilatory tactics of appellant's counsel.

The petition is denied.

Hearing denied; SCHAUER, J., dissenting.

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71 Cal.App.2d 375

STOWE et al. v. NIETO et al.

Civ. 14963.

District Court of Appeal, Second District, Division 2, California.

Oct. 27, 1945.

1. Vendor and purchaser ⇨37(4)

The fact that vendor made false statement to purchasers prior to contract of sale that land had never been flooded, knowing statement to be untrue, and purchasers believed statement and were deceived thereby, authorized rescission of contract of purchase for fraud.

2. Fraud ⇨59(1)

Purchasers were entitled to recover of vendors value of livestock lost and cost of repair of damaged machinery, resulting from flood covering purchased land, on ground of fraud, where vendors prior to contract of sale made false statement to purchasers that land was never flooded, knowing statement to be untrue, and purchasers believing such statement were deceived thereby.

3. Vendor and purchaser ⇨123

A judgment canceling for fraud a note given for balance of purchase price and deed of trust securing note was not error on ground that it merely relieved purchasers from making further payments on their note but did not require them to reconvey purchased realty to vendors, where trial court found as a fact that, prior to trial, vendors had foreclosed deed of trust without taking a deficiency judgment and realty had been reconveyed to vendors by reason of the foreclosure.

Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Action by Lowery L. Stowe and another against John J. Nieto and others for cancellation of a promissory note and a deed of trust and for damages. From an adverse judgment, defendants appeal.

Affirmed.

Rupert B. Turnbull, of Los Angeles, for appellants.

Catlin & Catlin, Frank D. Catlin, and Henry W. Catlin, all of Los Angeles, for respondents.

WILSON, Justice.

Appeal from a judgment in favor of plaintiffs in an action for cancellation of a promissory note and deed of trust and for damages.

Respondent Lowery L. Stowe purchased a tract of real property from appellants under the following circumstances: A real estate agent took Stowe to the property. They did not go on the land but stopped on the highway, the agent stating that he did not want to disturb the tenants. Neither Stowe nor the agent was acquainted with the neighborhood or the property. Stowe paid a deposit to the agent, receiving a receipt therefor, but no binding contract was made. Later Stowe was told by friends that the place had been flooded. Stowe went to the agent and together they called on Mrs. Nieto. She stated that the land had not been flooded, that the water never came over the driveway, and that the condition was even better since they built a dyke. Stowe relied on the statement of Mrs. Nieto, purchased the property, paid part cash and gave a promissory note and deed of trust to secure the balance. He took possession in September, 1943. In February, 1944, a flood covered the property to a depth of four feet, causing the loss of respondents' rabbits and chickens and damage to their machinery. Respondents immediately served a notice of rescission on appellants, offered to reconvey the property, and demanded the repayment of the portion of the purchase price that had been paid by respondents.

[1] 1. Appellants' chief defense was that respondents made an independent investigation and knew the facts before they purchased the property and that they cannot complain that they were deceived. When respondents were told that the property had been flooded they interviewed the owner, Mrs. Nieto, who told them emphatically that anyone who made such a statement was a liar. She said that the water had never come above the driveway, and had not remained on any of the land more than two or three days. It appears from the evidence that if the latter statement had been true only a small part of the land would have been covered with water and that it would not have been damaged. Mrs. Nieto testified that she and her husband had owned the property for 25 years; that in 1937 and 1940 the water was around the house to a depth of four or five feet, and that she had knowledge of these facts when she told respondents that the land had not been flooded. Other witnesses testified that floods covered the property in four different years prior to its sale to respondents and that on some occasions it remained for weeks or a month. From all the evidence the only conclusion that can be drawn is that appellant Mrs. Nieto made false statements to respondents concerning material facts, knowing them to be untrue, and that respondents believed her statements and were deceived thereby. Cases cited by appellants in which defects in property were plainly visible to the purchasers are not in point. The floods were intermittent and the land was dry when respondents purchased it.

[2] 2. There is no merit in appellants' claim that rabbits were lost by reason of the negligence of respondents. While attempting to move the rabbits to high ground respondents, standing in water four feet in depth, dropped a hutch and a few of the rabbits were drowned. Respondents were not negligent in attempting to rescue the animals from the flood. The remainder of the livestock apparently were drowned before they could be saved. Respondents are entitled to recover the value of property lost and the cost of repairing damaged machinery.

[3] 3. Neither is there any virtue in the claim that the judgment should be reversed by reason of the fact that it merely relieved respondents from making further payments on their note and did not require them to reconvey the property. In their notice of rescission respondents offered to execute a deed to the land. The court found as a fact that prior to the trial appel-

lants had foreclosed the deed of trust without taking a deficiency judgment and that the property had been reconveyed to them by reason of the foreclosure.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

COLBERT v. COLBERT.*

Civ. 14791.

District Court of Appeal, Second District, Division 3, California.

Oct. 31, 1945.

Hearing Granted Dec. 27, 1945.

1. Husband and wife 🔑295

Order in separate maintenance action directing husband to pay alimony pendente lite, attorney's fees, and court costs is presumed valid. Civ.Code, § 137.

2. Husband and wife 🔑295

Record, disclosing that, at time of entry of order directing defendant in separate maintenance action to pay to plaintiff pendente lite alimony, counsel fees, and costs, the only pleading before court was complaint which alleged marriage of parties and continued relationship of husband and wife, was sufficient to authorize entry of such order. Civ.Code, § 137.

3. Appeal and error 🔑714(4)

Appellant's recital of matters which were not contained in record on appeal could not be considered.

4. Husband and wife 🔑295

Power to order payment of alimony, counsel fees, and costs in domestic relations case may be exercised only in favor of a husband or wife. Civ.Code, § 137.

5. Husband and wife 🔑295

Where it was established by undisputed evidence that relationship of husband and wife did not exist when order was made directing defendant in separate maintenance action to pay to plaintiff alimony pendente lite, attorney's fees, and court costs, court was without jurisdiction to make order notwithstanding court had jurisdiction of the parties. Civ.Code, § 137.

6. Husband and wife 🔑295

Trial court had power to vacate an order pendente lite for alimony, counsel fees, and costs on ground of lack of jurisdiction even though the order was appealable. Civ. Code, § 137.

7. Husband and wife 🔑295

Where it was established, on motion to vacate order directing defendant in separate maintenance action to pay alimony pendente lite, counsel fees, and costs, that relationship of husband and wife between parties had previously been dissolved by a court of competent jurisdiction so that court had no jurisdiction to enter the order, court erred in not vacating such order notwithstanding court was justified in entering order on basis of record before court at time order was made. Civ.Code, § 137.

8. Appeal and error 🔑790(3)

Where District Court of Appeal reversed order denying a motion in trial court to vacate a prior order and vacated the prior order, appeal from the prior order would be dismissed as moot.

SHINN, J., dissenting.

Appeal from Superior Court, Los Angeles County; Stanley Mosk, Judge.

Action by Ruth Colbert against Joseph W. Colbert for separate maintenance. From an order directing defendant to pay alimony pendente lite, attorney's fees, and costs, and from a second order denying defendant's motion to vacate the first order, defendant appeals. On rehearing.

Second order reversed and appeal from first order dismissed.

Prior opinion 159 P.2d 668.

Clarence Hansen, of Los Angeles, for appellant.

Michael Rudolph and Daly B. Robnett, both of Los Angeles, for respondent.

PARKER WOOD, Justice.

Defendant appeals from an order of August 14, 1944, that he pay alimony pendente lite, attorney's fees and costs. He also appeals from an order of September 1, 1944, denying his motion to vacate the order of August 14, 1944.

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* Subsequent opinion 169 P.2d 633.

Plaintiff filed a complaint for separate maintenance on July 21, 1944, and the complaint and summons were duly served on the defendant. An order directing defendant to show cause on August 14, 1944, why he should not pay alimony pendente lite, attorney's fees and costs was also duly served on defendant. Upon the hearing of the order to show cause on August 14, 1944, the court ordered that defendant pay to plaintiff the sum of $22.50 per week as alimony pending the trial but not to exceed three months, and to pay $125 as attorney's fees and $25 as costs.

Defendant contends that the court did not have jurisdiction to award alimony or attorney's fees or costs for the reason that plaintiff was not the wife of defendant.

[1-3] The record on appeal, as to the documents before the court at the hearing on the order to show cause, includes only the complaint. The record as to that hearing also includes the order of the court made as a result of the hearing, but it does not include any affidavits of the parties, or a reporter's transcript, or a settled statement or record of the proceedings had at that hearing. The complaint alleged that the plaintiff and defendant intermarried at Benton, Texas, on May 3, 1940, and "ever since have been and are now husband and wife." The defendant had not answered the complaint at the time of the hearing on August 14th. (His default was entered the next day but the default was set aside on September 15, 1944.) There is a presumption in favor of the validity of the order of the court made on August 14th. The record as to the matters before the court at the time of the hearing on August 14th is sufficient to support the order of the court. In his opening brief defendant asserts that he told the court at the hearing of the order to show cause that plaintiff had obtained a divorce from defendant in Texas on June 27, 1941, and that he exhibited to the court a postal card from the clerk of the Texas court stating that plaintiff and defendant had been divorced. Since the record on appeal as to that hearing does not include those asserted matters, this court cannot consider defendant's recital of them.

On August 22, 1944, defendant filed a motion to set aside the order, which had been made on August 14th "upon the ground" that the court had no jurisdiction to make said order, and "upon the further ground" that plaintiff and defendant were not husband and wife when the order was made or when the action was commenced. Said motion stated further that it would be "made upon" the files and records of the action, the affidavit of defendant filed concurrently therewith, and a certified copy of the final judgment of divorce entered in the Texas court. The affidavit of defendant, referred to in said motion, was also filed on August 22, 1944, and it stated, among other things, that at the hearing of the order to show cause on August 14th, the plaintiff and her counsel were present and defendant appeared without counsel; that at said hearing "the court was advised that plaintiff and defendant were not husband and wife and subsequent thereto were divorced in Texas, however the above entitled court, nevertheless proceeded with the hearing of the order to Show Cause"; that he and the plaintiff were divorced in the State of Texas and that a final decree of divorce was entered in cause number 32312-A, entitled Ruth Colbert v. J. W. Colbert, as the same appears in volume C-23, page 149, minutes of the District Court at Fort Worth, Texas; and that on August 14th, when the order to show cause was heard, and on July 21, 1944, when the present action was filed, he and plaintiff were not married to each other.

On September 1, 1944, the affidavit of plaintiff in opposition to said motion of defendant was filed and it stated, among other things, that the alleged decree of divorce was for convenience only, being obtained with the understanding they would continue as husband and wife and that "the divorce would be a mere formality to comply with the employment laws of the United States"; that "it was secured by reason of the fact that the government regulations did not permit two employees belonging to the same family in the same establishment"; that it was agreed that plaintiff would secure a decree of divorce from defendant but their marital relations would not be disturbed; that they were married two months prior to the divorce and had not been separated since the marriage on May 3, 1940, until their separation in Los Angeles on July 8, 1944; that after the divorce they lived together about two years as husband and wife in the State of Texas; and that prior to the hearing on August 14th, her attorney in her presence offered to continue the hearing if defendant wanted to get an attorney but defendant declined the offer stating that he did not need an attorney and he would pay nothing.

At the hearing of the motion to vacate, on September 1, 1944, the defendant testified that he and plaintiff were married on May 3, 1940, at Benton, Texas; that they were divorced and he did not remarry plaintiff. An exemplified copy of a decree of divorce entitled, "In the 96th Judicial District Court of Tarrant County, Texas. Ruth Colbert (Plaintiff) v. J. W. Colbert (Defendant) No. 32312-A," showing that the decree of divorce was granted on June 27, 1941, was offered in evidence by defendant and it was received. It appears that it was conceded the parties mentioned in that decree were the same parties who are plaintiff and defendant herein. The defendant testified further that after the marriage and before the divorce he lived with her about six months; that after the divorce they lived together about half the time, and held themselves out to the public as Mr. and Mrs. Colbert, and they "split the bills" for the place where they were living; and that there was a separation at the time of the divorce.

At the hearing of that motion the plaintiff testified that the divorce "was at one month" after they were married; that plaintiff and defendant were doing government work and it was against the rules for a husband and wife to have such employment; that the divorce was secured in order to keep their employment. In answer to the question, "was there any separation at the time [of the divorce]?" she replied, "No. We only separated for about 3 weeks and he was looking for a job, we lived together all the time." She testified further that they were together constantly in the State of Texas from the time of the divorce until April 8, 1942, when she came to live in Los Angeles (a period of approximately nine months and not approximately "two years" as she had stated in her affidavit); that "I lived—we lived here in—he has been paying the rent, but signed my name."

Thereupon the court denied the motion to vacate the order of August 14th.

[4] Upon the hearing of the motion to vacate on September 1st, it was established by the exemplified decree of divorce and the admissions of plaintiff that on June 27, 1941, the plaintiff herein obtained a decree of divorce from defendant herein dissolving the contract of marriage made between them at Benton, Texas, on May 3, 1940. The action herein for separate maintenance was based specifically upon the contract of marriage which was dissolved by that decree. The court's power to order payment of alimony, counsel fees and costs may be exercised only in favor of a husband or wife. Civ.Code, sec. 137. In Carbone v. Superior Court, 18 Cal.2d 768, at page 771, 117 P.2d 872, at page 874, 136 A.L.R. 1260, it was said "* * * the existence of the marriage is a jurisdictional prerequisite for the right of the court to order support, costs, and counsel fees pendente lite in an action for divorce." In the case of Talbot v. Talbot, 218 Cal. 1, 21 P.2d 110, a separate maintenance action, wherein an order for alimony and counsel fees pendente lite was made, defendant filed as an exhibit a certified copy of a final decree of divorce in a certain action entitled Joseph Jay Pausner v. Esther Roof Pausner. The defendant Talbot contended that said decree showed that Esther Talbot, the plaintiff in the Talbot case, was a married woman at the time of her alleged marriage to the defendant Talbot, and therefore that the essential basis for the action of Talbot v. Talbot, namely, the marriage relation, could not exist. The court said at page 3 of 218 Cal., at page 110 of 21 P.2d: "The point would be well grounded if there were any showing that the plaintiff [Esther Talbot] in the present action and the defendant [Esther Roof Pausner] in the former action were one and the same person." In the matter of Ex parte Cook, 42 Cal.App.2d 1, 108 P.2d 46, the petitioner sought his release in habeas corpus from a commitment for contempt for failure to comply with an order for payment of alimony and suit money pendente lite in a divorce action. It appeared therein that the marriage, which had been the basis for the order for alimony and suit money, was void for the reason that petitioner was married to a person other than the plaintiff in the divorce case when he and the plaintiff were married, and that plaintiff had knowledge of such other marriage when she married the petitioner. The court therein said, 42 Cal.App.2d at page 3, 108 P.2d at page 47: "The undisputed record before us discloses that the petitioner is not now and never has been the husband of Hilda [the plaintiff in the divorce action] * * * that the superior court was * * * without jurisdiction to or-

der petitioner imprisoned for failure to comply with the illegal award of alimony and suit money." The case of Parmann v. Parmann, 56 Cal.App.2d 67, 132 P.2d 851, 852, was an action, in the alternative, for an annulment or divorce. The appeal therein was from an order that, pending the trial, defendant pay attorney's fees and court costs. The allegations of the complaint therein and the testimony of the parties showed indisputably that the marriage was void. It was held therein that "The court is without jurisdiction to order such payments."

[5] It having been established by undisputed evidence that the relationship of husband and wife, as a result of the alleged marriage of May 3, 1940, did not exist when the order of August 14th was made, the court was without jurisdiction to make the order of August 14th.

[6] Even though an order pendente lite for alimony, counsel fees and costs is appealable the court had power to vacate such order on the ground of lack of jurisdiction. In the case of Sharon v. Sharon, 67 Cal. 185, 7 P. 456, 635, 8 P. 709, a divorce case, wherein an order for alimony and counsel fees pendente lite had been made, it was held (67 Cal. at page 196, 7 P. at page 462) that such an order "possesses all the essential elements of a final judgment" and (67 Cal. at page 199, 7 P. at page 465) "is an appealable order." It was said further therein (67 Cal. at pages 195, 196, 7 P. at page 462) that, "If the court had afterwards found that the marriage relation never existed between the parties, that would not have affected the order for the payment of temporary alimony. It would have afforded good ground for vacating it." It is true as respondent asserts that, the defendant having been duly served with summons, the complaint and the order to show cause, and having appeared generally at the hearing on the order to show cause, the court had jurisdiction of the parties; however, the question of jurisdiction under section 137 of the Civil Code to order the payment of alimony, counsel fees and costs did not depend solely upon jurisdiction of the parties but depended upon the relationship of husband and wife existing between the parties. The question here presented is one of jurisdiction under section 137, and not the erroneous exercise of jurisdiction. The plaintiff herein, with full knowledge that the marriage contract of May 3, 1940, made at Benton, Texas, had been dissolved (upon her petition), alleged herein the continued existence of the marriage; and in order to suit her immediate convenience, in asking for separate maintenance in California, she ignored the decree of the Texas court and sought to treat that formal decree of a court of competent jurisdiction as a mere matter of form. Her position is that she obtained the decree of divorce in order to meet her convenience in Texas in proving that she and the defendant were not husband and wife; and that the decree was of no value in California as proof of what it recited, if such proof did not meet her convenience.

[7] The court should have granted the motion to vacate the order of August 14th. The order of September 1, 1944, denying defendant's motion to vacate the order of August 14, 1944, is reversed, and it is hereby ordered that the order of August 14, 1944, be and the same is hereby vacated.

[8] As above stated, the record as to the matters before the court at the time of the hearing on August 14th is sufficient to support the order of the court made on that day; however, since that order has been vacated by this court the question on the appeal from the order of August 14, 1944, is moot, and therefore the appeal from the order of August 14th is dismissed.

DESMOND, P. J., concurs.

SHINN, Justice (dissenting).

I dissent. Although the main opinion correctly holds that an order for temporary alimony and attorney's fees should be vacated upon satisfactory proof that there had been no marriage of the parties, it does not touch upon the real ground for the order denying the motion to vacate. The trial judge no doubt refused to vacate the original order for the reason that he considered the evidence to be sufficient to show a common law marriage subsequent to the divorce. I think the evidence was clearly sufficient to meet the requirements for proof of marriage upon an application for a temporary order. Plaintiff stated in her affidavit that the divorce was obtained in order to circumvent government regulations, "which did not permit two employees belonging to the same family in the same establishment," and that "it was thereupon agreed that plaintiff would secure from the defendant a decree of divorce, but that their marital relations should not in any way be disturbed," and "that such divorce was had with the understanding that the parties would continue as husband and wife and that the divorce would be a mere formality to comply with the employment laws of the United States." This evidence was uncontradicted. Plaintiff's affidavit further stated that she and defendant continued to live together in the same dwelling in the relation of husband and wife and that they held themselves out to the public generally as such and that they lived under these conditions in Texas for approximately two years after the decree of divorce. Upon the hearing plaintiff testified that she and the defendant were separated for about three weeks at the time of the divorce and that thereafter they "lived together all the time, every day and every night." Defendant testified that they only lived together about half the time after the divroce and that they held themselves out as husband and wife. Plaintiff's evidence as to the agreement under which the parties continued to live together as husband and wife was not contradicted by defendant and, although plaintiff was not questioned as to the words in which the agreement was expressed, the trial judge was justified in drawing the inference that there was an agreement to marry. The circumstances of the case furnished strong evidence that during the three years the parties lived together after the divorce, two of which were spent in Texas, they regarded themselves as husband and wife. It is undisputed that they held themselves out as husband and wife and lived openly in that relationship. The conduct of the parties after the decree was granted was sufficient to prove a marriage under the laws of Texas. It is not questioned that the law of Texas is as stated in the syllabus in Bobbitt v. Bobbitt, Tex.Civ.App. 1920, 223 S.W. 478, as follows: " 'Marriage' is a status, the living together of a man and a woman as husband and wife, under an agreement, express or implied, which need not be solemnized by any ceremony, or be under license from the state, where the agreement is made effective by the parties living together publicly as husband and wife." The evidence to prove a marriage need not be as complete and satisfactory upon an application for temporary support as that required to prove a disputed marriage upon a trial. Carbone v. Superior Court, 1941, 18 Cal.2d 768, at page 772, 117 P.2d 872, 136 A.L.R. 1260. There was no testimony except that given by the parties but the court was justified in believing that if additional evidence had been produced it would have been corroborative of the testimony of plaintiff and of the admissions of defendant. Defendant offered no evidence that there was not an agreement of marriage, and corroboration of his testimony that the cohabitation as husband and wife extended over only one-half of the two-year period of the residence in Texas would not have required a finding that he and plaintiff did not enter into a common law marriage. Although the complaint pleaded the ceremonial marriage, all of the evidence as to the claimed common law marriage was considered by the court without objection that it was not pleaded. If that objection had been made, plaintiff would have been entitled to amend her complaint to allege the common law marriage, if, indeed, an amendment would have been required. The point of alleged variance, not having been raised at the hearing, was waived. In my opinion, the order should be affirmed.

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71 Cal.App.2d 396

SLAUGHTER et al. v. DEMPSEY.

Civ. 15007.

District Court of Appeal, Second District, Division 2, California.

Oct. 29, 1945.

Rehearing Denied Nov. 19, 1945.

1. Appeal and error ⇨770(1)

Where no brief was filed on behalf of respondent, appeal would be submitted upon appellant's opening brief. Rules on Appeal, rule 17b.

2. Appeal and error ⇨356

Failure to appeal within time prescribed by statute from judgment entered in minutes of court granting motion for nonsuit effected a legal termination of the litigation. Code Civ.Proc., § 581.

3. Religious societies ⇨27(3)

In action to enjoin defendant from acting as pastor and from interfering with trustees in administration of church, evidence supported findings that, under rules governing church, pastor could not be removed without three months' written notice, that only nine of thirty members were present at meeting at which resolution of removal was adopted, and that pulpit was not declared vacant by majority of members.

4. Appeal and error ⚷1010(1)

Where record disclosed substantial evidence in support of findings on which judgment was based, appellate court was powerless to do more than affirm the judgment.

◆

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Action by Ned Slaughter and others, as trustees of Big Bethel Baptist Church, an unincorporated religious association, against H. D. Dempsey to enjoin defendant from acting as pastor of the church and from interfering with plaintiffs in administration of the church. From an adverse judgment, plaintiffs appeal.

Judgment affirmed.

Sylvester Isonberg, of Los Angeles, for appellants.

Curtis C. Taylor, of Los Angeles, for respondent.

MOORE, Presiding Justice.

[1] No brief having been filed on behalf of respondent herein, this appeal is submitted upon appellants' opening brief pursuant to rule 17b of the Rules on Appeal. For two reasons the judgment must be affirmed.

Appellants instituted this action to enjoin defendant from acting as pastor of the Big Bethel Baptist Church situated in the city of Los Angeles and from interfering with plaintiffs in the administration of the church. They alleged that at the time of the organization of the church in 1941 it was agreed that its temporal affairs should be governed by Hiscox's Guide and Directory for Baptist Churches; that such guide provides that no pastor shall be imposed upon a Baptist church without the consent of its qualified and active members and that at a meeting of the members defendant was removed from the pastorate to which he had been duly elected.

After the evidence of the plaintiffs had been introduced defendant moved for a nonsuit on the ground that the evidence affirmatively proved that at the meeting at which the appellants undertook to remove appellee from the pastorate only 9 members including appellants out of a membership of 30 were present, and that the meeting had not been called as required by the governing rules. The motion was granted on February 2, 1945, was entered in the minutes of the court and no appeal was taken therefrom.

[2] Failure to appeal from the judgment of non-suit effected a legal termination of the litigation. Code Civil Proc. § 581; McColgan v. Jones, Hubbard & Donnell, Inc., 11 Cal.2d 243, 246, 78 P.2d 1010; Tromanhauser v. Grisemer, 123 Cal.App. 153, 11 P.2d 32. But two strange occurrences having intervened, served to prolong the contest resulting in a "Judgment" which is now before us. Two weeks after the non-suit had been entered the court signed and filed findings and decision. Then duly came the motion for a new trial in the argument of which both parties participated; then its denial. Appeal "from the judgment heretofore rendered therein" was filed on April 9, 1945. Even though we ignore the judgment of non-suit we find no merit in the appeal.

The court made findings upon all of the material issues in favor of appellee and particularly found that a pastor cannot be separated from his church without at least three months notice in writing, as provided by the rules governing the church; that the pulpit was not declared vacant by a majority of the members; that appellee was not ousted from the pastorate but that a meeting was convened by the trustees at the residence of one of the members at which only 9 out of a membership of 30 were present, including appellants; that an abortive motion was adopted to remove appellee as pastor.

[3] The evidence supporting these findings consists of (1) the rules governing the church; (2) the testimony of appellee that no meeting of the membership was called as the rules require; (3) the minutes of the trustees showing that the meeting which attempted to remove respondent did not have a quorum present and therefore that the pulpit was not declared vacant by a majority of the members.

[4] We are powerless to do more than affirm a judgment where the record discloses substantial evidence in support of the

findings. Crawford v. Southern Pacific Co., 3 Cal.2d 427, 45 P.2d 183; Fischer v. Keen, 43 Cal.App.2d 244, 248, 110 P.2d 693.

The judgment is affirmed.

McCOMB, J., and FOX, Justice pro tem., concur.

STRUDTHOFF et al. v. YATES et al.
YATES v. STRUDTHOFF et al.
In re STRUDTHOFF'S ESTATE.*

Civ. 3402.

District Court of Appeal, Fourth District, California.

Oct. 29, 1945.

Rehearing Denied Nov. 21, 1945.

Hearing Granted Dec. 27, 1945.

1. Executors and administrators 🔑144, 365
Trusts 🔑198

Trustees and executors and administrators cannot make a valid purchase of any part of estates in respect to which they have duties to perform, and an executor or administrator may not even be interested in the sale. Probate Code, § 583.

2. Executors and administrators 🔑144, 365

The rule that no executor or administrator may directly or indirectly purchase any property of the estate or be interested in any sale is founded on public policy and should be rigidly enforced, notwithstanding good faith of executor or administrator, absence of fraud, and without regard to result to estate in any particular transaction. Probate Code, § 583.

3. Executors and administrators 🔑144, 365

Administrator of estate cannot sell estate to his wife, notwithstanding that purchase is made with wife's separate property and regardless of adequacy of price, apparent regularity of proceedings, or absence of fraud. Probate Code, § 583; Civ.Code, §§ 157, 158, 162, 164.

4. Executors and administrators 🔑149, 379

Where administrator's wife purchases estate property and administrator is interested in such purchase or sale either directly or indirectly, transaction is voidable at instance of a party legally interested in estate. Probate Court, § 583.

5. Executors and administrators 🔑149, 379

Testator's heirs are persons "legally interested in estate", and hence may sue to invalidate a transaction in which estate property is sold to administrator's wife and in which purchase administrator is interested, either directly or indirectly. Probate Code, § 583.

See Words and Phrases, Permanent Edition, for all other definitions of "Legally Interested in Estate".

6. Executors and administrators 🔑144, 365

The purpose of code section prohibiting purchase by executor or administrator of estate property is to prevent property from being sold at a price less than its true value, rather than to declare who may or may not become a purchaser of estate property. Probate Code, § 583.

7. Executors and administrators 🔑115

An administrator holds property of testator's estate as trustee, and public policy precludes him from dealing with himself as an individual in any transaction concerning such trust property. Probate Code, § 583.

8. Descent and distribution 🔑1
Vendor and purchaser 🔑1

The word "purchase", in a technical sense, means acquisition of real estate by any means whatever except by descent and, in a popular and confined sense, means acquisition by way of bargain and sale or other valuable consideration or transmission of property from one person to another by voluntary act and agreement founded on a valuable consideration.

See Words and Phrases, Permanent Edition, for all other definitions of "Purchase".

9. Executors and administrators 🔑144, 149, 365, 379

Where administrator with will annexed, as such, executed a deed conveying estate property to his wife in consideration of the cancellation of indebtedness allegedly due wife from estate and of the payment to estate of $1000 in cash, transaction constituted a "purchase" in which administrator was interested and transaction should have been found void at instance of testator's heirs.

10. Executors and administrators 🔑149, 379

Decree setting aside, at instance of testator's heirs, conveyance of land by administrator with will annexed to his wife, was required to provide for an accounting, to declare that wife held legal title in trust for parties legally interested, and to provide in the alternative for a conveyance by wife to interested parties upon payment to wife within a reasonable time of amount found due her or, if payment is not made, for a sale of property at public auction with distribution of proceeds, after payment of amount found due wife, according to terms of will or according to approved and valid agreements or assignments of interested parties. Probate Code, §§ 571, 583, 920-922, 925, 1020.1, 1063, 1068.

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* Subsequent opinion 170 P.2d 873.

11. Executors and administrators 🔑314(11)

Where claimed assignments of interest by heirs and devisees are presented for court approval, court may then inquire into consideration for such assignments and other questions raised, such as fraud, undue influence, and duress, and may refuse to make distribution pursuant thereto. Probate Code, § 1020.1.

12. Executors and administrators 🔑149, 379

Where administrator with will annexed improperly sold estate property to his wife in satisfaction of her claims against the estate, in proceedings by heirs to set aside that transaction, an accounting was required to determine the amount due administrator's wife for advancements made, services performed, and the like, for the benefit of the estate. Probate Code, §§ 583, 921, 922, 925, 1063.

13. Executors and administrators 🔑33, 458

The Legislature, by enactment of code section providing for termination of proceedings where there is no property subject to administration, did not intend to permit an administrator who is charged with possession of a large estate and who operates property and realizes and pays out thousands of dollars over a period of several years, to merely represent that all property that came into his possession has been disposed of and that there remains no property subject to administration, without accounting for that property, and then summarily obtain an order terminating further proceedings and be discharged. Probate Code, § 1068.

14. Executors and administrators 🔑458

Administrator with will annexed, through whose hands large sums of estate money passed and who eventually sold estate property to his wife in compromise of her claims against estate, was required to account for all income of the estate and could not escape necessity of filing a full and final account by negligently omitting to render annual accounts. Probate Code, §§ 571, 583, 920-922, 925, 1063, 1068.

15. Executors and administrators 🔑473(5)

Where administrator with will annexed had kept no records, notwithstanding that many thousands of dollars of estate money passed through his hands and that he had contracted with his wife for care of estate property, on remand of case for an accounting, petition for revocation of letters of administration, which had previously been denied, was required to be reconsidered in connection with the accounting. Probate Code, §§ 571, 583, 920–922, 925, 1063, 1068.

Appeal from Superior Court, Orange County; Kenneth E. Morrison, Judge.

Action by Adolph William Strudthoff and another against Sydney Yates, individually and as administrator with will annexed of the estate of John B. Strudthoff, deceased, and Edith H. Yates, to compel administrator to account and to impress a trust on real property conveyed by administrator to Edith H. Yates, wherein defendant Edith H. Yates cross-complained to quiet her title. The action was consolidated with a proceeding in the matter of the estate of John D. Strudthoff, deceased, on the petition of Adolph William Strudthoff and another for revocation of letters of administration with will annexed previously issued to Sydney Yates and for revocation of the approval of a so-called final account of administrator. From a judgment for defendants and cross-complainant, plaintiffs and cross-defendants Arthur P. Strudthoff, Adolph William Strudthoff, Evelyn A. Strudthoff, and Amelia C. Yates, formerly Amelia C. Strudthoff, appeal.

Reversed.

William L. Waters, of Fullerton, for plaintiffs, cross-defendants, and appellants.

Mize, Kroese & Larsh, of Santa Ana, for defendant, respondent, cross-defendant, and appellant Sydney Yates.

Stephen F. Gallagher, of Anaheim, for defendant, cross-complainant, and respondent Edith H. Yates.

GRIFFIN, Justice.

This is an action by two of four heirs of deceased to require the administrator to account and to impress a trust upon real property deeded by the administrator to the holder of incumbrances on real property, who was the wife of the administrator, under authority of an order of the Probate Court to compromise such claims. Also involved in this action is a petition for revocation of letters of administration and the approval of a so-called final account of the administrator arising out of the probate proceedings in the matter of the estate of John D. Strudthoff, deceased. John D. Strudthoff died testate on August 14, 1936, leaving four adult children. Two of these, Adolph and Arthur Strudthoff, are plaintiffs herein and the other two, Evelyn A. Strudthoff and Amelia C. Yates, were made cross-defendants in a cross-complaint in which respondent Edith H. Yates sought to quiet her title to the property involved. The deceased, at the time of his death, owned 40 acres of land in Orange County planted to oranges, which were divided into two parcels. He devised ten acres of parcel one to a bank in trust for his son Adolph. The other ten acres of parcel one were devised to his daughter Evelyn and 20 acres, all of parcel two, to his son Arthur. Another tract was devised to his daughter Amelia but he did not own that tract at the time of his death. By subsequent agreement of the devisees Evelyn, Arthur and Amelia, each was granted an undivided one-third interest in each of the last two mentioned parcels (30 acres) subject to one-third of the respective incumbrances. Arthur and Evelyn were appointed administrator and administratrix respectively with the will annexed on August 19, 1936. A loan was made to the estate by one W. C. Endicott for the sum of $11,000, during the course of administration. This loan was secured by an incumbrance on the north one-half of parcel two. In October, 1939, that ten acres was deeded to Endicott for $250 and a satisfaction of the incumbrance, pursuant to an order of compromise. This action was brought to impress a trust on the remaining acreage devised to Arthur and Adolph. Amelia and Evelyn did not join in the charges of fraud made by the brothers but disclaimed any interest in the property. The bank named in the will as executor declined to act as such. On January 25, 1937, the administrators, by court order, borrowed for the estate $6,500, giving a crop mortgage as security. On March 30, 1937, they again petitioned to borrow $11,000 secured by a deed of trust covering parcel one and a crop mortgage. The petition recited that they did not have money enough to pay off the incumbrances then against the property. This loan was not consummated. On May 17, 1937, they borrowed from Southern County Bank, subject to first incumbrances, $12,700 and gave as security a deed of trust upon parcel two and a crop mortgage upon all 40 acres. On May 25, 1939, the Southern County Bank filed a petition to revoke the letters of administration, and asked that Evelyn and Arthur be removed on the ground that they were wasting the estate and were neglectful in the management thereof and were not keeping proper accounts. After citation issued, they resigned as such and all four heirs nominated Sydney Yates as administrator with the will annexed. The final account of the retiring administrators showed $85.75 on hand; that Evelyn had advanced from her personal funds for ranch operations $381.25, which had not been repaid to her. The indebtedness of the estate then showed a total of $42,662.29, and most of the obligations were delinquent.

Decedent had, prior to his death, filed a petition under sec. 75, sub. s of the Federal Bankruptcy Act, 11 U.S.C.A. § 203, sub. s. A composition of his creditors had been made but these terms were in default. In refinancing the estate's obligations, the Southern County Bank advanced money to it to pay off pressing claims and incumbrances against the estate. On July 17, 1939, Sydney Yates was appointed administrator with the will annexed. On July 20, 1939, Edith H. Yates, who owned, as her separate property, an adjoining grove, and who operated her own ranch equipment, signed a contract with the administrator (her husband) agreeing to cultivate, irrigate, fertilize and care for the 40 acres for one year for the sum of $4,000. This contract was fulfilled. On July 20, 1940, she signed another similar contract for $4,500 for 30 acres, conditioned that the work be done to the satisfaction of the Southern County Bank, Federal Land Bank, and the owners and mortgage holders of the groves. On July 5, 1941, she again made a similar contract on the 30 acres for $5,250. The orchards were apparently cared for to the satisfaction of the parties concerned. None of these contracts were approved by the court. The last one reads in part as follows: "While it may not be necessary to execute this contract, I feel it necessary for the record, as the administrator is my husband, and on this account, desire a record for my file." On December 22, 1939, the Federal Land Bank, incumbrancer for an amount in excess of $11,000, requested that past due payments be brought up to date. On April 29, 1940, the administrator, by court order, borrowed, for the estate, $3,000 from Edith H. Yates, his wife, and gave as security, a deed of trust on the west one-half of parcel one. On February 10, 1941, the administrator petitioned to borrow from Edith H. Yates, his wife, $11,500, and an additional advancement not exceeding $2,500, to be repaid within one year, and to be secured by a trust deed and crop mortgage on the 30 acres, covering crops for the years 1941, 1942 and 1943, which were to be subject to incumbrances of record. The petition to borrow recites that that sum was to be used in paying off certain delinquent indebtedness of the estate, namely, on Federal Land Bank mortgage, $11,800, and interest in the sum of $2,300; Southern County Bank, $2,700; Southern County Bank $6,500 and $1,400 interest and taxes; claim of Anna Strudthoff $3,400; personal loans by Mrs. Yates or advances to the estate $1,550. On February 21, 1941, the court granted the petition. The record is not clear what indebtedness was paid by the loan, if any. Mrs. Yates's claim for three years of orchard care had then reached the sum of $13,750. On April 7, 1942, Sydney Yates, as administrator, petitioned the court for authority to compromise the indebtedness due Edith H. Yates. The petition alleged that the sum was past due; that the estate was unable to pay the debt and that she agreed to satisfy the debt in full and pay the estate $1,000 in consideration of a conveyance to her of the 30 acres subject to prior incumbrances. It is then alleged that the property, including the crops, was then worth only $30,000; that the property was incumbered by a trust deed in favor of Mrs. Yates for $11,500 and $2,500 advances made by her and authorized by the court, secured by 2 chattel mortgages on the crops in the sums of $5,000 and $3,000 respectively; and prior incumbrances of Federal Land Bank for $11,000 and Southern County Bank for $6,500. On April 17, 1942, the court made an order authorizing the conveyance and a release of her incumbrances. There was some discrepancy in the description of the property in the petition and order. On June 9, 1942, the court set aside that order and on the same day a similar petition to compromise was filed, set for hearing, and on September 4, 1942, the court made an order authorizing the compromise. The deed from the administrator to his wife was executed and recorded on October 2, 1942. Under the theory that the estate then had no assets, no further proceedings were had until August 27, 1943, when Adolph filed a petition in the probate proceedings, No. A5250, for revocation of letters of administration of Sydney Yates alleging generally the facts set forth in the complaint herein, and sought an accounting by him. Yates answered the petition and alleged that he was not required to file an account under sec. 921 of the Probate Code; that all of the assets of the estate were exhausted; that the $1,000 paid by way of compromise to the estate had been paid to the attorneys for the estate in settlement of their fees and costs. It is then alleged in the answer that the value of the estate, without fault of the administrator, had greatly decreased; that the crops, during the administration, were taken by the holders of crop mortgages; and that at the time the estate came into his hands it was already indebted in excess of $35,000. He denied generally the allegations of the petition in reference to his removal and asked that the hearing on the citation in the probate proceedings be consolidated with the trial of the issues in the present action. The court ordered such consolidation. On November 2, 1943, Sydney Yates filed a purported final account, acknowledging receipt of $85.88 from the former administrators, and certain other items amounting in all to $1,566.28. The disbursements totaled the exact amount as shown by the receipts. It is then alleged that there remained no property of any kind belonging to the estate and subject to administration. Settlement of the account and termination of the proceedings were sought under sec. 1068 of the Probate Code. That account was settled and approved by the court in the judgment herein appealed from.

Plaintiffs brought this action, alleging, generally, some of the facts above related, and emphasized the fact that the administrator, Sydney Yates, never filed any proper report or account of his administration as required by sections 921 and 922 of the Probate Code. The complaint alleges that defendants Yates "entered into a conspiracy to defraud the said heirs out of their respective interests in said orange grove * * * by misrepresentations and fraudulent concealment of the facts" from the court to secure an order authorizing loans from and the subsequent conveyance of the property to Edith H. Yates under the compromise order. It is alleged generally that Sydney Yates falsely represented that he would do a better job in operating the 40 acres of oranges if the devisees would "get him appointed as administrator"; that he falsely promised that he would so manage said groves that the production would gradually liquidate all outstanding indebtedness and save the property from the foreclosure without cost to them; that relying upon such promises and representations they premitted him to manage said estate and made no inquiry nor investigation of the facts concerning its operation; that Sydney Yates concealed all facts and proceedings from them; that he sold each year's crop of oranges and that such proceeds were sufficient to pay costs, interest, taxes, and leave a substantial cash balance; that he purposely concealed the real facts from the court and purposely failed to render any annual account; that he, in violation of his duty, fraudulently secured the authorization of the loan of $11,350 from his wife when said estate was not in need of the money; that such loan was made for the financial benefit of the defendants and was made to obtain for themselves the conveyance of said 30 acres; that no part of said loan was ever paid into the estate but was a pretended advance for the consummation of the fraudulent purpose; that Sydney Yates fraudulently and negligently caused the loss of the 10 acres deeded to the incumbrancer, W. C. Endicott, under the order of compromise; that on June 9, 1942, when defendant Sydney Yates filed his petition to compromise the indebtedness claimed to be due to his wife, 30 acres of oranges had fully matured, and approximately 11,000 field boxes of oranges were then growing on the trees and that said crops could have been sold, as defendants well knew, for the sum of $22,000, and that he did receive said amount in cash and had it on hand on October 2, 1942, when the deed to his wife was made and recorded; that defendants fraudulently concealed these facts from the court and the plaintiffs; that on June 9, 1942, the reasonable market value of the 30 acres of oranges was in excess of $45,000, which fact the defendants well knew; that defendant administrator refused to sell the ranch during 1942 at $1,500 per acre; that Edith H. Yates was the wife of the administrator but such relationship was not disclosed in the petition to compromise or otherwise; that the conveyance was secured by fraud and that Edith H. Yates should be declared as holding such property as trustee for plaintiffs. An accounting is sought for the oranges sold.

Sydney Yates appeared by answer and denied generally all of the allegations set forth and alleged specially that the court was fully informed, at all times, of the relationship between himself and Mrs. Yates, and by way of separate defense alleged two written assignments of all rights of plaintiffs in the estate to defendant Sydney Yates and set up copies of such assignments. Mr. Yates testified that he did not consider these assignments of any value, but paid plaintiffs ten dollars for them. The trial court failed to find on the question of their validity. It is then alleged that when he was appointed administrator the assets of the estate were heavily incumbered in the sum of $35,000; that all acts and proceedings were free of fraud or concealment and were done in good faith in the interest of the estate and upon advice of competent counsel. The answer of Edith H. Yates was to the same effect.

After a protracted trial the court found in all respects in favor of defendants and cross-complainant and against plaintiffs' allegations. It is specially found that the administrator Yates made his final account, petition for termination of further proceedings and for his discharge as such, under section 1068 of the Probate Code; that there is no property of any kind belonging to said estate subject to administration; that said account lists all receipts and disbursements of said administrator and that it is a full, true and correct accounting; that the conveyance to W. C. Endicott, under the petition to compromise, was to the best interests of the estate; that the petition of Sydney Yates, as administrator, for authority to borrow $11,350, and additional sums not to exceed $2,500, from Edith H. Yates, and to execute a deed of trust on the 30 acres of said estate property to secure its payment, was made and the order was granted in good faith and for the best interests of said estate; that no facts were concealed from the court; that the full amount of the authorized loan was advanced and was not "made for the financial benefit of defendant Sydney Yates and Edith H. Yates or either of them" or as part of any conspiracy to declare said loan due or to obtain for themselves any conveyance of said 30 acres of said estate; that Edith H. Yates is the owner, as her separate property, of the 30 acres described in the deed. The court then, in the judgment, allowed and settled the purported final account of said administrator, terminated further proceedings, discharged the administrator and decreed that Edith H. Yates was the owner of the property described; that plaintiffs take nothing by their complaint and that the petition of Adolph William Strudthoff, in the matter of the estate of John D. Strudthoff, deceased, case No. A2520, be denied.

The two main questions presented on this appeal are, first, the validity of the deed of the 30 acres by the administrator to his wife, authorized by the court, under the compromise agreement. The trial court found, upon conflicting evidence, that there was no fraud or misrepresentation practiced by respondents upon the court or parties in interest. This finding by the court has supporting evidence and if it were the only question presented, our power to review the order would end. In this connection, it is contended that since Yates, as administrator, sold the estate property to his wife under the compromise agreement, he in effect was either directly or indirectly an interested purchaser under section 583 of the Probate Code, and that the sale was therefore voidable and should be declared void at the instance of those interested in the estate; that plaintiffs are such interested parties and that it was the plain duty of the trial court, under the undisputed facts, to so declare it, citing O'Connor v. Flynn, 57 Cal. 293; Santos v. Santos, 32 Cal.App.2d 62, 89 P.2d 164; In re Estate of Richards, 154 Cal. 478, 98 P. 528; Chastain v. Pender, 52 Okl. 133, 152 P. 833.

Respondents argue that these cited cases are not applicable by reason of the fact that the money borrowed by Mrs. Yates was on her separate property and remained such under sec. 162 of the Civil Code, that the earnings of her separate business or property was her separate property, citing Gray v. Perlis, 76 Cal.App. 511, 245 P. 221, and that under Civil Code, secs. 157, 158, 162 and 164, neither husband nor wife has any interest in the property of the other, and either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might, if unmarried, and that all property of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise or descent, with the rents, issues and profits thereof, is her separate property; and that whenever any real or personal property, or any interest therein or incumbrance thereon, is acquired by a married woman by an instrument in writing, the presumption is that the same is her separate property, and that the presumptions in this section mentioned are conclusive in favor of any person dealing in good faith and for a valuable consideration with such married woman or her legal representatives or successors in interest. It is argued that section 583 of the Probate Code does not affect such a sale under compromise and that if it did the consideration involved in the transaction was the separate property of Mrs. Yates and was, under substantial evidence, so found to be her separate property by the trial court; that the question whether the administrator benefited by such conveyance was one of fact and that fact was resolved in favor of respondents.

[1, 2] It is an established rule of law that trustees, strictly so-called, and executors and administrators cannot make a valid purchase of any part of the estates in respect to which they have duties to perform. No executor or administrator may directly or indirectly *purchase* any property of the estate he represents, nor be interested in any sale. This provision is only a declaration of the pre-existing principle of law that a trustee must not deal with himself, and is founded on public policy and should be rigidly enforced. Although he may act in perfect good faith, so far as his intentions are concerned, yet so strict is the law in respect to persons dealing with trust property and funds that it will not permit them to place themselves in a position antagonistic to the interests of their cestuis que trust. It is wholly immaterial whether or not the agreement was actually fraudulent. Likewise, the result to the estate in any particular transaction is immaterial. 11 Cal.Jur. p. 863, sec. 516; Jones v. Hanna, 81 Cal. 507, 22 P. 883.

[3] Edith H. Yates contends she had a legal right to deal with her husband administrator, as a third party, because the funds, furnished by her in negotiating the loan to the estate, and her earnings and funds used in caring for the groves of the estate were contracted for by her husband as administrator and that the returns therefrom were and remained, under the law, her separate property. Whether the wife's

earnings remained her separate property under the evidence here produced is questionable, it becomes immaterial under the well-reasoned authorities hereafter cited. That same question was presented fully and was considered, discussed and decided contrary to respondents' contention in Chastain v. Pender, supra, quoting from Burton v. Compton, 50 Okl. 365, 150 P. 1080, where the husband administrator, under order of the Probate Court, sold the real property of the estate at private sale to his wife. It was there said:

"As to the first proposition presented, whether the husband administrator can sell the estate to his wife, we need look no further than the well-considered opinion of Burton v. Compton [50 Okl. 365], 150 P. 1080, where we find this question answered in the negative. We quote therefrom:

"'The first proposition is before this court for the first time. Yet it is an old question, and has been passed upon repeatedly. And as far as we know, Indiana stands alone in upholding such deeds. In 1781, long before there was any statute upon the subject, Lord Chancellor Thurlow of England, in Fox v. Mackreth, 2 Leading Cases in Equity (White and Tudor) 722, held: "That trustees expose themselves to great peril in allowing their own relatives to intervene in any matter connected with the execution of the trust; for the suspicion which that circumstance is calculated to excite, where there is any other fact to confirm it, is one which it would require a very strong case to remove." And he says, in substance, that the rule rests upon public policy, and such a purchase will not be permitted in any case, however honest the circumstances, for the general interest of public justice requires it to be destroyed in every instance, and that: "From general policy and not from any peculiar imputation of fraud, a trustee shall remain a trustee to all intents and purposes." And our statute (section 6409, Revised Laws 1910 [58 Okl.St.Ann. § 496]) says: "No executor or administrator must directly or indirectly, purchase any property of the estate he represents, nor must he be interested in any sale."

"'But the defendant (plaintiff in error) insists that this transaction was free from fraud, and that the price paid was adequate. That might all be true in this particular case, but the law looks beyond the circumstances of any individual case; for, as said in Frazier v. Jenkins, 64 Kan. 615, 68 P. 24, 57 L.R.A. 575: "The opportunities which are open to an unfaithful trustee to advantage himself out of the trust estate are so many and so tempting, and the condition of the beneficiary in the trust ordinarily so helpless and confiding, that the law gives warning in advance against all transactions out of which it is possible for the former to make gain at the expense of the latter." And for this reason the Legislature has fixed this statutory rule which removes both the temptation and opportunity to do wrong. And the courts can make no distinction in the application of the rule between the honest and the dishonest. And whether the transaction be free from fraud or not is immaterial to the issue in the case. It is a transaction prohibited by the statute and condemned by public policy. And the fact that the common-law disabilities of the wife have been removed, and under our statutes she is a feme sole and can buy and sell in her own name, does not, by any means, divorce the mutual interest she and her husband have in each other's property. In case of the death of the one, the other would inherit not less than one-third of his or her estate. And it would be strange indeed if this alone did not lead them to do all in their power to enhance the pecuniary interests of each other. And where the wife purchases the property of her husband's cestui que trust, to say that the husband is not interested in that sale, and has not directly nor indirectly purchased the property of the estate, seems to us to be absurd. Besides, as well said in Tyler v. Sanborn, 128 Ill. 136, 21 N.E. 193, 4 L.R.A. 218, 15 Am.St.Rep. 97: "There is, moreover, apart from this pecuniary interest, an intimacy of relation and affection between husband and wife, and of mutual influence of the one upon the other for their common welfare and happiness, that is absolutely inconsistent with the idea that the husband can occupy a disinterested position as between his wife and a stranger in a business transaction. He may, by reason of his great integrity, be just in such a transaction, but, unless his marital relations be perverted, he cannot feel disinterested; and it is precisely because of this feeling of interest that the law forbids that he shall act for himself in a transaction with his principal. It is believed to be within general observation and experience that he who will violate a trust for his own pecuniary profit will not hesitate to do it, under like circumstances, for the pecuniary profit of his wife." And for that reason the law forbids a trustee to put himself in a position where either his integrity may be questioned, or his inclination to dishonesty may be indulged.'"

In support of this same contention, see, also, Tyler v. Sanborn, 128 Ill. 136, 21 N.E. 193, 4 L.R.A. 218, 15 Am.St.Rep. 97; Gahanna Bank Co. v. Miesse, 41 Ohio App. 316, 181 N.E. 31; Cooper v. Burchett, 66 S. D. 162, 279 N.W. 598; Bopst v. Williams, 287 Mo. 317, 229 S.W. 796; and Crume v. Rivers, 178 Okl. 363, 61 P.2d 862.

[4, 5] Therefore, if the undisputed facts in reference to the transaction in the instant case can be held to be a purchase of the estate property by the administrator's wife and the administrator was interested in such purchase or sale, either directly or indirectly, the transaction was voidable at the instance of a party legally interested in the estate. U. S. Fidelity & Guaranty Co. v. Postel, 64 Cal.App.2d 567, 149 P.2d 183; Boyd v. Blankman, 29 Cal. 19, 87 Am. Dec. 146. Plaintiffs in this action were such legally interested parties. Santos v. Santos, supra.

[6, 7] The only remaining question, then, is whether the transaction constituted a "purchase" of the property within the meaning of sec. 583 of the Probate Code. It has been held in this state, in Corporation of America v. Bank of America, 7 Cal.App.2d 470, 46 P.2d 262, that the execution of a note and mortgage by the administrator bank to itself did not constitute a "sale of the property" within the meaning of former section 1576 of the Code of Civil Procedure (now sec. 583 Probate Code). Section 764 of the Probate Code provides that: "At any sale of real or personal property upon which there is a mortgage, deed of trust, or lien, the holder thereof may become the purchaser, even though no claim thereon has been, or could have been, presented or allowed." The original section of the Probate Act (Sec. 193) upon which sec. 583 of the Probate Code is based, discloses that it was enacted for the purpose of declaring not who might or who might not become a purchaser of the property of an estate, but it was to prevent the property from being sold at a price less than its true value, which might be the case if the administrator, either directly or indirectly, prevented competition among the bidders, by entering into the market, either personally or through his agents, or if, with a view of purchasing, he was tempted to undervalue the property in his proceedings respecting the sale. Boyd v. Blankman, supra, 29 Cal. at page 36, 87 Am.Dec. 146. Former sections 1576 and 1617 of the Code of Civil Procedure were carried into section 583 of the Probate Code. The original intent and purpose of the section has not been changed. An administrator holds the property of his testator's estate as trustee and he will not, for wise reasons, be permitted to deal with himself as an individual in any transaction concerning the trust property. It has been held that it is beyond the power of the court to approve a transaction which is contrary to public policy. In re Estate of Boggs, 19 Cal.2d 324, 333, 121 P.2d 678; In re Guardianship of Carlon's Estate, 43 Cal.App.2d 204, 110 P.2d 488; 6 Cal.Jur. p. 114, sec. 73; 6 Cal.Jur. p. 95, sec. 58.

[8] The word "purchase", in a technical and broader meaning relative to land generally, means the acquisition of real estate by any means whatever except by descent. Kelly v. Southworth, 38 Wyo. 414, 267 P. 691. In a popular and confined sense, it means acquisition by way of bargain and sale or other valuable consideration, or the transmission of property from one person to another by their voluntary act and agreement founded on a valuable consideration. Cobb v. Webb, 26 Tex.Civ.App. 467, 64 S.W. 792. See, also, 35 Words and Phrases, Permanent Edition, p. 473; Robbins v. Pacific Eastern Corporation, 8 Cal.2d 241, 269, 65 P.2d 42.

[9] In Waskey v. Hammer, 223 U.S. 85, 32 S.Ct. 187, 56 L.Ed. 359, where a governmental employee located a placer mining claim, it was held that the word "purchase", as used in a statute prohibiting certain governmental employees from becoming interested in the purchase of public lands, is inclusive of the various modes of securing title to or rights in public lands. See, also, State ex rel. Board of Commissioners of Valley County v. Bruce, 106 Mont. 322, 77 P.2d 403, 406. Factually similar to the instant case is Vaughan v. Vaughan, 65 Okl. 1, 162 P. 1131. There an administrator, under an agreement with the creditors, which agreement was approved by the court, received and appropriated, under a decree of distribution, all of the property of the estate, as his individual property, and

gave his note as security to the creditors. It was there held that such transaction constituted a "purchase" within the meaning of their statute, which statute was similar to ours. In the instant case the administrator, as such, executed a deed of the property to his wife. The consideration for the deed, agreement or transaction was the cancellation of his wife's claimed indebtedness due her from the estate and the payment to it of the sum of $1,000 in cash.

[10] We must conclude that the undisputed evidence shows, as a matter of law, the violation of section 583 of the Probate Code, and the trial court should have found the deed or transaction void at the instance of the legally interested parties plaintiff. The judgment and order should be reversed and the cause remanded. The court below should take an accounting between the parties upon the basis suggested in O'Connor v. Flynn, supra, and in Re Estate of Richards, supra, and decree that the respondent, Edith H. Yates, holds the legal title to the premises in trust for the parties legally interested and should make appropriate provisions for a conveyance of the property by her to the interested parties in the event the amounts found due to her are paid within a reasonable time to be fixed by the court; or, if such payment is not made, for a sale of the property at public auction, with all interested parties having a right to purchase thereat, and with the proceeds, after the payment of any amount found due to Mrs. Yates, to be distributed according to the terms of the will or in accordance with any approved and valid agreements or assignments of the interested parties.

[11] Since the trial court failed to find on the validity of the two claimed assignments of interest by the heirs and devisees, this may have a bearing on the question of ultimate distribution of the estate, if such assignments are presented for approval by the court. The court may then, under section 1020.1 of the Probate Code, inquire into the consideration for such assignments and other questions raised, such as fraud, undue influence and duress, and may refuse to make distribution pursuant thereto. In re Estate of Cohen, 66 Cal.App.2d 450, 458, 152 P.2d 485; Golson v. Dunlap, 73 Cal. 157, 14 P. 576; French v. Phelps, 20 Cal. App. 101, 128 P. 772; In re Estate of Lund, 65 Cal.App.2d 151, 150 P.2d 211.

[12] An accounting therefore must be had to determine the amount due Edith H. Yates for advancements made, services performed, etc., for the benefit of the estate.

[13] As to the question of an accounting by the administrator under section 1068 of the Probate Code, we are firmly convinced that it was not the intention of the legislature, by the enactment of that section, to permit an administrator or executor, who is charged with the possession of estate property, in an inventory and appraisement in an amount exceeding the sum of $75,000, who operates the property, such as in this case, who realizes and pays out thousands of dollars over a period of several years, and who files no annual account, to merely come before the court and represent, by petition, that all the property that came into his possession, without specifying it, has been disposed of, and that now there remains no property subject to administration, without accounting for that property, and then summarily obtain an order terminating further proceedings and be discharged as such administrator under section 1068 of the Probate Code. In the instant case, the report of the inheritance tax appraiser, filed 9/28/37, lists all outstanding indebtedness of the estate, including administrator's and attorneys' fees, as $43,877.67, and recites that the fair market value of the property at the time of the death of the decedent, 7/14/36, was $75,000, and that the clear market value thereof as of that time was $31,635.71. The inventory and appraisement showed, as of December 30, 1936, an appraised value of parcel 1 at $35,000, and of parcel 2 at $40,000. The original administrators appointed were charged with this amount in the final account rendered by them. They also showed an income from the sale of oranges, water, oil lease rental, money borrowed, etc. in an additional sum of over $25,000. An itemized account showed expenditures totaling over $28,000, leaving a balance of $75,000, charged in the inventory and appraisement, plus $85.78 in cash. The administrator Yates receipted for this amount. From July 7, 1939, the date when Yates was appointed administrator and authorized to carry on the business of operating the groves, to September 10, 1943, when he was cited to render an account, no account was ever presented or filed showing receipts and expenditures by him as such administrator. Admittedly, several thousands of dollars came into his hands as such administrator. The only account filed by him was when he petitioned the court for dis-

charge as such administrator. The items shown as receipts are:

July 19, 1939, cash from prior administrator	$ 85.78
October 27, 1939, Endicott deed	250.00
June, 1940, Revolving fund	180.50
September, 1942, Edith H. Yates, compromise	1000.00
December, 1942, Endicott easement	50.00
Total	$1566.28

Expenditures are:

July, 1939, Bond	15.00
September, 1939, Repair house	70.78
Attorneys' fees	1190.00
Title Company	50.00
Edith H. Yates, money advanced by her	240.50
	$1566.28

Cancelled checks from the Granada Packing House show payments jointly to Mrs. Edith H. Yates and Strudthoff Estate, in large sums. The checks were endorsed by Mrs. Yates and S. Yates, administrator.

Yates testified that he kept no record of the receipts because he did not receive any money; he "just turned the checks over to crop mortgagees" each time he received a check; that he contracted with his wife for the care of the grove; that he didn't have any money with which to pay her; that he kept no account of her charges other than the written contract with her, but that what money he did receive he turned over to her and she credited the Strudthoff Estate with it and that Mrs. Yates loaned the estate $13,850, but that he did not show that sum in his account because it went to "pay off the present incumbrance"; that he did not know what Mrs. Yates paid out; that if she spent "an extra $500 or $700" that would be added to the incumbrance. In one transaction, Mrs. Yates purchased a crop mortgage owned by one of the banks. She took the check for the proceeds of the orange crop ($3,500), paid off the crop mortgage, and claimed that there was a balance remaining which she applied to her account. Administrator Yates kept no account of the transaction. He testified that on August 14, 1941, he received a check payable to himself as administrator "for $1700 less advances"; that he didn't keep any record of the receipt of it but knew he turned it over to Mrs. Yates to apply on her account; that he did not know what the advances were for nor did he keep any record of them, or the amount. As to the 1941 crop, a statement from the packer shows that $7,113.92 was paid to the administrator by checks. Yates testified that either he or Mrs. Yates received those checks; that he made no record of their receipt but turned them over to her; that he kept no accounting as to any balance due her from the estate; that the total proceeds from the grove in 1941 were $9,053.64; that his wife told him she would not give any extension of the one-year trust deed and note and was going to start foreclosure; that immediately after the first attempted compromise sale to his wife he picked oranges from the ranch but did not remember the net amount it brought in. The packing house statement shows 5,735 field boxes were picked and the net return was $7,887.82, plus advance of $2,500, totaling $10,387.82. He then testified that in June, 1942, he believed there was due his wife from the estate approximately $4,000 in excess of the amount of her loan; that he never received, as administrator, any money from any of the loans made under authority of the court and therefore was not required to account therefor; that his wife kept track of payments made to her, in her own books.

[14, 15] It should be here noted that had the purported compromise sale been postponed to a few months later, the amount received from the crops then on the trees would have been more than a substantial payment on her claimed incumbrance. This fact emphasizes and strengthens our belief that a strict accounting of the receipts and expenditures for the previous years should be had in accordance with sections 921 and 922 of the Probate Code. Admittedly, money was paid out for interest, taxes and many other items entailed in the handling of two orange groves over this period of years. Yates accounts for his failure to keep an account as follows: that he did keep an account book for those several items for about one year, but that his book was stolen from his automobile and therefore he kept none because he had access to his wife's books and they seemed to be accurate. No vouchers were produced supporting any of the expenditures by the administrator, as required by section 925 of the Probate Code. Under section 571 of the Probate Code it is the duty of an administrator to take into his possession all of the

estate of the deceased, real and personal. He is charged in his accounts with the value of the whole of the estate of the deceased which may come into his possession, and with all the income, issues and profits thereof. Prob. Code sec. 920; In re Estate of Boggs, 33 Cal.App.2d 30, 90 P.2d 814. Under the facts here related and the conclusions herein reached, it cannot be rightfully said that the proceeds of the crops did not come into the possession of the administrator, or that he fully accounted for all the income of the estate. He cannot escape the necessity of filing a full and final account by negligently omitting to render an annual account, as required by section 1063 of the Probate Code. The administrator should be required to file his account and a full and complete accounting should be had of his stewardship. The reasonableness of the unapproved contract with the administrator's wife for the care of the orchard should be fully considered in the accounting. The petition for revocation of letters of administration should be reconsidered in connection with that accounting

The judgment and the order settling and approving the alleged account and discharging the administrator are reversed.

BARNARD, P. J., and MARKS, J., concur.

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71 Cal.App.2d 412

BURGESS v. STATE et al.

Civ. 14690.

District Court of Appeal, Second District, Division 1, California.

Oct. 30, 1945.

Taxation 🔑363½

Where trustees of Canadian trust paid income tax to Canadian authorities on difference between income received and trust expenses including trustees' and bookkeeping fees, safe deposit rental charges, other bank charges, stationery, and postage, and paid net income to California beneficiary, the tax paid to the Canadian government was a "net income tax" for which California beneficiary was entitled to credit in computing her personal income taxes. St.1935, pp. 1094, 1097, §§ 6–8; St.1937, p. 1117, § 25(a).

See Words and Phrases, Permanent Edition, for all other definitions of "Net Income Tax".

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Frieda F. Burgess against the State of California, Charles G. Johnson, as Treasurer of the State of California, and Charles J. McColgan, as Franchise Tax Commissioner of the State of California, to recover personal income taxes paid. Judgment for plaintiff, and Charles J. Colgan, as Franchise Tax Commissioner of the State of California, appeals.

Affirmed.

Robert W. Kenny, Atty. Gen., and John L. Nourse and James E. Sabine, Deputy Attys. Gen., for appellant.

Latham & Watkins and Richard W. Lund, all of Los Angeles, for respondent.

YORK, Presiding Justice.

Plaintiff by the instant action seeks a refund of California personal income taxes paid for the calendar years 1935, 1936, 1937 and 1938, the basis of the suit being that this State has improperly refused to allow her a credit against the taxes payable to this State for the amount of taxes paid by her to the Dominion of Canada. The facts herein are stipulated, and may be summarized as follows: During each of the taxable years here involved, plaintiff, a resident of Los Angeles County, was a beneficiary of two trusts created and administered in the Dominion of Canada, the corpus of which consisted of Canadian property. At the close of each quarterly period, the trustees prepared and filed with the Canadian Inspector of Income Tax a prescribed form of return, and withheld and paid a tax of five per cent upon the difference between the income received by the trusts during the quarterly period and the expenses of the trusts for the same period, said expenses including "trustees' and bookkeeping fees, safe deposit rental charges, other bank charges, stationery and postage." After the close of the calendar year, said trustees prepared and filed an income tax return therefor and reported therein the income, expenses and taxes which were equivalent to the amounts theretofore reported quarterly.

In her California personal income tax return for the years 1935, 1936, 1937 and 1938, plaintiff reported as taxable income the net income from each of said trusts, and in 1935 and 1936, she claimed as a credit against her tax liability in this State, the amount of the five per cent tax paid to Canada. By a notice of deficiency, defendant Franchise Tax Commissioner disallowed said credit, but permitted the Canadian tax to be taken as a deduction from gross income. Plaintiff paid the deficiency thus assessed, but in view of the action of said Commissioner, she did not claim the Canadian tax as a credit in her 1937 and 1938 returns. Upon denial of her claims for refunds for all four years, plaintiff instituted the instant action.

The trial court found in favor of plaintiff and entered judgment for $1,225.62 "California personal income taxes and interest overpaid for the calendar years 1935, 1936, 1937 and 1938."

Defendant Commissioner prosecutes this appeal from the judgment upon the theory that section 25(a) of the California Personal Income Tax Act of 1935, Stats.1935, pp. 1090, 1117, and the amendment thereto of 1937, Stats.1937, pp. 1831, 1855, contemplate a credit "only for a *net* income tax paid to another state or country," and that the tax imposed by section 9B (2)(d) of the Income War Tax Act of Canada is "on the gross amount" of income; therefore, it is not a net income tax entitled to credit in this State.

Section 6 of the Personal Income Tax Act of 1935, Stats.1935, pp. 1090, 1094, defines net income as "the gross income computed under section 7 of this act less the deductions allowed by section 8 of this act."

Section 7 defines gross income generally as "income derived from any source whatever," and section 8 of the act enumerates the allowable deductions from gross income, including "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered."

Appellant urges that a statute which imposes a tax on the entire amount received by a beneficiary *"without allowing any deductions or personal exemptions* would be a gross income tax, and that is what the tax imposed by section 9B (2)(d) is." (Emphasis added.) While it is true that no personal exemptions were deducted from the gross income received from the trusts, both the stipulation of facts herein, and the Canadian return attached thereto as Exhibit D, disclose that expenses of the trusts, including the yearly fee to the trustees for their services, were deducted from the gross income received from the trusts. After specifying each item of income and the various items of expenditures a final summary is made in which total deductions are subtracted from total income, resulting in an item denominated "net income," which is used as the basis for computing the five per cent tax paid to the Canadian government.

Section 9B (2)(d) of The Income War Tax Act of Canada, which is recited in Exhibit D attached to the stipulation of facts herein, provides as follows:

"In addition to any other tax imposed by this Act an Income Tax of five per centum is hereby imposed on all persons who are non-residents of Canada in respect of: * * * (d) All income for any taxation period received from any Canadian Estate or Trust which income shall be deemed to include all income accruing to the credit of non-resident beneficiaries whether received by them or not during the taxation period * * *."

There is nothing in the wording of the aforementioned section which would indicate that the tax thereby imposed should be computed upon the gross income of the trust estate before deducting the expenses thereof. In the instant suit, the trial court found that, under said provision, "a net income tax was imposed on plaintiff upon income derived from sources within Canada in the amounts set forth in the Stipulation incorporated herein."

In accord with the foregoing analysis and the trial court's finding, it is the conclusion of this court that the tax paid to the Canadian government was a net income tax for which respondent is entitled to credit in this State.

The judgment is affirmed.

DORAN and WHITE, JJ., concur.

ZIESEMER et al. v. McCARTY et al.

Civ. 14884.

District Court of Appeal, Second District, Division 1, California.

Oct. 29, 1945.

Hearing Denied Dec. 27, 1945.

1. Appeal and error 🔑978(1)
New trial 🔑39

In granting new trial on ground of erroneous instructions, much is committed to trial court's discretion, abuse of which must appear before order granting new trial will be set aside.

2. Appeal and error 🔑977(1)

The granting or denial of new trial is so largely in discretion of trial court that it will not be disturbed except upon unmistakable abuse, especially when such discretion is used in awarding a new trial which does not finally dispose of the matter.

3. Negligence 🔑105

The doctrine of "assumption of risk" presupposes existence of a dangerous situation or condition known to plaintiff who nevertheless chooses to enter upon or remain within area of risk.

See Words and Phrases, Permanent Edition, for all other definitions of "Assumption of Risk".

4. New trial 🔑39

In action for death of construction superintendent who was crushed by empty trailer attached to truck which rolled backwards onto pile of lumber which had been discharged, granting plaintiffs new trial on ground of error in giving instruction on assumption of risk was not an abuse of discretion where there was nothing to indicate that decedent had any idea that a dangerous situation existed.

◆

Appeal from Superior Court, Los Angeles County; Harold B. Jeffery, Judge.

Action by Martha T. Ziesemer and another against C. H. McCarty and another to recover for wrongful death. From an order granting plaintiffs' motion for new trial, defendants appeal.

Affirmed.

Reginald I. Bauder, of Los Angeles, for appellants.

Matot & Seelig and Tudor Gairdner, all of Los Angeles, for respondents.

YORK, Presiding Justice.

Plaintiffs are the widow and mother, respectively, of Harry M. Ziesemer, who on February 1, 1943, while working in Los Angeles on Miranda Street, met his death in an accident involving a truck and trailer belonging to defendant McCarty, and which was being operated by defendant Lindsey in the course of his employment.

The truck was approximately 25 feet in length and the trailer was about 20 feet long and were joined by a pole or tongue 10 feet in length. Both the truck and trailer were loaded with lumber, that on the trailer being earmarked for the Miranda Street location, where houses were being erected by Harold L. Shaw, as owner, under the direction of decedent Ziesemer, as construction superintendent.

Miranda Street at the point in question is 27 feet wide, on each side of which is a sloping shoulder or apron about four feet in width. The elevation of the shoulders from the street to the adjoining lots is about one foot, or a grade of 25 per cent. The over-all length of the trailer (19 or 20 feet) and the truck (24 or 25 feet) plus the pole or tongue which connected them (10 or 12 feet) was approximately 55 feet, consequently it was necessary for the driver Lindsey to back the trailer over the shoulder on the north side of the street into a position where the lumber could be rolled off onto the vacant lot. By the use of a bar and rollers, "the lumber was rolled backwards off the trailer so that it tipped down onto the ground," whereupon the defendant Lindsey drove the whole mechanism ahead, and the lumber dropped to the ground from the trailer at a point about four feet north of the shoulder on the north side of Miranda Street. This movement left a space of three or four feet between the south end of the pile of lumber and the rear end of the trailer, so that said rear end was about even with the shoulder. With the trailer in the position described, the rear wheels of the truck were on the shoulder on the south side of the south side of the street with the front wheels on the soft ground of the vacant lot, said truck standing at an angle to the southwest. After Mr. Ziesemer checked the lumber and signed a delivery slip therefor, defendant Lindsey got into the cab, released the brakes, and the ten ton truck loaded with lumber, instead of moving forward, gradually rolled back. This movement of the loaded truck pushed the empty trailer into the pile of lumber, crushing Mr. Ziesemer, who was caught between the lumber and the trailer, and resulting in his death.

The jury brought in a verdict in favor of defendants whereupon plaintiffs moved for a new trial on all the statutory grounds except one. This appeal is prosecuted by defendants from the order granting said motion for a new trial which specified as grounds therefor: "Error in law consisting of the giving of defendants' requested instruction III as modified, and defendants' instructions IV and V."

The instructions referred to in said order are as follows:

"There is a legal principle commonly referred to by the term 'assumption of risk', which I will now explain to you:

"One is said to assume a risk when he knows, or in the exercise of ordinary care should know, that a danger exists in either the conduct or condition of another, or in the condition, use or operation of property, and voluntarily places himself, or remains within the area of danger. The heirs of a deceased who thus assumes a risk are not entitled to recover for damage sustained which resulted from the dangerous condition or conduct to which deceased thus exposed himself.

"Your attention is called to a distinction between contributory negligence and assumption of risk. As is said elsewhere in these instructions, contributory negligence must contribute in some degree, as a proximate cause, to the happening of the accident. But assumption of risk, if it meets with the requirements of the law, as stated to you, will bar recovery by the heirs of a deceased who has so assumed such risk, although it plays no part in causing the accident, except merely to expose the deceased to the danger.

"In determining whether a person assented to, or assumed, a risk so as to bar recovery by his heirs for his death, you may consider the deceased's age, experience and capacity along with all the other surrounding circumstances as shown by the evidence."

Appellants here urge that under the facts presented by the evidence, the instructions on the question of assumption of risk were properly given, hence the court committed error in granting respondents' motion for a new trial.

[1] "In granting a new trial on the ground of erroneous instructions, as upon other grounds, much is committed to the discretion of the trial court, and an abuse of such discretion must appear before the order will be set aside." 20 Cal.Jur. 140, sec. 92, and authorities there cited.

[2] " 'The granting or denial of a new trial is a matter resting so largely in the discretion of a trial court that it will not be disturbed except upon a manifest and unmistakable abuse. It is especially so when such discretion is used in awarding a new trial which does not finally dispose of the matter.' 2 Cal.Jur. 905." Pettigraw v. O'Donnell, 32 Cal.App.2d 502, 503, 90 P.2d 93.

[3] The doctrine of assumption of risk presupposes the existence of a dangerous situation or condition, known to the plaintiff, who nevertheless chooses to enter upon or to remain within the area of risk. Sec. 893, Rest.Torts, p. 491, Vol. 4.

Under the facts presented by the evidence herein, there is nothing to indicate that decedent had any idea that a dangerous situation existed. Nor can it be said that a reasonable man would expect appellant Lindsey, when he left the premises, to do anything other than to move the empty trailer forward. However, with knowledge that decedent was somewhere in the vicinity of the recently delivered pile of lumber, said appellant permitted the equipment to roll back without taking the precaution to discover the then whereabouts of the decedent and without giving warning of his intention to move such equipment.

[4] The trial court apparently doubted the applicability of the instructions given to the jury on the doctrine of assumption of risk to the facts disclosed by the evidence. As a result it is not within the province of an appellate court to declare that the trial court abused its discretion in granting respondents' motion for a new trial upon the ground of error in the giving of such instructions.

For the reasons stated, the order appealed from is affirmed.

DORAN and WHITE, JJ., concur.

71 Cal.App.2d 544

WOOD et al. v. BROWN et al.

Civ. 3401.

District Court of Appeal, Fourth District, California.

Nov. 5, 1945.

Hearing Denied Jan. 3, 1946.

1. Trusts 🔑140(3)

Under terms of declaration of trust by husband and wife out of community where no disposition of corpus was made by will, and husband was survived by 5 heirs while wife was survived by a sole heir, heirs of husband and wife each took one-sixth of corpus, as against contention that wife's heir was entitled to one-half of the corpus. Probate Code, § 228.

2. Descent and distribution 🔑43

The words "per stirpes" denote a taking by right of representation of that which an ancestor of the parties would take if living.

See Words and Phrases, Permanent Edition, for all other definitions of "Per Stirpes".

3. Appeal and error 🔑1050(1)

Where trial court's interpretation of trust agreement was fully sustained by the instrument itself, any possible error in admission of evidence for sole purpose of showing intention of trustors would not justify a reversal.

Appeal from Superior Court, Orange County; Kenneth E. Morrison, Judge.

Action by Alice Ross Wood and others against Laura N. Brown and others, for declaratory relief to determine the rights of the parties in connection with the termination of a trust. The defendant Laura N. Brown died while the action was pending and the First National Bank in Santa Ana, as executor of her will, was substituted as a party defendant. From an adverse judgment, the First National Bank in Santa Ana, as executor, appeals.

Affirmed.

George H. Gobar, of Fullerton, for appellant.

Dorothy Thompson Lodge, of Fullerton, and R. C. Mize and S. M. Davis, both of Santa Ana, for respondents.

BARNARD, Presiding Justice.

This is an action for declaratory relief, the purpose of which was to determine the rights of the parties in connection with the termination of a trust.

In 1926, Sydmer Ross and his wife Bertie Ross conveyed certain securities to the First National Bank in Santa Ana under a declaration of trust. The trust agreement provided that the trust should be irrevocable upon the death of either Mr. or Mrs. Ross; that the income should be paid to Mr. and Mrs. Ross and their unmarried daughter Sheila Ross, during their respective lives; and that the trust should terminate upon the death of all three beneficiaries. The last survivor of the beneficiaries was given the power to dispose of the corpus of the trust by will. It was then provided that, in the absence of such a disposition by the last survivor and if no lineal descendants of the trustors should then be living, the trustee should convey the corpus of the trust "in equal shares per stirpes and not per capita to such persons as shall then constitute the heirs at law of the Trustors according to the laws of the State of California." It is conceded that the securities thus conveyed to the trustee had been the community property of Mr. and Mrs. Ross, and both of them signed the trust agreement as trustors.

Mr. Ross died in 1934 and Mrs. Ross died in August, 1941. Sheila Ross died on December 31, 1941, without issue and without disposing of the trust estate by will. No lineal descendant of Mr. and Mrs. Ross, or either of them, was living at the time set for the termination of the trust.

It appears without question that at the time set for the termination of the trust the sole heir of Mrs. Ross was her sister, Laura N. Brown. Mr. Ross had had five brothers and sisters, all of whom died before the termination of the trust. At that time, Mr. Ross' heirs consisted of numerous descendants of his deceased brothers and sisters. Certain of this heirs brought this suit for the benefit of all of his heirs. Laura N. Brown died while the action was pending and the First National Bank of Santa Ana was substituted as the executor of her will. The identity of the heirs of Sydmer Ross was determined in a proceeding in the superior court of Orange County and no question with respect thereto is here raised.

The controversy was between Mrs. Ross' sister, on the one hand, and the various descendants of Mr. Ross' five brothers and sisters on the other hand. The complaint was based on the contention that the parties to the trust agreement intended, by the language used and under the circumstances here appearing, that the corpus of the trust estate should be conveyed in six equal shares, one share of Mrs. Ross' sister and one share to the descendants of each of the five brothers and sisters of Mr. Ross. In the answer filed by the executor of the estate of Laura N. Brown, it was contended that since the property in the trust was the community property of the trustors and since Laura N. Brown was the sole heir of Mrs. Ross she was entitled to one-half of the corpus of the trust, and that the other half should go to the descendants of the deceased brothers and sisters of Mr. Ross.

The court found that the parties to the declaration of trust, by using the language therein contained, did not mean or intend that there should be constituted two groups of heirs representing the two trustors, respectively, but meant that all of the heirs of both trustors should constitute one group to share equally, the descendants of deceased heirs to take upon the principle of representation, and that in the contingency which now exists it was intended that the corpus of the trust should be divided into six equal shares, one share going to the estate of Laura N. Brown and one share to the descendants of each of the deceased brothers and sisters of Mr. Ross. Judgment was entered accordingly and the bank, as executor of the will of Laura N. Brown, has appealed.

[1] Appellant's main contention is that the trial court's allowance to the estate of Laura N. Brown of one-sixth of the corpus of the trust is contrary to the laws of this state and that, under those laws, one-half of the corpus should have been awarded to the appellant and the other half to the heirs of Mr. Ross. It is argued that since the trust was created out of community property section 228 of the Probate Code applies and governs, and the property must go one-half to the family of Mr. Ross and one half to the family of Mrs. Ross. It is further argued that the provision in the trust agreement "in equal shares per stirpes and not per capita to such persons as shall then constitute the heirs at law of the Trustors according to the laws of the State of California" must be interpreted so as to give effect to section 228 of the Probate Code; that the words "by right of representation" in that statute mean the same as the words "per stirpes" in the trust agreement and should be substituted for those words; that when this substitution is made it clearly appears that the intention of the parties was that the property should go in equal shares "as a family", and not in equal shares among the individuals referred to; that there were two trustors and two families; that the words "in equal shares" in the trust agreement means one-half to each of the two families; and that the clause in question must be interpreted as providing that one-half of the corpus of the trust shall go, respectively, to the heir or heirs of each of the trustors.

As supporting its contention the appellant relies on In re Estate of Watts, 179 Cal. 20, 175 P. 415, In re Estate of Brady, 171 Cal. 1, 151 P. 275, In re Estate of Bryant, 3 Cal. 2d 58, 43 P.2d 529, and other cases in which subdivision 8 of section 1386 of the Civil Code, the predecessor of section 228 of the Probate Code, is discussed, and the reasons given why the property acquired jointly by a decedent and his or her predeceased spouse should go to the two families rather than to the family of one alone, in the absence of lineal descendants, and where no other provision is made. Dickey v. Walrond, 200 Cal. 335, 253 P. 706, 707, is also cited as holding that section 1386 of the Civil Code is the source in every case for a designation of the persons who meet the description of heirs and that, of necessity, this must also include the proportions in which they shall take.

In all of the cases cited, where no disposition of the property was made, other than to give it to the heirs of the party to be distributed according to law, section 228 of the Probate Code, or its predecessor subdivision 8 of section 1386 of the Civil Code, was held applicable. In Dickey v. Walrond, the court said: "We entertain no doubt that, in a case where section 1334 legitimately applies, the section makes applicable section 1386, not only for the designation and description of the takers, but also for the purpose of fixing the proportions in which each shall take." Section 1334, as pointed out, related to "a testamentary disposition to 'heirs,' * * * of any person, without other words of qualification * * *." The will in that case provided that in the event of the death of the testator's wife during the life of a testamentary trust certain property should go "to her heirs at law."

In the instant case we are concerned with the interpretation of language used in connection with a conveyance made long prior to the time the words in question were to take effect. While the property had been the community property of the trustors it was conveyed by them to the trustee and the conveyance became irrevocable upon the death of the first trustor in 1934. It is not a case where the property was not disposed of by will or otherwise, or where the general laws of succession should be applied. The property was disposed of under the conditions set forth in the trust agreement. The solution of the problem must depend upon the language there used, and the question here is as to whether the interpretation placed by the trial court upon that language is a reasonable one. It is not merely provided therein that the property is to go, at the termination of the trust, to such persons as are then heirs at law of the trustors, but it is further provided that it shall go to the members of that class in "equal shares per stirpes and not per capita."

The language thus used not only designates the persons who are to receive but attempts to fix the proportions in which they shall take. Any doubt as to the meaning intended arises from the fact that the phrases "in equal shares" and "per stirpes and not per capita" are both used. In a New Jersey case, Camden Safe Deposit & Trust Company v. MacMullan, 112 N.J.Eq. 574, 165 A. 105, 106, in considering a somewhat similar situation, the court pointed out that the use of both phrases was inexact and then said:

"The testator apparently intended to direct an equal division of his estate among his eight nieces because he named them without reference to the parent. It would seem that, if he had intended to divide them into classes, and give one-half of his estate to the three daughters of his sister Mrs. MacMullan, and the other one-half of his estate to the five daughters of his sister Mrs. Simpkins, he would have directed a division among the daughters of these two sisters 'per stirpes and not per capita,' omitting the phrase 'share and share alike.'"

It would seem here that if it had been intended to give half of the property to the heirs of Mr. Ross and half to the heirs of Mrs. Ross, the heirs of both would not have been treated together as one class, and it would not have been provided that all members of this class should take "in equal shares" when it was apparent that the heirs of Mr. Ross were and were likely to be much more numerous than those of Mrs. Ross. It rather clearly appears from the language used that the trustors did not intend to constitute two groups of heirs, his and hers, and to divide the property between these two groups, but that they intended to include the heirs of both in one group and to provide for some sort of an equal division within that group.

[2] The words "per stirpes" denotes a taking by right of representation of that which an ancestor of the party or parties would take if living. As used here these words must refer to those descended from someone who, if living, would have been an heir of one of the trustors. Primarily, the reference must be to the sister of Mrs. Ross and the brothers and sisters of Mr. Ross, who would, if living, have been the heirs. It must have been intended that their children or descendants, respectively, should take what otherwise would have been their share.

The intention seems to have been, while giving the property to the heirs of both trustors as one class, to consider the brothers and sisters of both as the original primary heirs and to provide that the property should go in equal shares to their respective sets of descendants by right of representation. Under any other interpretation one or both of the phrases used would be meaningless. The court thus construed the language used and it cannot be held that this interpretation is an unreasonable one.

It seems apparent that whatever was meant by the words "per stirpes and not per capita" it was not meant to divide the property equally between the relatives of Mr. Ross on the one hand and those of Mrs. Ross on the other. Under any other interpretation than that adopted by the trial court those words would have to be disregarded as the persons then constituting the heirs of both trustors would take in their own right as heirs, and not by right of representation. In that event, the numerous descendants of the brothers and sisters of Mr. Ross and the sister of Mrs. Ross, her one heir, would each share equally in the property and the estate of Laura N. Brown would take a share much smaller than the one-sixth awarded it. The heirs of Mr. Ross, who were quite numerous, have not appealed and are not here complaining of the division as made by the court.

It follows that section 228 of the Probate Code has no application here and that the court's interpretation of the language used must be sustained.

[3] The only other point raised by the appellant is that the court erred in admitting into evidence a copy of a will executed by Mr. Ross on the day following the execution of the trust agreement, but which was presumptively revoked as it was not found after his death, and a copy of a will of Mrs. Ross, executed two days after the execution of the trust agreement and which will she later revoked. These wills were admitted for the sole purpose of showing an intention on the part of these parties, about the time the trust agreement was executed, to dispose of all other property owned by them in the same way as that provided for in the trust agreement, as interpreted by the court. It is argued that these wills, which the attorney was required to produce, were privileged communications since they had been revoked. It is unnecessary to decide the question thus raised as the court's interpretation of the trust agreement is fully sustained by the instrument itself, and any possible error in this regard could not be regarded as sufficiently prejudicial to justify a reversal.

The judgment appealed from is affirmed.

MARKS and GRIFFIN, JJ., concur.

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71 Cal.App.2d 524

PEOPLE v. WHITE et al.

Cr. 2369.

District Court of Appeal, First District, Division 1, California.

Nov. 1, 1945.

1. Automobiles 🔑339

To constitute taking of article such as automobile in violation of Vehicle Code, there must be an asportation, but any removal, however slight, of entire article, not attached to soil or anything not removed, is sufficient. Vehicle Code, § 503, St.1939, p. 1481.

2. Automobiles 🔑339

Defendants' taking of another's automobile into their possession and forcible removal thereof from place where its owner parked it by pushing it forward about 20 feet constituted "taking" thereof in violation of Vehicle Code. Vehicle Code, § 503, St.1939, p. 1481.

See Words and Phrases, Permanent Edition, for all other definitions of "Taking".

Appeal from Superior Court, City and County of San Francisco; William F. Traverso, Judge.

George R. White and Walter Lloyd were convicted of driving or taking an automobile belonging to another in violation of the Vehicle Code, and they appeal.

Affirmed.

George R. White and Walter Lloyd, both of San Quentin, in pro. per., for appellants.

Robert W. Kenny, Atty. Gen., and David K. Lener and Miriam E. Wolff, Deputy Attys. Gen., for respondent.

DOOLING, Justice pro tem.

Defendants appeal from a judgment of conviction of a violation of section 503 of the Vehicle Code, St.1939, p. 1481. The evidence shows that one Seeman parked his automobile on Valencia Street in San Francisco about seventy-five feet south of the entrance to the apartment house in which he lived. He took the ignition key from the car but did not lock its doors. About 1:30 a.m. two policemen saw this automobile slowly moving north on Valencia Street without lights and with the hood open. Upon investigation they observed the defendant White seated in the car behind the steering wheel and the defendant Lloyd with one foot on the right running board of the automobile and the other foot on the street, pushing the automobile forward. They waited until they had seen the car moved about twenty feet and then arrested the defendants.

[1, 2] The sole claim on appeal is that the evidence does not establish the completed crime of driving or taking an automobile denounced by section 503 Vehicle Code, but at most shows only an attempt to commit that crime. There is nothing in this point. To constitute a taking of the automobile there must be an asportation,

but "Any removal, however slight, of the entire article, which is not attached to the soil, or to anything not removed, is sufficient." 15 Cal.Jur. 905; People v. Dukes, 16 Cal.App.2d 105, 60 P.2d 197; see 36 C.J. 749, 750; 32 Am.Jur. 902-906; 2 Wharton's Criminal Law, 12th Ed., 1480-1482; 2 Bishop's Criminal Law, 9th Ed., 606; and cases collected in the notes in 19 A.L.R. 726 et seq. and 144 A.L.R. 1385 et seq. Defendants had taken the car into their possession and were forcibly moving it from the place where its owner had left it. We are satisfied that this constituted a taking within the meaning of the Vehicle Code section.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.

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71 Cal.App.2d 481

PALM et al. v. WEBER et al.

Civ. 7097; Sac. 5672.

District Court of Appeal, Third District, California.

Oct. 31, 1945.

1. Appeal and error 🔑786

Heirs' appeal from an order denying a preliminary injunction to restrain administrator with will annexed, individually, from proceeding with the sale of estate property under a trust deed in his favor, was dismissed as frivolous where record disclosed that order appealed from, before appeal, had been amended on petition of heirs and sale of land had been enjoined.

2. Appeal and error 🔑781(4)

An appeal which asks appellate court to reverse an order which trial court has itself reversed and which has therefore ceased to exist will be dismissed.

3. Costs 🔑232, 257

Where appeal was dismissed, appellants, in addition to costs recoverable by respondent, were ordered to pay to District Court of Appeal the costs of records filed therein in augmentation of the record on appeal.

Appeal from Superior Court, Yolo County; C. C. McDonald, Judge.

Proceedings in the matter of the estate of Edward A. Palm, wherein Elmer E. Palm and others sought to enjoin Frank Weber, the administrator with will annexed of such estate, from proceeding with the sale of estate's property which was subject to a trust deed in favor of Frank Weber, individually. From an order denying a preliminary injunction, Elmer E. Palm and others appeal. Before the decision on appeal was rendered, the appellant Palm died.

Appeal dismissed.

Prior opinion, 156 P.2d 62.

Elmer W. Armfield, Arthur B. Eddy, and Ralph H. Cowing, all of Woodland, for appellant.

Thomas B. Leeper, of Sacramento, for respondent.

ADAMS, Presiding Justice.

In 1933 Edward A. Palm and Wilhelmina Palm, husband and wife, were possessed of an estate of considerable value, including the entire community interest in a ranch in Sacramento County. On February 3rd of that year the spouses executed a promissory note payable to Frank Weber for the sum of $31,152.30, secured by a trust deed on the Sacramento ranch. December 7, 1934, Edward A. Palm died testate, and his wife, Wilhelmina, who was the sole beneficiary under his will, was duly appointed and qualified as executrix. May 24, 1935, Weber filed a claim against the estate for said indebtedness and other items, which was duly approved in the total sum of $44,084.95. November 20, 1934, the estate being in financial difficulties, Wilhelmina Palm resigned as executrix and upon her nomination Frank Weber was appointed and qualified as administrator of said estate with the will annexed.

At the time Weber took over the administration of the estate the property was not in a condition to produce to advantage, being planted to prune trees which had to be removed. Thereafter it was planted with hops, which crop proved profitable. Weber operated same and made various improvements for which he advanced his own moneys. June 22, 1937, Wilhelmina Palm signed a document by the terms of which she consented to and confirmed all the acts and management of Frank Weber, as administrator and also waived the reporting of any of said acts to the court or the obtaining of confirmation of said acts by the court. May 31, 1940, Mrs. Palm signed a similar document ratifying all acts of Mr. Weber performed as administrator, including the borrowing and expenditure of money, the making of improvements and the handling of the estate. No account was filed in the estate by Mr. Weber during the lifetime of Mrs. Palm. She died March 11, 1941.

December 2, 1941, E. E. Palm and Florence E. Farris, a son and daughter of the deceased, gave notice to Mr. Weber to show cause why he should not file an account of his administration of the estate. In June, 1942, the administrator filed his first account. January 5, 1943, E. E. Palm and Florence E. Farris filed objections to that account. February 10, 1943, the administrator filed a second account. The same heirs filed objections to that account. After hearing upon said accounts, both were settled by the court December 16, 1943.

On September 20, 1943, E. E. Palm and Florence Farris filed a petition to revoke Mr. Weber's letters of administration with the will annexed; and on December 16, 1943, when the probate court made and entered its order settling the accounts of the administrator, it also made an order revoking his letters. In its order settling the accounts the court found that there was due, owing and unpaid to Weber on his claim filed in the estate the sum of $25,000 together with interest from December 21, 1942. However, said court disallowed certain items of interest with the payment of which Weber had credited himself, on the ground that said administrator had waived such interest. From both of these orders Weber appealed, but no other appeal was taken. Decision on Weber's appeal was rendered by this court on February 26, 1945. Estate of Palm, 68 Cal.App.2d 204, 156 P.2d 62. The order revoking letters of administration with the will annexed was affirmed; but the order settling the accounts was reversed in so far as it denied the item of interest, with direction to the probate court to amend its findings and order to allow Weber all interest due and unpaid upon his claim. Hearing in the Supreme Court was denied on April 26, 1945, and on April 28, 1945, remittitur issued.

In the meantime and on or about March 5, 1943, Weber had procured notice of sale of the property under his trust deed to be given, and on the 9th day of June, 1943, E. E. Palm and Florence E. Farris had filed the present action praying that Weber render an accounting of all receipts and disbursements received and disbursed by him from the time he went into possession of the property down to the date of filing of the action and thereafter until said accounting was heard and determined.

An order to show cause why an injunction should not issue restraining defendant from proceeding with the sale of the property until such time as an accounting be had and settled, was also prayed.

Hearing on the order to show cause was had on June 28, 1943, at which time the trial court apparently made a minute order that it would deny the preliminary injunction on condition that Weber deposit the sum of $28,000 in a reputable bank in Woodland in the name of the estate of E. A. Palm, deceased, as an indemnity fund to secure the payment to the said estate of any indebtedness which the court might find he owed the said estate. On July 2, 1943, the court made and entered a written order reciting that defendant had deposited the said sum of $28,000 in the savings department of the Bank of America in Woodland, in the name of the estate of E. A. Palm, deceased, subject to the terms and conditions expressed. It therein ordered: "1. That the preliminary injunction prayed for in the complaint on file herein be, and the same is hereby, denied." It further ordered that Weber as an individual, and as beneficiary under the deeds of trust referred to in the complaint, render an accounting of all of his acts, moneys received and moneys disbursed by him as said administrator and by virtue of his occupancy and management of the lands as beneficiary under said deeds of trust, and that he be restrained from withdrawing any of the $28,000 deposited except upon written order of the court.

On August 26, 1943, appellants appealed from the aforesaid order, their notice of appeal reciting that appellants "hereby appeal from the order of the above entitled court made herein in open court on the 28th day of June, 1943, and the written order of said court made and entered herein on the 2nd day of July, 1943, both denying plaintiffs' application and prayer for a preliminary injunction restraining the sale of the real property described in paragraph II of the complaint on file herein * * * pending the determination of the accounting prayed for by the plaintiffs in said complaint."

While the aforesaid appeal was pending the accounts of Weber were settled in the probate proceeding, and the appeal from the order of settlement was determined by this court as aforesaid. Thereupon this court ordered appellants to show cause why their appeal should not be dismissed, since the amount due Weber had been finally determined. Hearing on said motion was had, briefs were filed by both parties, and the cause was submitted.

Thereafter this court became possessed of information that subsequent to the making of the order of July 2, 1943, from which this appeal was taken, and prior to the filing of appellants' notice of appeal on August 26, 1943, certain proceedings were had in the trial court which had not been made a part of the record on appeal and which were pertinent thereto. Upon the motion of this court, said records were ordered transmitted to it and made a portion of said record under Rule 12 of the Rules on Appeal. As so augmented, the record now shows that on or about August 5, 1943, appellants petitioned the trial court for an order modifying its order of July 2, 1943, in so far as said order denied a preliminary injunction, and for an order to show cause why a preliminary injunction should not issue as prayed for in their complaint; that thereupon the said court made an order, dated August 7, 1943, which provided that the order of July 2, 1943, be modified by striking therefrom "that language therein contained at line 20, page 2 thereof as follows: '1. That the preliminary injunction prayed for in the complaint on file herein be, and the same is hereby, denied.'" Said order also restrained and enjoined defendants from proceeding with the sale of the property described in the complaint, until the further order of the court.

[1, 2] From the record as so augmented it becomes obvious that appellants appealed from an order denying a preliminary injunction, which very order, on their own petition, had already been amended by striking therefrom the only portion thereof from which they appealed, and that the trial court had in fact, prior to the appeal, restrained and enjoined the sale of the property. The effect is that this court has been asked by appellants to reverse an order which the trial court had itself reversed and which had, therefore, ceased to exist.

In this state of the case we feel that it is unnecessary to determine whether the appeal had or had not become moot by reason of the accounting rendered by Weber in the probate proceedings, and that the appeal should be, and it is hereby dismissed.

Were it not for the fact that counsel who represented these appellants when the appeal was filed is gravely ill, and we have been advised that appellant Palm has recently died, we would feel justified in imposing a penalty upon appellants and their counsel for what appears to have been a frivolous appeal taken only for delay.

[3] In addition to costs recoverable by respondent, appellants are ordered to pay to this court the cost of the records filed herein in augmentation of the record on appeal.

PEEK and THOMPSON, JJ., concur.

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71 Cal.App.2d 333

SPRAGUE v. FAUVER.

Civ. 14853.

District Court of Appeal, Second District, Division 3, California.

Oct. 26, 1945

1. Landlord and tenant ⇔159(1)

Where improvements, changes, and additions called for by rider to written lease were not completed by lessee as required, lessor was justified in securing their completion at reasonable prices and calling upon lessee in action at law to meet such expense. Civ.Code, §§ 3300, 3359.

2. Landlord and tenant ⇔159(1)

Evidence warranted judgment for lessor for a certain amount for lessee's violation of terms of written lease of restaurant premises which required lessee to make certain repairs and improvements, and for waste caused by the lessee. Civ.Code, §§ 3300, 3359.

3. Damages ⚷157(3)

One relying for recovery upon stipulation for liquidated damages must allege and prove that it is impracticable or extremely difficult to fix actual damage. Civ.Code, § 1671.

4. Damages ⚷78(6)

A rider attached to lease to effect that, if improvements were completed and paid for by lessees within six months, lessor would give credit to lessee for a designated sum on the last four months' rent if lessees were still in possession and were not otherwise in default, did not constitute an agreement to pay liquidated damages, so as to require lessor to prove impracticability of ascertaining actual damages in order to recover on rider. Civ.Code, § 1671.

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Action by Farah A. Sprague against Frank F. Fauver, to recover damages for violation of terms of a written lease wherein defendant filed a cross-complaint. From a judgment for plaintiff, defendant appeals.

Affirmed.

Gordon M. Gale, of Bell, for appellant.

Maurice Levy, Jr., and Caryl Warner, both of Los Angeles, for respondent.

DESMOND, Presiding Justice.

Defendant appeals from a judgment in the sum of $2416 assessed against him by the court in a non-jury trial for violation of the terms of a written lease. It appears that he bases his appeal on insufficiency of the evidence to support the findings and judgment based thereon.

By an instrument, dated July 27, 1940, and signed by both parties, the plaintiff leased to the defendant certain premises in the county of Los Angeles described as "7914 Atlantic Boulevard, to be used for the purpose of conducting and carrying on the business of dealing in food and drinks." At that time, and for a short time previously, the defendant had been a tenant from month to month. The record indicates that there was contained in the leased premises equipment for a restaurant, consisting of counter, stools and other furnishings and fixtures. The lease was granted for a term of three years from August 1, 1940, to July 31, 1943, at a cash rental of $31 per month. Attached to the lease was a rider reading, in part, as follows:

"As part consideration for this lease, said lessees covenant and agree to make certain alterations and improvements on said premises at their own expense, which said alterations and improvements are as follows: Alter front of building, place new awnings thereon, add another toilet and a new addition to present building which shall be finished in conformity with the present building, place a cement floor in new addition and a cement slab from the front of building to sidewalk, all of which said improvements shall be entirely paid for by said lessees and said lessees covenant and agree to pay for same and will obtain receipts and releases in full for all labor and materials and will hand same over to said lessor within thirty (30) days after the completion of said improvements; said lessees will indemnify and save harmless said lessor from payment of any part of the expense of said labor and improvements. Any breach of this condition shall be deemed a default under the terms of this lease and shall constitute a cause of action for cancellation of this lease by said lessor."

Additional provisions of the lease bound the lessee not to commit waste upon the premises and to hold the lessor harmless from any loss or damage from the use or misuse of the premises by the lessee; also bound the lessee "At the expiration of said term, or any sooner determination of this lease, to quit and surrender possession of said premises, and its appurtenances, to lessor in as good condition as reasonable use and wear will permit, damage by the elements or other casualty excepted."

Shortly after the expiration of the lease plaintiff filed this action on September 1, 1943. It was based upon the claimed violation of the provisions which we have mentioned. Count I sought the recovery of $93 due for rent for the last three months of the lease. Count II alleged that the plaintiff had sustained damages in the sum of $1170 by reason of the failure of the defendant to make the improvements and alterations mentioned in the lease. Count III charged that waste was committed in that the defendant destroyed a wall on the premises, broke windows thereon, tore out booths and tables, removed part of a counter, removed fixtures in the bathroom and damaged walls of the building. The plaintiff sought to recover on that count the sum of $500. The complaint closes with Count IV, charging that the defendant carried away fixtures and furnishings, consisting of variously described items of equipment for a restaurant and including a stove. The fourth count alleges damages suffered in the sum of $777.30. The defendant filed a cross-complaint claiming there was due him the sum of $750 for labor performed and materials furnished in and about the premises of the plaintiff at 7914 Atlantic Boulevard.

The court found that the essential allegations of all counts of the complaint were true and that the cross-complainant was entitled to take nothing by reason of his cross-complaint. Judgment was awarded to the plaintiff in the sum of $2166 as damages, together with attorneys' fees in the sum of $250, provision for which is made in the lease, making a total of $2416.

It appears from the findings that the court estimated the items of damage as follows: The rent for the last three months of the lease, as claimed, $93; for failure to carry out the terms of the lease providing for an addition and various other changes mentioned in the rider to which we have referred, the sum of $1170, as claimed in Count II; for waste, $354 instead of $500, the amount claimed; for violation of the provisions of the lease requiring surrender of the premises and its appurtenances in good condition, the sum of $549 "rather than the sum alleged." In the same finding the court determined that the stove, above mentioned, did not belong to the plaintiff.

It appeared from the evidence that in the early days of the lease the defendant made a feeble effort to carry out the provisions of the rider, four photographs being introduced which indicated that he constructed a two room addition but left it unfinished and failed to make other changes or additions which he undertook to carry out as part payment for his right to occupy the premises. There is no question that he abandoned the contemplated work shortly after the lease was signed, and left it standing in an uncompleted condition for the balance of the term. In the meantime, he sublet the premises at certain times for a rental of $45 per month. The evidence indicates that a few months before his term expired defendant's wife, acting in his behalf, removed the articles of personal property that had been used in the conduct of the restaurant business and which belonged to the plaintiff. The four photographs above mentioned were introduced as a single exhibit, and not being numbered or otherwise identified, we must look to the record to ascertain what view of the premises they actually portray. One of these photographs plainly shows the front of the building apparently in the condition in which it was at the time that the lease became effective. We say this because the plaintiff testified, when shown one of the photographs, that it was a picture of the front of the building, and that in the latter part of July, but before the 27th, she met the defendant in front of the premises and discussed with him the changes which he had in contemplation and which they had previously discussed. She was accompanied at this meeting by a Mr. Rankin, who took part in the discussions and finally advised the plaintiff to lease her property to the defendant at a low rental of $31 "because he was going to make these extensive improvements." Plaintiff testified that at that time "he [the defendant] was in the front of the building putting that cement between the building and the sidewalk when we drove up and had a talk with him." Upon being asked whether there was any tar paper or chicken wire placed on the building at that time, she answered affirmatively, saying: "The front part of the building, it was a frame building and he had put in chicken wire and was plastering it, the front part, he started immediately to improve the front." The photograph in question shows a cement strip in front of the building and also shows that the front of the building has a stucco finish. Plaintiff also testified as follows: "They said they would like to change the front and then put in a cement floor in the front from the building to the sidewalk, they would like to change the knotty pine—fix up the restaurant into knotty pine, they would like to extend 20 feet to the storeroom and remove the partition between the storeroom and the restaurant and put a cement floor there and finish it in knotty pine and they would like to add two more bedrooms in the back, also finish in knotty pine and put a toilet in the back and stucco the entire building, the new as well as the old one, stucco to conform, to look alike." The other three photographs show various views of the uncompleted addition, the walls of which show chicken wire and plaster construction. We believe that the trial judge, having these photographs before him and the testimony relative thereto, was justified in determining that the entire building, new and old, was to have been stuccoed and that this, together with completion of other structural items agreed upon by the parties, would have secured the conformity which was required by the terms of the lease.

[1, 2] Since the improvements, changes and additions called for by the terms of the rider were not completed, the plaintiff was justified in securing their completion at reasonable prices and calling upon the defendant in an action at law to meet that expense. Civ.Code, §§ 3300 and 3359; Fabian v. Lammers, 1906, 3 Cal.App. 109, 84 P. 432. Upon plaintiff's testimony, based upon written memoranda produced in court, the court found that the cost of the improvements, changes and additions equalled $1170; the cost of repairs for the waste committed equalled $354; and also found that the plaintiff was entitled to recover $549 as the value of the restaurant equipment and other fixtures removed from the premises. Appellant raises no question about the justice of the remaining item of damages, $93, admitting "that the evidence discloses * * * the defendant did not pay the rental for the months of May, June and July, 1943, in the sum of $31 per month."

Although defendant testified that he did not sign the lease in question, his counsel now admits in his brief that the evidence discloses that he did sign. The evidence also discloses, we may add, that the items of damage awarded by the court were amply substantiated by the testimony submitted, for as respondent states in her brief, "the items charged to appellant were either provided for in the alteration provision of the lease, or constituted necessary repair of damage and waste committed by appellant. No charge was made for one water heater, or for the partition from the restaurant proper, or for switching two windows about, or for the knotty pine interior. These items were either not included in the $1659.00 figure expended by respondent, or the items if included were deducted * * *." The $1659.00 figure mentioned was really $1659.28, the total amount expended by plaintiff according to the itemized list which she used as a reference when testifying. Certain items in that list amounting to $135 the court did not allow, not being properly chargeable to this lessee, but the balance, $1524, the court did allow, allocating $1170 to the cost of alterations, including the addition, and $354 to repairing damage done to the premises. So far as this item of waste is concerned the plaintiff gave a vivid picture of the condition of the interior of the building at the time she visited it in May of 1943. In the preceding month she had found all the fixtures in place, but in May, according to her testimony summarized in her brief, "the partition that was taken down from between the storeroom and the restaurant was all torn down, and there was no plumbing left in any part of the building either in back or in front; the floor was dirty and broken up; the cement was all broken; the plaster in the bedroom was all full of holes and had to be replastered; the bathroom where respondent had had a wash bowl was removed and a door had been put in its place, and the plaster was all off the bathroom, and had to be replastered; the screens were all off the windows and were torn; and three windows were broken."

In regard to the cost of replacing the appurtenances which were removed by the tenant, the plaintiff testified that she had made a list of the missing items, had taken it to a prominent dealer in second hand fixtures and had obtained from him a quotation on the value of each item. She produced that list in court and referred to it in advising the court of the total cost. Her tabulation amounted to the sum of $777.30, but the court reduced that figure by $228.30 in awarding her judgment for the cost of the replacement in the sum of $549.

We note the appellant's general statement, which is not supported by argument, that the court ruled erroneously upon the admission and rejection of evidence, but we find no error in this regard.

[3, 4] It remains for us to dispose of appellant's claim that an additional clause in the rider, which was attached to this lease and to which we have not heretofore referred, constituted an agreement for liquidated damages. This section of the rider reads as follows: "The said Lessor, provided that said improvements are completed and paid for by said lessees within six months from date hereof will give credit to the said lessees for the sum of $117.90 on the last four months rent of said lease, if said lessees are still in possession and op-

erating said premises and have not otherwise made default of any of the other terms and conditions of this lease but if the said lessees shall have assigned said lease or sublet the premises with the consent of the said lessor as herein provided, then the assignees or sublessees shall be only entitled to credit of the last months rent of said term amounting to the sum of thirty-one dollars and no more." One who relies for recovery upon a stipulation for liquidated damages must allege and prove the circumstances that bring the case within the rule set up in section 1671, Civil Code. Kelly v. McDonald, 1929, 98 Cal.App. 121, 276 P. 404. This the appellant failed to do and that is not surprising considering the language used in the rider. The provision we have just quoted does not constitute an agreement to pay the sum of $117.90 as liquidated damages. It is merely a provision for the payment of a bonus under the conditions stated, none of which were fulfilled.

Judgment affirmed.

SHINN and PARKER WOOD, JJ., concur.

TABOR et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY. *

Civ. 15065.

District Court of Appeal, Second District, Division 2, California.

Oct. 29, 1945.

As Amended Nov. 14, 1945.

Hearing Granted Dec. 27, 1945.

1. New trial 🔑139

If notice of intention to move for new trial was a nullity because prematurely filed, it could not be revitalized by attempts of counsel to defeat it by any legal means, and hence the irregularity was not waived by participation of defendants' counsel in argument of the motion for new trial. Code Civ.Proc. § 659.

2. New trial 🔑153

The filing of notice of intention to move for new trial before signing and filing of findings and decision is ineffectual for any purpose, notwithstanding statute providing that such notice may be served "before the entry of judgment." Code Civ. Proc. § 659.

3. New trial 🔑153

Where notice of intention to move for new trial was prematurely filed, all proceedings for new trial were abortive and trial court lost jurisdiction on the eleventh day following entry of judgment. Code Civ. Proc. § 659.

◆

Petition by Winnie Estelle Tabor and another against the Superior Court of the State of California in and for the County of Los Angeles for writ of prohibition against proceedings pursuant to order granting new trial in action against petitioners.

Peremptory writ issued.

Holcomb & Kempley, of San Diego, for petitioners.

J. H. O'Connor, Co. Counsel, and S. V. O. Prichard, Asst. Co. Counsel, both of Los Angeles, for respondent.

Chas. A. Sunderlin, Mark Jones, and Max Bernbaun, all of Los Angeles, for the real party in interest.

MOORE, Presiding Justice.

The question posed by this petition for writ of prohibition is whether a notice of intention to move for a new trial filed prior to the filing of findings of facts and conclusions of law has any efficacy as the basis for proceedings and order granting a new trial even though the counsel for the prevailing parties participate in the argument of the motion.

Petitioners were defendants in an action brought by Emma Viola Taylor to annul her own deed conveying to petitioners certain real property and to quiet her title thereto. The basis of plaintiff's demand was the fraud of petitioners in procuring the deed. Issue having been joined the action was tried in respondent court and concluded on December 14, 1944. Decision in favor of petitioners was announced on March 8, 1945. Eight days thereafter plaintiff served and filed her notice of intention to move for a new trial. On April 5, 1945, the court signed and filed findings of fact and conclusions of law. Judgment was entered on the next day and notice of entry was served on April 10, 1945. In the meantime, on the sixth day of April the court heard and considered plaintiff's motion for a new trial, notice of intention to make which had been served and filed 21 days before the hearing of the motion. On April 17th the court made an order granting a new trial and on the motion of the plaintiff the court fixed November 27, 1945, as the day for a retrial.

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* Subsequent opinion 170 P.2d 667.

Subsequent to the order of the court placing the cause on its calendar for retrial petitioners duly moved the court to strike it therefrom on the ground that the order granting the new trial was a nullity. This motion was denied.

Petitioners contend here that the order for a new trial was void for the reason that the notice of intention was served and filed "prior to the signing and filing of findings of fact and conclusions of law."

Respondent counters this thesis with two propositions: (1) That petitioners waived the irregularity in the proceedings for a new trial by their active acquiescence therein in that they were present and participated in the argument of the motion, and (2) that under section 659, Code Civil Procedure, a party may "before the entry of judgment" file and serve upon the adverse party a notice of his intention to move for a new trial.

[1] If the notice of intention was a nullity because it had been prematurely filed at the time the motion was presented, then it could not have been revitalized by the attempts of petitioners' counsel to defeat it by any legal means. It is the privilege and the duty of an attorney to resist any illegal order by any legal action or legitimate means.

[2] As to the second point, while the statute (Code Civ.Proc. 659) clearly implies that the notice of intention may be filed and served before "findings * * * and conclusions" have been made, yet Root v. Daugherty, 201 Cal. 12, 255 P. 181, 182, decided subsequent to the 1923 amendment of section 659, unequivocally held that filing of a notice of intention prior to the signing and filing of findings and decision is "ineffectual for any purpose." While respondent contends that the holding of the Root case has been "blindly followed" (Middleton v. Finney, 214 Cal. 523, 527, 6 P.2d 938, 78 A.L.R. 1104; Reeve v. Jahn, 9 Cal.2d 244, 250, 70 P.2d 610; In re Estate of Green, 25 Cal.2d 535, 154 P.2d 692; In re Estate of Barker, 207 Cal. 112, 276 P. 992; Frye v. Pacific Freight Lines, 27 Cal. App.2d 748, 750, 81 P.2d 1027), yet even though we could see eye to eye with respondent under no circumstances could we compose a decision of such potency as would prevail against a pertinent pronouncement of the Supreme Court applicable to the factual situation shown in this case.

[3] Respondent contends that it did not lose jurisdiction even though the motion for a new trial was premature. With this we cannot agree. All proceedings for a new trial having been abortive, respondent had no jurisdiction of the matter on and after the eleventh day following the entry of the judgment.

Let the peremptory writ issue.

McCOMB and WILSON, JJ., concur.

27 Cal.2d 121

PEOPLE v. SIDWELL et al.

Cr. 4590.

Supreme Court of California.
Oct. 30, 1945.
Rehearing Denied Nov. 26, 1945.

1. Licenses 🔑18½

Legal consequences of defendants' acts in contracting to set aside percentage of production of prospective oil well, and sufficiency of evidence to sustain conviction for selling security without permit, must be judged by Securities Act and by transaction itself, regardless of innocence of intentions or misunderstanding of nature of transaction. Gen.Laws 1937, Act 3814.

2. Licenses 🔑40

In prosecution for selling security without permit, state is not bound by provisions of defendants' contract purporting to give complaining witness a percentage of production from oil well in consideration of loan. Gen.Laws 1937, Act 3814.

3. Licenses 🔑18½

An instrument evidencing a fractional or percentage interest in oil and gas production is a "certificate of interest" in oil or gas lease within Securities Act, and permit is required for issuance of such a certificate in bona fide private transaction. Gen.Laws 1937, Act 3814, § 2(a)7.

See Words and Phrases, Permanent Edition, for all other definitions of "Certificate of Interest".

4. Licenses 🔑18½

An instrument delivered to complaining witness whereby defendants agreed to set aside for him 5 per cent of production of prospective oil well in consideration of a loan covered by defendants' note, and agreed to apply for issuance of such interest on completion of well, constituted a "security" within Securities Act requiring a permit. Gen.Laws 1937, Act 3814, § 2(a)7.

See Words and Phrases, Permanent Edition, for all other definitions of "Security".

5. Licenses 🔑18½

An instrument whereby defendants agreed to set aside for complaining witness 5 per cent. of production of oil well in consideration of a loan, and on completion of well to apply for permit to transfer such interest, "disposed of" the 5 per cent. interest within Securities Act defining "sale" as including a disposition. Gen.Laws 1937, Act 3814, § 2(a)8.

See Words and Phrases, Permanent Edition, for all other definitions of "Dispose Of".

6. Licenses 🔑18½

Where defendants agreed to set aside for complaining witness 5 per cent. of production of prospective oil well in consideration of loan by witness for which defendants gave their note for 90 days at 6 per cent., transaction was not primarily a loan for which no permit was required under Securities Act, in view of defendants' own testimony to the effect that agreement as to the percentage was made as inducement for loan. Gen.Laws 1937, Act 3814.

7. Licenses 🔑18½

Where defendants agreed to set aside for complaining witness 5 per cent. of production of prospective oil well in consideration of a loan covered by defendants' note, fact that note was issued did not in itself bring transaction within provisions of Securities Act exempting notes issued in ordinary course of business and notes not offered to public. Gen.Laws 1937, Act 3814, § 2(b), 10, 11.

8. Licenses 🔑18½

The principle that substance and not mere form of transaction determines its character applies where instrument in form appears to be, but in substance is not, within Securities Act. Gen.Laws 1937, Act 3814.

9. Criminal law 🔑260(11)

In prosecution for violating Securities Act, trial court's implied finding on conflicting but sufficient evidence that transaction, in both substance and form, was within act, could not be disturbed, though evidence amply admitted of inferences that essentially transaction was not within Act. Gen.Laws 1937, Act 3814.

10. Constitutional law 🔑287
Licenses 🔑7(1)

Securities Act provision requiring permits does not exceed state's police power nor violate Fourteenth Amendment nor similar guarantees of state constitution, as applied to bona fide private transaction between individuals, such as agreement by borrowers to set aside for lender five per cent of production of prospective oil well.

Gen.Laws 1937, Act 3814; Const. Cal. art. 1, §§ 1, 13; U.S.C.A.Const. Amend. 14.

11. Criminal law ⇨1001

Trial court has no power to suspend execution of sentence except as incident to granting probation. Pen.Code, §§ 1203, 1203.1.

12. Criminal law ⇨1001, 1192

Trial court may entertain application for probation at any time prior to execution of sentence, before or after judgment is pronounced, and on the going down of a remittitur. Pen.Code, § 1203.1.

13. Criminal law ⇨1001

Trial court, as in prosecution for selling security without permit, may impose conditions, such as making of restitution, on which probation is granted. Gen.Laws 1937, Act 3814; Pen.Code, § 1203.1.

14. Criminal law ⇨1001

Defendant is not entitled as matter of right to have application for probation considered after denial of previous application presenting same issues. Pen.Code, §§ 1203, 1203.1.

15. Criminal law ⇨1192

Where trial court in prosecution for selling security without permit denied application for probation, but judgments imposing jail sentence recited that court would consider suspension thereof if restitution was made, and it appeared that court and counsel misapprehended effect of denial of probation and that question of probation was considered separate from suspension of sentence, defendants would be entitled to apply for probation on going down of remittitur. Pen.Code, §§ 1203, 1203.1.

In Bank.

Appeal from Superior Court, Los Angeles County; Kurtz Kauffman, Judge.

Thomas P. Sidwell and Louis Davis were convicted of violating the Corporate Securities Act, Gen.Laws 1937, Act 3814, and they appeal.

Affirmed.

Prior opinion 151 P.2d 145.

James E. Pawson, of Long Beach, and John N. Metcalf and Bernard Brennan, both of Los Angeles, for appellants.

Robert W. Kenny, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Fred N. Howser, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for respondent.

SCHAUER, Justice.

The defendants, Sidwell and Davis, were charged with violation of the Corporate Securities Act (Stats.1917, p. 673, as amended, Deering's Gen.Laws, Act 3814) in that, on June 1, 1940, they knowingly sold a "certificate of interest" in an oil and gas lease, "to wit, five per cent of all oil, gas and other hydro-carbon substances from a [described] well," without having obtained a permit from the Corporation Commissioner. Defendants each pleaded not guilty, waived a jury, and after trial were convicted and sentenced to imprisonment in the county jail for the term of one year. They appeal from the judgments of conviction and from an order denying their motions for new trial. Defendants contend that the transaction for which they were prosecuted was primarily a loan and not a sale of a security within the meaning of the Corporate Securities Act, and that, if the act does require the obtaining of a permit for such a transaction, it is to that extent unconstitutional. We have concluded that these contentions cannot be sustained.

On June 1, 1940, the defendants and one Moore (the complaining witness) signed, and defendants delivered to Moore, an agreement which reads as follows:

"In consideration of Five Thousand ($5000.00) Dollars advanced by you [Moore] to us [defendants] covered by our note for that amount dated June 1, 1940 running for ninety days and bearing interest at the rate of six (6%) per cent annum, we hereby agree to set aside or cause to be set aside for you 5% of all oil, gas and other hydro-carbon substances of production in the well known as Chicago Oil Co. Founders #1. * * * It is definitely understood between all of the parties to this letter [agreement] that this transaction does not constitute a sale or a purchase of the above described 5% interest in the * * * well, but that proper application will be made through proper authorization upon completion of said * * * well to have such interest duly issued and placed in your name or such nominee as you may designate under permissive authority. In any event * * * Davis and Sidwell acknowledge the advance of said $5000.00 covered by note as above described as a full personal obligation. Such interest in the well as may be permitted will come from their own interest or interest controlled by them. * * * In any event said $5000 note shall be paid to Joseph J. Moore on the due date together with interest thereon."

The agreement in typewritten form had been prepared by defendants; the last sentence was added in handwriting, after all the parties had signed, at the instance of Moore and on the advice of his attorney. As part of the same transaction Moore delivered $5,000 to defendants and defendants executed and delivered to Moore their promissory note described in the agreement. No application to the Corporation Commissioner for a permit to issue a certificate of interest in the described well was made by or on behalf of defendants. The well was never put on commercial production. At the time of trial the note had been partially, but not fully, repaid.

The circumstances leading up to the execution of the above-quoted agreement, according to the testimony of Moore, were as follows: Defendant Sidwell told Moore, his neighbor, that he (Sidwell) and defendant Davis were "in the oil business, digging a well on the Rosecrans field and that I ought to go in on it. * * * That he had gone down around 7,000 feet, that some big oil company had supplied the equipment and the derrick and one thing and another, and that they knew their business, and that there was not any risk to it at all. That they also had royalties and assets from other wells and that if I would give them $5,000 to complete the well to go down a few feet they would guarantee me 5% of the oil and gas and if they did not strike any oil it wouldn't make any difference, my $5,000 would be secured. They would pay me the $5,000 back plus 6% interest." Sidwell "took me down there, showed me, well, his derricks. He said, 'Do you think these people would be putting up the pipes and materials if they didn't know there was oil here?'" Sidwell and Moore thereafter went to defendants' office, where Davis told Moore that if he advanced $5,000 he would receive "5% of the oil and gas that was produced from the well and they would at least get around a 500 to 1,000 barrel well."

Defendant Sidwell testified that "we always very definitely told Mr. Moore we had no interest for sale, but * * * if he would make us a loan we would stand behind the loan. He said, 'What security will I get for the loan? * * * I want to have a bonus.' So we said, 'The well is not on production yet, but we will set aside 5% of the oil from the well as security for your note. We will stand behind the note itself. And then after the well is on production we would apply to the department for a permit.'"

Defendant Davis testified that "Moore asked what we could do in the nature of security for him in the event that he loaned us some money and I told him the only thing we could give him was to set aside an interest in the well, where if it ever came to anything, and upon due application the thing to be issued to him would be worth his while if the thing came in."

[1, 2] The understanding or misunderstanding of the parties as to the nature of the transaction is not determinative of its legal effect. However innocent in one sense may have been the defendants' intentions, their acts in entering into the contract were deliberate and it is by their acts and the language of the Corporate Securities Act that we must judge the legal consequences of those acts and the sufficiency of the evidence to sustain the judgment. (People v. Rubens (1936), 11 Cal. App.2d 576, 591, 592, 54 P.2d 98, 1107; People v. Murphy (1936), 17 Cal.App.2d 575, 585, 62 P.2d 592; cf. People v. Flumerfelt (1939), 35 Cal.App.2d 495, 498, 96 P.2d 190.)

And in this criminal prosecution the State is not bound by the written provisions of the civil contract between the defendants and Moore. (People v. Martin (1894), 102 Cal. 558, 566, 36 P. 952; People v. Eiseman (1926), 78 Cal.App. 223, 241, 248 P. 716; People v. Kelley (1927) 81 Cal.App. 398, 403, 253 P. 773; People v. Robinson (1930), 107 Cal.App. 211, 221, 290 P. 470.)

[3] A "certificate of interest in an oil, gas or mining title or lease" is a security within the meaning of the Corporate Securities Act (Stats.1937, p. 1429, § 2, par. (a), subd. 7). An instrument which evidences a fractional or percentage interest in oil and gas production is such a certificate of interest (People v. Craven (1933), 219 Cal. 522, 524, 27 P.2d 906) and a permit is required for the issuance of such a certificate in a bona fide, private transaction (Domestic and Foreign Pet. Co., Ltd., v. Long (1935), 4 Cal.2d 547, 558, 51 P.2d 73).

[4] But, defendants urge, they did not issue a security to Moore; their transaction with him was an innocent "agreement to make a lawful attempt to dispose of an interest in a security." In this connection they emphasize that only such interest "as may be permitted" after "proper authorization" was agreed to be issued, and they call attention to Moore's testimony (a conclusion) that he never received a certificate; that "all he gave me was a piece of paper." Under defendants' construction of the agreement, if the well was put on production and defendants applied for, but the commissioner refused, a permit, they would be in the peculiar situation of being obligated to "set aside" 5 per cent of the production for Moore yet being unable lawfully to pay or transfer such per cent to Moore. More realistically, if the defendants' venture was successful they would be required to apply for (and no doubt would obtain) a permit; if the venture was unsuccessful they would not be put to the trouble of seeking a permit. In People v. Oliver (1929), 102 Cal.App. 29, 36, 282 P. 813, 817, an argument similar to that now under consideration was made. The District Court of Appeal said, "If the instrument of sale creates a present right to a present or a future participation in either the income, profits, or assets of a business carried on for profit, it is a 'security,' as defined in the Corporate Securities Act. Because the interest created will not return a profit until the performance of a future act, such as the sale of an interest in a patent, or the grant to a licensee of the right to use it, does not bring it without the provisions of this act. Agnew v. Daugherty, 189 Cal. 446, 209 P. 34. To hold otherwise would make the real test of the legality or illegality of the sale the ultimate success or failure of the venture. * * * It is the act of selling that is primarily placed under the examination of the commissioner of corporations, and his action in granting or withholding his permit to sell cannot be made contingent upon the future success or failure of the business venture."

[5] Defendants further contend that the per cent of production here involved was not "sold" within the meaning of the Corporate Securities Act; that they agreed only to set it aside and later, when and if the well was completed, there would arise the further obligation to apply to the commissioner for permission to transfer the per cent. According to the act (Stats.1937, p. 1429, § 2, par. (a), subd. 8) a sale includes "every disposition, or attempt to dispose, of a security or interest in a security for value. Any security given or delivered with, or as a bonus on account of, any purchase of securities or any other thing, shall be conclusively presumed to constitute a part of the subject of such purchase and to have been sold for value. 'Sale' * * * shall also include a contract of sale * * * an attempt to sell, [etc.]." The per cent of production was disposed of within the meaning of the quoted statutory provision. "Dispose of" means, among other things, "to fix the condition, employment, etc., of; to direct or assign for a use" and also "To transfer to the control of someone else, as by selling; to alienate; part with; relinquish; bargain away." (Webster's New Int. Dict., 2d ed.) It is apparent that the 5 per cent interest in production of the well was assigned to a specified use by the agreement. It was not transferred to the immediate control of Moore, but it was bargained away; i. e., for an entire consideration of $5,000 the defendants issued their promissory note and agreed that the per cent, if it was ever transferred to anyone, was to be transferred to Moore.

[6, 7] Defendants urge that the transaction was primarily and in substance a loan for which no permit was required under the provisions of subdivisions 10 and 11 of paragraph (b) of section 2 of the Corporate Securities Act (Stats.1937, p. 1431). Subdivision 10 exempts from the provisions of the act "promissory notes and other commercial paper issued, given or acquired in a bona fide way in the ordinary course of legitimate business," and subdivision 11 exempts "Promissory notes, whether secured or unsecured, where the notes are not offered to the public, or are not sold to an underwriter for the purpose of resale." Defendants' promissory note and the quoted agreement were executed as parts of one transaction. The testimony of defendants themselves supports the implied finding that they made the agreement as to the per cent to induce Moore to make the loan rather than as an incidental matter subordinate to the loan. (Cf. People v. Weibert (1937), 18 Cal.App.2d 457, 469, 64 P.2d 169.) The fact that a promissory note was issued as part of the transaction does not in and of itself bring the entire transaction within either of the quoted exemptions.

[8, 9] Both defendants and the People rely on the principle that the substance and not the mere form of a transaction determines its character. It is true that the courts of this state have often had occasion to hold that instruments variously phrased as assignments, options to purchase, grant deeds of described land, etc., were certificates of interest in proceeds of oil leases, titles, or royalties. (People v. Craven (1933), supra, 219 Cal. 522, 524, 27 P.2d 906; Domestic & Foreign Pet. Co., Ltd., v. Long (1935), supra, 4 Cal.2d 547, 554, 51 P.2d 73; People v. Rubens (1936), supra, 11 Cal.App.2d 576, 580, 581, 54 P.2d 98, 1107; People v. Jackson (1937), 24 Cal. App.2d 182, 192, 74 P.2d 1085; People v. Daniels (1938), 25 Cal.App.2d 64, 68, 76 P.2d 556; People v. Yant (1938), 26 Cal. App.2d 725, 734–736, 80 P.2d 506; Moore v. Stella (1942), 52 Cal.App.2d 766, 776, 127 P.2d 300.) It is also true that the principle applies where an instrument in form appears to be, but in substance is not, within the act. (People v. Davenport (1939), 13 Cal.2d 681, 690, 91 P.2d 892; Morello v. Metzenbaum (1944), 25 Cal.2d 494, 498, 154 P.2d 670.) In the present case the trial court, upon conflicting but sufficient evidence, impliedly found that the transaction, in substance as well as in form, was within the act. The fact that the evidence amply admits of inferences that in its essential substance such transaction was not within the proscription of the act does not permit us to disturb the trial judge's determination.

[10] Defendants earnestly contend that the Corporate Securities Act, insofar as it requires that an individual must obtain a permit before he can issue and dispose of a security in a private transaction, violates the Fourteenth Amendment of the Constitution of the United States and sections 1 and 13 of article I of the California Constitution. They urge that the decision of this court to the contrary in Domestic & Foreign Pet. Co., Ltd., v. Long (1935), supra, 4 Cal.2d 547, 558, 51 P.2d 73, should be overruled and that the reasoning of People v. Pace (1925), 73 Cal.App. 548, 558–563, 238 P. 1089 (which limits the right of the state to require the individual owner, who is neither issuer nor underwriter, of a security to obtain a permit to sell such security), applies with equal force and logic to the situation presented in the Long case and the present case. We are satisfied that the application of the Corporate Securities Act to a bona fide private transaction on the part of individuals, under circumstances such as those shown here, does not exceed the police power of the state. To hold otherwise would encourage those interested in evasion of the act to seek to disguise their operations as private "loan" transactions.

[11-15] The trial court denied defendants' application for probation but the judgments, after sentencing defendants to imprisonment for one year in the county jail, recite that "The Court will consider suspending all or part of sentence if restitution is made within five days." (The $5,000 due on the note, as stated above, had not been paid in full.) The court had no power to suspend execution of sentence except as an incident to granting probation. (Pen.Code, §§ 1203, 1203.1; In re Eyre (1934), 1 Cal.App.2d 451, 453, 36 P.2d 842; People v. Wallach (1935), 8 Cal.App.2d 129, 132, 47 P.2d 1071; Ellis v. Department of Motor Vehicles (1942), 51 Cal.App.2d 753, 757, 125 P.2d 521.) A trial court has power to entertain an application for probation at any time prior to execution of sentence, before or after judgment is pronounced, and on the going down of a remittitur. (Lloyd v. Superior Court (1929), 208 Cal. 622, 630, 283 P. 931; People v. Superior Court (1930), 208 Cal. 692, 284 P. 451.) It may, of course, impose conditions, such as the making of restitution, upon which probation is granted. (Pen.Code, § 1203.1; People v. Lippner (1933), 219 Cal. 395, 398, 26 P.2d 457.) Although it has been held that a defendant is not, as a matter of right, entitled to have an application for probation considered after a previous application presenting the same issues has been denied (People v. Payne (1930), 106 Cal.App. 609, 615, 289 P. 909), it appears from the wording of the judgments in this case and from certain remarks of counsel on the hearing of the application for probation that there was a misapprehension of judge and counsel as to the effect of denial of probation and that the matter of probation was considered as a question entirely separate from the matter of suspending sentence; thus an application for probation on the going down of the remittitur would present a question not determined on the previous application.

The judgments and order appealed from are affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SPENCE, JJ., concurred.

27 Cal.2d 108

In re STEVENS' ESTATE.

LAVENBARG v. SHETRONE.

L. A. 18951.

Supreme Court of California.

Oct. 30, 1945.

1. Courts 🔑202(5)

An order approving the terms of a compromise with a creditor of an estate and disallowing objections thereto by a legatee is appealable.

2. Courts 🔑202(5)

Where evidence taken at hearing on petition to compromise claim of creditor of estate was not brought up in record on appeal, Supreme Court presumed that evidence was sufficient to sustain finding in favor of disposition made by trial court. Probate Code, §§ 750, 751.

3. Wills 🔑770

Proof of an intention to abrogate bequests under a will is necessary to show an "ademption".

See Words and Phrases, Permanent Edition, for all other definitions of "Ademption".

4. Wills 🔑705

Where order construing will had become final, legatee could not raise contentions with respect to issues decided therein. Probate Code, §§ 750, 751.

5. Appeal and error 🔑882(3)

Where record on appeal contained neither a transcript nor other statement of evidence indicating that case was tried on any other or broader theory than that indicated, legatee was required, on appeal, to adhere to theory disclosed by record.

6. Appeal and error 🔑694(1)

Where evidence did not appear in the record, reviewing court could not question a finding of fact and appellant could not invoke a proposition which would necessarily imply a fact contrary to such finding.

7. Executors and administrators 🔑269

In proceeding for the compromise of a claim against an estate, question of applicability of code section providing that legacies to a spouse or to kindred shall abate only after abatement of legacies to persons not related to testator was not a proper issue. Probate Code, § 754.

8. Wills 🔑812

Where all the property of estate was covered by specific bequests, only one of which was in favor of a person not related to testator, selection of such bequest for abatement to pay claim against estate was within discretion of administratrix. Probate Code, §§ 750–754.

9. Wills 🔑848

Legatee whose bequest has been used to pay a claim against testator's estate may, when proceedings for distribution of estate are before probate court, properly urge demand for contribution from other devisees. Probate Code, § 753.

10. Wills 🔑848

The right of contribution from other legatees existing in favor of a legatee, whose legacy has been sold for the payment of debts, also exists where the particular legacy has been appropriated in its tangible form, without first being converted into cash, to payment of a debt of estate by means of a compromise settlement with creditor. Probate Code, § 753.

11. Wills 🔑848

The code provision that all legatees must contribute according to their respective interests to legatee whose legacy has been appropriated to payment of debts contemplates interest as measured by the class of the various legacies as general or specific, and by kinship to decedent as well as by monetary value of various legacies. Probate Code, §§ 750, 753.

12. Wills 🔑809

Where no property has been expressly appropriated by will for payment of debts and no property exists which is not disposed of by will and in order to pay debts of estate resort to one or more legacies is necessary with resultant abatement of at least a portion of such legacies, the code section providing that legacies to a spouse or to kindred shall abate only after abatement of legacies to persons not related to testator applies. Probate Code, §§ 750, 752, 753.

13. Statutes 🔑231

Sections 750–753, relating to selection of property of estate to be applied to debts of estate, relate to the same subject matter and are, therefore, in pari materia, and must be construed together as one act, and, if there is an apparent conflict between such sections, they should be harmonized, if possible. Probate Code, §§ 750–753.

14. Statutes ⚷231

When code provisions appear to conflict, they should be given such a construction as will give effect to all of them if possible. Code Civ.Proc. § 1858.

15. Wills ⚷809

Code provision that, unless a different intention is expressed in will, legacies to a spouse or kindred shall abate only after abatement of legacies to persons not related to testator, and provision that all legatees must contribute according to their respective interests to legatee whose legacy has been appropriated to payment of testator's debts, when construed together, manifest intent of Legislature to give preference to spouse and kindred. Probate Code, §§ 752, 753.

16. Wills ⚷439

Court in construing a will must seek to ascertain intention of testator, and, insofar as testator's intention is expressed, it must be given effect. Probate Code, § 101.

17. Executors and administrators ⚷269

Whether testator intended to and did, by language used in will, evidence an intent which would preclude application of legislative preference for spouse and kin in abatement of devises or legacies for the payment of estate debts, must be determined by probate court at time distribution is ordered rather than at time legacy of one not a relative is used to compromise a claim. Probate Code, §§ 101, 750–753.

18. Wills ⚷848

When property given by will to persons other than residuary devisee or legatee is sold for payment of testator's debts, contribution is to be enforced from spouse and kindred of testator only after property appropriated for the other devises or legacies in the same class as those of such spouse or kindred has been exhausted, unless different intention is expressed in will. Probate Code, §§ 750–753.

EDMONDS, J., dissenting in part.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Proceedings in the matter of the estate of Guy D. Stevens, deceased, on the petition of Elva L. Shetrone, administratrix with the will annexed, to compromise a creditor's claim by surrendering to creditor the specific bequests made in testator's will in favor of Edith Lavenbarg. From an order granting petition to compromise a creditor's claim, approving the terms of the compromise and disallowing objections thereto, Edith Lavenbarg appeals.

Affirmed.

Prior opinion 150 P.2d 530.

Ivan Miller, of Los Angeles, for appellant.

Stanley Arndt and Voorhees & Voorhees, all of Los Angeles, for respondent.

SCHAUER, Justice.

The controversy arose upon a petition by an administratrix for compromise of a claim against her decedent, and involves the construction of sections 750-753 of the Probate Code in their application to a situation which has not heretofore had the attention of this court.

The decedent, Guy D. Stevens, left an estate appraised at approximately $2,700, against which a creditor's claim filed by his divorced wife Vera M. Stevens in the sum of $990, plus interest from November 14, 1941, was allowed. His will, which is holographic, reads as follows:

"Oct. 23 1941

"This is my last will an testament. I own the Residence at 4501 Homer St., Los Angeles, Cal. and I want Edith Lavenberg to have the use of this house 4501 Homer St. for (5) five years, unless she should marry and get security in the meantime. She is to keep up the taxes. At the end of that time she shall have the option to buy the place, for $2000 with monthly payments not more that $20.00 per mo. Then the house is to go to Earl Stevens, 2446 Blanche St., Pasadena, Cal., and Elva Shetrone 2007 Corning St., Los Angeles, Cal., and what cash I have is to be divided between Earl & Elva. It is at the Bank of America in Santa Monica. I have note of $400.00 held on Art Jones, Malibu, to pay expenses with. I also want my father to have 1/3 of the cash left after expenses (T. G. Stephens)

"Guy D. Stevens"

The administratrix (decedent's daughter, Elva L. Shetrone) filed a petition for interpretation of the will. At the hearing thereon (on April 19, 1943) there were present the administratrix, her brother Earl Stevens, and Edith Lavenbarg (named in the will as Edith Lavenberg). The latter is not a kindred of the decedent. By its order in that proceeding the probate court decreed:

1. That title to the property at 4501 Homer Street, Los Angeles, was vested in Earl Stevens and Elva Shetrone, subject to (a) the administration of this estate, and (b) the right of Edith Lavenbarg to use and occupy the premises and her option to purchase them for $2,000.

2. That the right of Edith Lavenbarg was to use and occupy the house for five years from decedent's death and should cease immediately (a) upon her marriage to a person able to support her according to her current state of life; or (b) upon her failure to pay the taxes on the property promptly as they become due.

3. That the option of Edith Lavenbarg is an option to purchase the property at the end of the five-year period for $2,000 payable in installments of $20 a month without interest, provided that she had not in the meantime married as described above and that she had paid the taxes promptly.

4. That if Edith Lavenbarg should exercise her option, then the sum payable thereunder "shall be payable to Earl Stevens and Elva Shetrone, share and share alike; that their right to receive said money is a present right. * * *"

5. That all funds in the Bank of America in Santa Monica were bequeathed to Earl Stevens and Elva Shetrone, share and share alike.

6. That the Art Jones note of $400 should be used for the payment of administration expenses, etc., and the balance, if any, should go one-third to T. G. Stevens, decedent's father, and two-thirds to the children.

7. That all of the bequests are specific bequests and were so intended by the decedent.

In the present proceeding (the petition to compromise) the court found that the only assets of the deceased at the time of his death and the only assets that came into the hands of the administratrix were:

(a) $1,014.22, in cash, which at the time of the hearing on the petition to compromise was in the Highland Park branch of the Bank of America. The record does not disclose where such money was located on the date of decedent's death.

(b) Personal effects valued at $10.

(c) The right of Edith Lavenbarg to use and occupy the home, valued at $750.

(d) Her right to buy the home, valued at $100.

(e) The home real estate (subject to the rights and option of Edith Lavenbarg) valued at $850.

The note of Art Jones for $400, referred to in the will, had been paid prior to decedent's death but what had become of the proceeds does not appear.

[1] The administratrix reached an agreement with the claimant, Vera M. Stevens, by which the latter agreed to accept in full settlement of her approved claim of $990 and interest the specific bequests made to Edith Lavenbarg, which as shown above had been appraised at $850. Thereupon the administratrix petitioned the probate court for permission to so compromise the claim and to such petition Edith Lavenbarg filed objections. After a hearing the probate court made its order approving the terms of the compromise and disallowing the objections thereto. From that order Edith Lavenbarg has appealed. It is established that such order is appealable (see In re Estate of Lucas (1943), 23 Cal.2d 454, 463, 144 P.2d 340).

The sole grounds upon which appellant objected to the petition to compromise claim are "that the bequests or devises to others than * * * [herself], are not entitled to any preference over the specific bequest in favor of * * * [herself], and * * * that all property devised and bequeathed is liable for the debts of the decedent in porportion to the value or amounts of the several devises and legacies."

At the conclusion of the hearing on the petition to compromise the court found, among other things, that "all of the property in the estate is specifically covered by the specific legacies and there is no residuary estate which can be used or that is available for the payment of said claim of Vera M. Stevens. Therefore, in order to pay said claim of Vera M. Stevens, it will be necessary that abatement take place in one or more of said legacies. The sole issue herein is an issue of law. The Administratrix and the children of the deceased contend that under Section 752 Probate Code, the legacy to Edith Lavenberg must first be used and abated before any abatement whatsoever takes place in their legacies inasmuch as she is not related to the deceased and they are kindred of the deceased, while she claims and maintains that all legacies should be abated pro rata."

The pertinent portions of the sections of the Probate Code (750–753) here involved are as follows:

Section 750: "If the testator makes provision by his will, or designates the estate to be appropriated, for the payment of his debts * * * they must be paid according to such provision or out of the estate thus appropriated, so far as the same is sufficient. If insufficient, that portion of the estate not disposed of by the will, if any, must be appropriated for that purpose; and if that is not sufficient, the property given to residuary legatees and devisees, and thereafter all other property devised and bequeathed is liable for the same, in proportion to the value or amount of the several devises and legacies, but specific devises and legacies are exempt from such liability if it appears to the court necessary to carry into effect the intention of the testator, and there is other sufficient estate."

Section 751: "The property of a testator, except as otherwise provided in this code, must be resorted to for the payment of legacies in the following order:

"(1) The property which is expressly appropriated by the will therefor.

"(2) Property not disposed of by the will.

"(3) Property which is devised or bequeathed to a residuary legatee."

Section 752: "Unless a different intention is expressed in the will, abatement takes place in any class only as between legacies of that class, and legacies to a spouse or to kindred shall abate only after abatement of legacies to persons not related to the testator."

Section 753: "When property given by will to persons other than the residuary devisees and legatees is sold for the payment of debts * * * all the devisees and legatees must contribute according to their respective interests to the devisee or legatee whose devise or legacy has been sold, and the court, *when distribution is made,* must settle the amount of the several liabilities and decree the amount each person shall contribute, and reserve the same from his distributive share for the purpose of such contribution." (Italics added.)

It should be here noted that appellant expressly concedes that the bequests of "what cash I have. * * * It is at the Bank of America in Santa Monica" to decedent's two children were specific bequests and in the same class as the bequests to herself. Appellant further expressly concedes that the order (of April 19, 1943) interpreting the will and decreeing that all of the bequests are specific and were so intended by the decedent was an appealable order, that such order has become final and is not subject to review on this appeal from the compromise order, and that the issues determined thereby are res judicata. Therefore we refrain from expressing an opinion upon these conceded points, deciding this case in reliance upon appellant's concessions but without implying approval of the propositions conceded. We note, further, that no claim is made by appellant that the will discloses an intent to exempt her bequest from the payment of claims until all other property of the estate is exhausted. (See Prob.Code, § 752.)

[2, 3] Appellant's first contention is that at the time of decedent's death his money was in the Highland Park branch of the Bank of America, rather than in the Santa Monica branch (as specified in the will); that therefore the bequest of the money to the two children was adeemed and such money forms a part of decedent's residuary estate; and that consequently, pursuant to the provisions of section 750 of the Probate Code, such money must be appropriated to payment of the creditor's claim before resort is had to appellant's specific bequest. However, as stated above, the court found at the conclusion of the hearing on the petition to compromise that "All of the property in the estate is specifically covered by the specific legacies and there is no residuary estate. * * *" Although evidence was taken at the hearings on both the petition for interpretation of the will and the petition to compromise claim, it was not brought up in the record on appeal. Therefore we must presume that the evidence was sufficient to sustain such finding, that it did not convince the court that the money had been transferred from the Santa Monica branch to the Highland Park branch prior to decedent's death, or that if such transfer had been made decedent intended thereby to destroy the bequest to his children. (See 2 Cal.Jur. 877, 878, § 514; Carpenter v. Froloff (1939), 30 Cal.App.2d 400, 407, 86 P.2d 691; Stiles v. Bodkin

(1941), 43 Cal.App.2d 839, 840, 111 P.2d 675; Lamanet v. Lamanet (1937), 18 Cal. App.2d 402, 405, 63 P.2d 1195; Whitney v. Redfern (1940), 41 Cal.App.2d 409, 413, 106 P.2d 919.) Proof of such intent is necessary to establish an ademption. (See In re Estate of McLaughlin (1929), 97 Cal.App. 485, 488, 489, 275 P. 875.)

[4] It may be observed that appellant has also, in a supplemental brief filed by permission after argument before this court on the other issues involved herein, for the first time raised the point that the money to be paid by Edith Lavenbarg should she exercise her option to purchase the home property is not disposed of by the will and therefore must be appropriated to payment of the creditor's claim before resort is had to any of the specific bequests. However, in the order interpreting the will it was declared that title to the home property is vested "in Earl Stevens and Elva Shetrone, subject to * * * the right of Edith Lavenbarg to use and occupy" the premises and her option to purchase them for $2,000 and that should such option be exercised then the sum payable thereunder shall be paid "to Earl Stevens and Elva Shetrone * * *; that their right to receive said money is a present right." As stated above, appellant has conceded that such order interpreting the will has become final and is not now subject to review by this court. Moreover, inasmuch as title to the premises is in the decedent's two surviving children it is apparent that, as decreed by the court, should appellant choose to exercise her option the property may be purchased by her only by paying the purchase price to the owners thereof; i. e., Earl Stevens and Elva Shetrone.

[5, 6] A further answer to each of appellant's two propositions just discussed stems from the fact that the sole grounds upon which appellant objected in the probate court to the petition to compromise claim are "that the bequests or devises to others than * * * [herself], are not entitled to any preference over the specific bequest in favor of * * * [herself], and * * * that all property devised and bequeathed is liable for the debts of the decedent in porportion to the value or amounts of the several devises and legacies." Inasmuch as the record contains neither a transcript nor other statement of the evidence indicating that the case was tried upon any other or broader theory than that presented by such objections appellant must adhere to such theory upon appeal. The findings of the court recite that appellant's claim was that "all legacies should be abated pro rata." Furthermore, one of the specific findings is that "there is no residuary estate which can be used or that is available for the payment of said claim of Vera M. Stevens." In the absence of the evidence we cannot question such finding and appellant cannot invoke a proposition which would necessarily imply a fact contrary to that finding.

[7, 8] Appellant's next and most strongly urged assertion is that that portion of section 752 of the Probate Code which provides that "legacies to a spouse or to kindred shall abate only after abatement of legacies to persons not related to the testator" applies only where the legacies have not, as here, been resorted to for the payment of debts but where the estate, even if no debts existed, is insufficient to pay all legacies of the same class, and that such quoted provision is not to be given effect where it has been necessary to resort to any of the legacies in order to pay decedent's debts. In support of this proposition, appellant relies upon certain language from In re Estate of Wever (1936), 12 Cal. App.2d 237, 55 P.2d 279, and also upon the provision of section 753 of the Probate Code that "When property given by will to persons other than the residuary devisees and legatees is sold for the payment of debts * * * all the devisees and legatees must contribute according to their respective interests to the devisee or legatee whose devise or legacy has been sold * * *." Therefore, argues appellant, where, as here, it is necessary that property specifically bequeathed be appropriated to the payment of debts of the decedent, all the specific devisees and legatees must, according to their respective *monetary* interests, contribute to the devisee or legatee (i. e., appellant) whose devise or legacy has been sold.

It is our view that such contention is not a proper issue in a proceeding for the compromise of a claim against an estate. Section 754 of the Probate Code provides that "When a sale of property of the estate is necessary * * * [to pay debts] the executor or administrator may sell the same, * * * using his discretion as to which property to sell first, except as provided by sections 750 and 751 of this code." Inasmuch as, under the facts and circumstances here before us, sections 750 and 751 (herenabove quoted) do not appear to forbid the appropriation to the payment of decedent's debts of the bequest to appellant, it would seem to be within the discretion of the administratrix to select such bequest for that purpose. And if it appears to her and to the probate court to be more advantageous to the estate to employ the bequest directly to the effecting of compromise of a creditor's claim, rather than to sell the bequest outright and appropriate the proceeds of the sale to cash payment of the claim, such procedure will not be prejudicial to whatever rights of contribution from other devisees and legatees appellant may otherwise have. If a right of contribution is eventually established, the total of the assets remaining in the estate from which contribution would be made should presumably be greater than if a compromise had not been effected, and thus the appellant's ultimate distributive share of the estate will be greater. And if *at the time of distribution* it is determined that appellant is entitled to no contribution from the other devisees and legatees, then obviously the appropriation of her bequest to the payment of a creditor's claim will not legally have prejudiced her.

[9] It is to be noted that section 753 of the Probate Code, in addition to its provision, relied upon by appellant, that "all the devisees and legatees must contribute according to their respective interests to the devisee or legatee whose devise or legacy has been sold" for the payment of debts, further specifies that "the court, *when distribution is made,* must settle the amount of the several liabilities and decree the amount each person shall contribute, and reserve the same from his distributive share for the purpose of such contribution." (Italics added.) Thus, appellant may, when proceedings for distribution of the estate are before the probate court, properly urge her demands for contribution from the other devisees and legatees. However, even though a final determination of such claims prior to that time is premature (see In re Estate of Thayer (1904), 142 Cal. 453, 456, 76 P. 41), we feel that it is appropriate to express at this time, for the guidance of the probate court when a petition for distribution of the estate is before it, our views concerning the law applicable to appellant's asserted right of contribution.

[10] Preliminarily it may be observed that although section 753 of the Probate Code specifies that "all the devisees and legatees must contribute according to their respective interests to the devisee or legatee whose devise or legacy *has been sold*" (italics added) for the payment of debts, it would appear that the same right of contribution should and does exist if a particular devise or legacy has been appropriated in its tangible form and without first being converted into cash to the payment (by means, as in this case, of a compromise settlement with the creditor) of a debt of the estate. There is no substantial difference, material here, except perhaps in advantages accruing to the estate, between the sale of an asset of the estate for the purpose of securing cash with which to pay a debt and the transfer of such asset outright to the creditor, by means of a compromise approved by the probate court, in full satisfaction of such debt. In either event the debt is paid, the specific property constituting the devise or legacy is lost as such to the devisee or legatee, and the latter's right, if any, to receive contribution under the terms of section 753 when distribution is made, then arises.

[11, 12] However, we are of the opinion that the provision of section 753 that "all the devisees and legatees must contribute according to *their respective interests* to the devisee or legatee whose devise or legacy" (italics added) has been appropriated to the payment of debts contemplates interest as measured by the class of the various devises and legacies (i. e., whether general or specific, etc.; see In re Estate of De Santi (1942), 53 Cal.App.2d 716, 719–721, 128 P.2d 434) and by kinship to the decedent as well as by the monetary value of the various devises or legacies, and that in a case in which no property has been expressly appropriated by the will for the payment of debts and no property exists which is not disposed of by the will, and in order to pay debts of the estate it has become necessary to resort to one or more of the legacies (see Prob.Code, § 750), with resultant abatement of at least a portion of one or more of such legacies, it must be held that, as specified by section 752 of the Probate Code, "legacies to a spouse or to kindred shall abate only after abatement of legacies to persons not related to the testator."

[13-15] Sections 750 through 753 of the Probate Code, here under consideration, relate to the same subject matter, are therefore in pari materia, and "must be read and

construed together, as one act, each referring to and supplementing the other * * * [and] if there is an apparent conflict between such statutes, they should be compared and harmonized, if possible, to ascertain the legislative intent and to give force and effect to both or all of them so far as possible. * * *" (See 23 Cal. Jur. 785–788, §§ 163, 166.) It is also a familiar rule that when "code provisions appear to conflict, they should * * * be given such a construction as will give effect to all of them, if possible." (See Code Civ. Proc. § 1858; 23 Cal.Jur. 792, § 170.) Here, although the provision of section 752 that "Unless a different intention is expressed in the will * * * legacies to a spouse or to kindred shall abate only after abatement of legacies to persons not related to the testator" appears at first impression to conflict with the direction of section 753 that "*all* [italics added] the devisees and legatees must contribute according to their respective interests to the devisee or legatee whose devise or legacy has been" appropriated to the payment of the decedent's debts, such seeming conflict dissolves in the light of the construction suggested hereinabove. By such construction the provisions of each section are given full force and effect and the apparent intent of the Legislature (as expressed in § 752) to give preference to spouse and kindred in the payment of legacies, unless a different intention is expressed in the will, is carried out.

[16, 17] Having stated the rule we immediately emphasize that the legislative preference is to be given effect only where a different intention is not apparent in the will. It is preeminently the duty of the court in construing the will to seek to ascertain the intention of the testator. Insofar as his intention is expressed it must be given effect. (Prob.Code, § 101; In re Estate of Axcelrod (1944), 23 Cal.2d 761, 766, 147 P.2d 1; In re Estate of Heard (1944), 25 Cal.2d 322, 326, 153 P.2d 553.) Whether the testator here intended to and did, by the language used in the will, reasonably evidence an intent which would preclude application of the legislative preference must be determined by the probate court at the time distribution is ordered.

We note that the trial court in its conclusions of law undertook to declare that "The legacies to Earl Stevens and Elva Shetrone * * * should be abated only after abatement of the legacies to persons not related to the deceased" and that "The legacies to Edith Lavenberg * * * should be abated before the legacies to the kindred." These declarations, as shown above, purport to determine an issue which was not properly before the court in the hearing on the objections to the petition to compromise claim. They are, however, unnecessary to, do not support, and are not carried into the decree appealed from. They may, therefore, be disregarded.

[18] To summarize, it is our view that ultimate determination of the right of contribution must await the petition for distribution; that it is the paramount duty of the court to ascertain and give effect to the intention of the testator as expressed in the will; and that where no different intention is expressed in the will, "when property given by will to persons other than the residuary devisee and legatee is sold for the payment of debts" contribution is to be enforced from the spouse and kindred of the testator only after the property appropriated for the other devises or legacies in the same class as those of such spouse or kindred has been exhausted.

As already mentioned, appellant relies upon certain language appearing in Re Estate of Wever (1936), supra, 12 Cal.App. 2d 237, 238–243, 55 P.2d 279. We find nothing in that opinion which is inconsistent with our views as hereinabove expressed. Moreover the court in that case expressly pointed out (12 Cal.App.2d at page 243, 55 P.2d at page 282,) that there was not presented to it nor was it passing upon the issue as to "whether spouse and kindred should contribute proportionally to * * * [the payment of debts] as under section 753 [of the Probate Code]" and that such questions "must be determined only when the issues are properly raised for decision."

No other attacks are made by appellant upon the order appealed from. For the reasons stated above such order is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, and SPENCE, JJ., concurred.

EDMONDS, Justice (concurring).

I concur in the judgment but do not join in the determination that it is now appropriate to advise the probate court concerning the law applicable to appellant's asserted right of contribution.

71 Cal.App.2d 347

MAIS et al. v. POINSETTIA LAND CO.

Civ. 14892.

District Court of Appeal, Second District, Division 3, California.

Oct. 26, 1945.

1. Taxation ⚿305, 798

The proceedings of the board of supervisors in fixing tax rate of 1927–28 in which portion of revenue to be received from tax on unsecured personal property was underestimated, resulting in a higher rate upon real and secured personal property, was validated by the curative act of 1943 and could not form the basis for setting aside a certificate of sale and deed to state for taxes. St.1943, p. 1993.

2. Constitutional law ⚿93(1)
Taxation ⚿37

The fact that taxpayer owned realty before assessment was levied did not relieve taxpayer of operation of curative act, which validated illegal assessments, on the basis of a contention that taxpayer had a vested right which could not be taken from it by retroactive legislation. St.1943, p. 1993.

3. Schools and school districts ⚿103(1)

Where taxes were levied upon land situated in high school district and for benefit of district and there was a description of property which was sufficient to show that it was within high school district for which tax in part had been levied, irregularity of referring to city school district which was an elementary school district, the territory of which was included in high school district, without referring specifically to high school district, was a matter subject to correction by a subsequent validating act. Political Code, § 3650, subd. 11, as amended by St.1927, p. 400; St.1943 p. 1993.

4. Schools and school districts ⚿103(1)

The validating act of 1943 cured the defect in assessment roll which failed to show Compton Union High School District as one of the school and revenue districts in which the property was located, and in any event the defect was cured by the 1945 curative act. Political Code, § 3650, subd. 11, as amended by St.1927, p. 400; St.1943 p. 1993; St.1945, p. 2176.

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Action by Fred A. Mais and Frank J. Mais against Poinsettia Land Company to quiet title. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Newton E. Anderson and Arthur E. White, both of Los Angeles, for appellant.

John F. Bender and G. Loshoncy, both of Los Angeles, for respondents.

SHINN, Justice.

Plaintiffs, claiming title under a tax deed, brought this action to quiet title to a lot in a subdivision located in the City of Compton in Los Angeles County. Defendant, Poinsettia Land Company, the former owner, is the present owner of the property unless plaintiffs' tax title is valid. The court found that plaintiffs are the owners of the land, thereby determining their tax title to be good, and rendered judgment accordingly. Defendant appeals.

The property was deeded to the state in 1933, following a sale for taxes levied for the fiscal year 1927–28. It was deeded by the state to the City of Compton in 1943 and was later deeded to plaintiffs by the city. At the time of the assessment the property was in the Compton Union High School District and the levy was in part for the benefit of the district.

Two grounds of alleged invalidity are asserted by defendant. It is contended (1) that in fixing the tax rate for 1927-28 the board of supervisors miscalculated and underestimated by $61,554.38 the portion of the revenue to be received from the tax upon unsecured personal property; that the resulting rate was .0021 higher by reason of such miscalculation, and that it resulted in the payment of excessive taxes upon real and secured personal property, the overcharge upon the lot in question amounting to more than one cent. The second ground of attack is that the assessment roll failed to show the Compton Union High School District as one of the school or revenue districts in which the property was located, as required by then section 3650(11) of the Political Code. Each of these defects in the proceedings is relied upon by appellant as sufficient to render void the certificate of sale and the deed to the state under which plaintiffs claim.

[1] The ground of invalidity predicated upon the failure to take into consideration in fixing the budget all of the revenue to be derived from the tax on unsecured personal property, which resulted in an excessive rate and tax upon real property and secured personal property, was passed upon by the Supreme Court in City of Compton v. Boland, 1945, 26 Cal.2d 310, 158 P.2d 397, the assessment and levy there considered being those of Los Angeles County for the same fiscal year, namely, 1927–28. The tax deed title of the city was upheld, one of the grounds of the decision being that the illegal method followed by the board of supervisors was one which might have been authorized by the legislature initially, that it therefore was subject to validation by subsequent legislation, and that the questioned proceedings were validated by the curative act of 1943, Stats. 1943, p. 1993, Deering's Gen.Laws, Act 8443. Recognizing this ground of the decision in the Boland case as one which is decisive upon the point, we hold that the proceedings which resulted in the inequality of which defendant complains were validated by the curative act.

[2] Defendant seeks to escape from the operation of the curative act, contending that since it owned the property before the assessment was levied, it had a vested right which could not be taken from it by retroactive legislation. It endeavors to find support for this position in Miller v. McKenna, 1944, 23 Cal.2d 774, 147 P.2d 531. All that the court held in that case was that the legislature could not validate tax proceedings as against a mortgagee who had acquired title to the land under a mortgage, held prior to the assessment, by foreclosure between the date of the assessment and the passage of the validating act. The doctrine thus stated in Miller v. McKenna was held in the Boland case to be inapplicable except as a protection to intervening rights.

[3, 4] In urging its other point, appellant states:

"On September 6, 1927, the Board of Supervisors of the County of Los Angeles levied a tax upon all real, secured personal, and unsecured personal property in the Compton Union High School District, including the subject property, for the maintenance of the Compton Union High School District * * *; also levied a tax for the purpose of making payments upon certain school bonds, including those of the Compton Union High School District * * *;

"Subsequently, the Assessment Roll was made up by the Office of the Assessor of Los Angeles County, and the figures representing extensions of the items set up on the Assessment Roll were filled in by the Office of the Auditor of Los Angeles County. In making up the roll the Assessor showed opposite the printed words 'School Dist.' the rubber stamped words 'Compton City.' * * * This is the only reference on the roll to any school district. There is no reference on the roll whatsoever to the Compton Union High School District, for the maintenance of which a tax was levied as stated hereinabove.

"* * * The law in effect during the entire years 1927 and 1928 included Political Code Section 3650, Subdivision 11, Stats.1927, p. 400, which later became subdivision 12 Stats.1929, p. 129, which provided that among other things the assessment book must show: 'The school, road, and other revenue districts in which each piece of property assessed is situated.'"

It appears from appellant's brief that the Compton City School District is an elementary school district, the territory of which, with certain surrounding territory, is included in the Compton Union High School District. If the statement on the assessment roll meant only that the property was in the Compton City School District, it would necessarily mean that it was also within the Compton Union High School District and would thus meet the specific objection which appellant makes. It is not contended that the description was inadequate for any other reason. Undoubtedly it would have been competent for the legislature to provide for an assessment roll which would describe the property assessed in any manner that would show it to be within the district covered by the levy which was the foundation of the assessment. The tax was levied upon the land situated in the high school district and for the benefit of the district; there was also a description of the property which was sufficient to show that it was within the high school district for which the tax had been levied. Under those circumstances an irregularity consisting of a failure to comply with any legal requirement for a more specific description would be subject to correction by a validating act. The construction heretofore given to the

1943 act in the cases cited is broad enough to encompass such irregularities as the one here claimed in the description of the property upon the assessment roll.

Another act was passed by the 1945 legislature which follows the 1943 act, but includes in its validating provisions, in addition to state, county, city and district agencies, acts and proceedings of each "revenue district." And it defines "revenue district" as including "every city and district for which the county officers assess property and collect taxes or assessments." If there be any question as to the applicability of the former act, there can be none as to the latter. If the description of the property as originally entered on the assessment rolls was insufficient, the error has been cured by the validating acts.

The judgment is affirmed.

DESMOND, P. J., and PARKER WOOD, J., concur.

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71 Cal.App.2d 528

HILL v. NELSON.

Civ. 14774.

District Court of Appeal, Second District, Division 1, California.

Nov. 2, 1945.

Rehearing Denied Nov. 29, 1945.

Hearing Denied Dec. 27, 1945.

1. False imprisonment 🔑7(3)

An arrest by general contractor constructing airfield for army air corps of picket who boarded a truck loaded with lumber for the project was not illegal on theory that no public offense was committed by picket in contractor's presence, where contractor's accusation was disturbing the peace. Pen.Code, §§ 415, 602(j).

2. False imprisonment 🔑39

In action for false imprisonment of plaintiff by general contractor constructing airfield for army air corps who caused plaintiff's arrest for disturbing the peace by interfering with movement of truck loaded with lumber for the project, whether boundaries of project were clearly marked was for jury. Pen.Code, § 415.

3. False imprisonment 🔑39

In action for false imprisonment by general contractor constructing airfield for army air corps who caused arrest of plaintiff who interfered with movement of truck loaded with lumber for the project, contractor's liability was for jury.

4. Trial 🔑296(2)

In action for false imprisonment, alleged error in using words "state law" instead of statutory words "public offense" in instruction that, if plaintiff was violating a state law at time of his arrest, arrest was justified, was harmless when considered with other instructions, particularly under evidence that plaintiff committed one or more public offenses in presence of defendant. Pen.Code, § 837.

5. Appeal and error 🔑1064(1)

In action for false imprisonment, instruction that if a person commits a trespass, owner, occupant, or person in charge is justified in ejecting the intruder or in holding him and calling upon officer to take intruder into custody for investigation, was not prejudicially erroneous as justifying a citizen to arrest a "civil trespasser", since instruction said nothing about arrest. Pen. Code, § 837.

6. False imprisonment 🔑40

In action for false imprisonment, instruction that person who willfully commits any act which seriously disturbs or endangers public peace or health is guilty of a public offense was warranted by evidence.

7. False imprisonment 🔑40

In action for false imprisonment, when facts with reference to alleged probable cause for arrest are admitted or established beyond controversy, determination of legal effect is absolute and jury must be told that there was or was not probable cause, but, when facts are controverted, determination of legal effect is necessarily hypothetical, and jury must be told that if they find the facts in designated way, such facts do or do not amount to probable cause.

8. Appeal and error 🔑1066

In action for false imprisonment, alleged error in instructions failing to inform jury in more detail what facts would or would not constitute probable cause was harmless, where evidence disclosed that plaintiff's acts committed in presence of defendant afforded probable cause to believe that plaintiff was then committing one or more public offenses which demanded plaintiff's immediate restraint. Pen.Code, § 837.

◆

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Howard L. Hill against Victor J. Nelson to recover damages for false imprisonment. From a judgment for defendant, plaintiff appeals.

Affirmed.

Arthur Garrett, of Los Angeles, for appellant.

Stater & Dawson, of Los Angeles, for respondent.

DORAN, Justice.

This is an action for damages for false imprisonment. The jury returned a verdict in favor of the respondent and the appeal is from the judgment entered in conformity therewith.

On August 1, 1941, the respondent Victor J. Nelson, as general contractor, was engaged in constructing an airfield and buildings for the Polaris Flying Academy, located about five miles west of Lancaster, California. The project was designed for the training of army air corps pilots, and some air corps personnel as well as army engineers and inspectors, were then on the premises. The buildings, which included training camps, hangars, housing, hospitals, mess hall, etc., were up and in course of construction, and about 300 men were then employed on the job under the supervision of the respondent. Entrance to the project was afforded by a dirt road some 250-300 feet from the highway, running across a filled ditch.

Signs, such as, "Defense project, private property, keep off," and "Trespassers will be prosecuted" were posted near the entrance. There was some conflict in the testimony as to whether there was a fence enclosing the project at this time or whether part of such fence had been removed during the construction work.

At the time in question, August 1, 1941, a picket line was being maintained near the entrance to the Polaris Flying Academy, and the plaintiff-appellant Howard L. Hill had been sent there as a picket captain, organizer, assistant business agent and paymaster. Appellant arrived there about 7:00 A. M. and about 8:00 A. M. a truck and trailer loaded with lumber for the project, approached the entrance. It appears that appellant Hill first yelled at the driver of the truck stating that there was a picket line, and when the truck failed to stop, appellant jumped on the running board and rode the truck into the property of the Polaris Flying Academy, a distance of some 150 or 200 feet. According to the testimony of the respondent, Hill "was jerking and pulling at the driver, together with yelling at him." This testimony was corroborated by Charles Fleishman who was employed on the Polaris job, and by Charles Carsten, carpenter foreman. The appellant testified that he did not know where the property line was, that he did not see any fence or signs, and that he did not jump on the truck or interfere with the driver. The defendant Nelson, who had witnessed the episode, and who had previously warned the pickets to remain outside the property line, then "went over and asked Mr. Hill to get down off the truck and to come into the office, that he was under arrest. * * * I told him he was under arrest for disturbing the peace and for trespassing." Hill accompanied Nelson into the office and the latter telephoned the sheriff at Lancaster. Hill was not handcuffed and "just sat there" in the office until about 8:30 A. M. when the officers arrived. Nelson testified: "I told Stockbridge that he had been trespassing and creating a disturbance, and told him I wanted him arrested, and he asked Mr. Hill if that was true, and Mr. Hill says, 'Yes, I guess it is, I must have let my job get away with me,' or words to that effect." The appellant was then taken to Lancaster and as the judge was not there, Hill was taken by the officers to Newhall, arriving about 9:30 or 10:00 A. M. Plaintiff's attorney, Arthur Garrett, having been summoned, drove to Newhall about noon, and after a conference with the Justice of the Peace the latter refused to issue a complaint and appellant was then released.

In the appellant's brief it is argued that, (I) the evidence is insufficient to support the verdict in favor of the defendant Nelson; (II) the court misdirected the jury in matters of law. Appellant's first assignment is predicated on the proposition that "the only circumstances under which one person may arrest another for a misdemeanor without a warrant is when the misdemeanor is committed in the presence of the person so making the arrest", and that the appellant Hill had committed no such misdemeanor in Nelson's presence.

Penal Code, § 837, provides that: "A private person may arrest another: 1. For a public offense committed or attempted in his presence. 2. When the person arrested has committed a felony, although not in his presence. 3. When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it."

[1] Appellant's argument maintaining the illegality of the arrest is based upon the premise that the only possible offense committed by appellant in respondent's presence, was that of trespass as defined by Section 602(j) of the Penal Code; that since appellant did not trespass "for the purpose of hunting, shooting, killing, or destroying any animal, or bird on such lands," as mentioned in the latter part of such statute, no "public offense" was committed and therefore the restraint and arrest were unwarranted. However, the record reveals that the offense of disturbing the peace, as defined by Section 415 of the Penal Code, was, in fact, the accusation made by the respondent Nelson both to the appellant Hill on making the arrest, and upon arrival of the officer Stockbridge. Likewise, the officer's report, which was read in evidence, contained the following corroborative statement: "Viol. 415PC—Distm. the Peace. (citizen Arrest)."

The Polaris Flying Academy under construction, was a "Defense Project", so designated by signs, to be used for the training of army air corps pilots. The United States flag was flying, visible from the road. "Army engineers, army inspectors and some air corps personnel" were on the premises at the time in question, and respondent Nelson had been given definite instructions "to keep everyone off the property who was not concerned with the construction or with the progress of it." There was no evidence of malice or bad faith on the part of defendant.

One aspect presented by appellant's conduct, is described by an instruction which the appellant conceded to be "a correct statement of the law," namely that "A person who intentionally and maliciously interferes or tampers with, or attempts to interfere or tamper with real or personal property with reasonable grounds and belief that such act will hinder, delay or interfere with the preparation of the United States or of any of the states for defense or for war, or with the prosecution of war by the United States, is guilty of a public offense."

[2] Appellant contends that "There is no evidence that the premises were enclosed by a fence." As hereinbefore mentioned, the record presents some conflict in reference to this matter. There was, however, substantial testimony to the effect that the boundaries of the project were clearly marked by fences, signs and survey lines, and any conflict has now been resolved by the jury's finding against appellant's contention. The appellant's own testimony concerning signs and fences was, in fact, equivocal and uncertain, for example: "to be truthful, I can't swear that I can say anything about either the signs or this fence around there, it might be something I had seen some other time, I don't know." Moreover, in reference to the charge of disturbing the peace, the matter of fencing is not of importance.

[3] That the evidence supports the verdict, there can be no question.

[4] It is also urged in appellant's brief that a reversal is warranted for the reason that "The court misdirected the jury in matters of law." One of these assignments of error is that the jury was instructed as follows: "If the plaintiff Howard L. Hill was actually violating a state law at the time of his arrest * * * then his arrest was justified"; the contention being that the term "public offense" should have been employed rather than the expression "violating a state law." While it is true that Section 837 of the Penal Code authorizing arrests without warrant, makes use of the term "public offense", and that, as urged by appellant, certain "state laws" relate to civil rather than criminal jurisprudence, it seems clear that the terminology used in the instruction cannot have resulted in prejudice to the appellant. When considered in connection with the other instructions given, any error in reference to this matter must be deemed harmless, particularly in view of the evidence hereinbefore mentioned, tending to show that the appellant Hill did commit one or more "public offenses" in the presence of the respondent.

Error is also predicated upon the court's instruction concerning trespass by entering lands enclosed by a fence, appellant maintaining that "even if it had been correct, (it) would not have been warranted by the evidence * * * (showing) that the land in question was not enclosed by a fence." As already pointed out, although there was some conflict as to this matter, substantial evidence was presented on which the jury could reasonably conclude that the land was fenced.

[5] The court further instructed that: "If a person commits a trespass * * * the owner, occupant or person in charge * * * is justified either in ejecting such intruder * * *, or in holding him and calling upon the officers of the law to take the intruder into custody for an investigation." Appellant again complains that this was erroneous as apparently justifying a citizen arrest of a "civil trespasser." But it is to be observed that the instruction just quoted says nothing whatsoever about arrest, and is apparently consistent with the holding in Collyer v. S. H. Kress & Co., 5 Cal.2d 175, 180, 54 P.2d 20, 23, which says: "Ordinarily, the owner of property in the exercise of his inherent right to protect the same, is justified in restraining another who seeks to interfere with or injure it." No prejudice to the appellant is seen in the giving of this or other instructions on the subject of trespass.

[6] The instruction that "A person who wilfully and wrongfully commits any act which seriously disturbs or endangers the public peace or health is guilty of a public offense," is conceded by the appellant to be "not an incorrect statement of the law, (but) it was not warranted by the evidence in this case." When it is considered that appellant's conduct included jumping on a truck loaded with lumber, "jerking and pulling at the driver," as the latter was delivering material to a defense project on which some 300 men were then working, some of them "working right alongside" the path of the truck, such instruction cannot be said to have been unwarranted by the evidence.

[7] It is argued by appellant that the trial court committed reversible error in that the instructions "submitted to the jury, as a matter of fact, the question whether the respondent had probable cause for believing the appellant guilty of a public offense." In Collyer v. S. H. Kress & Co., 5 Cal.2d 175, 181, 54 P.2d 20, cited by appellant, plaintiff was arrested by the manager of a retail store, accused of shoplifting, prosecuted and acquitted. The court there said: "What is probable cause, as has been often announced, is not a question of fact for the jury, but one of law for the court, to be decided in accordance with the circumstances at the time of the detention, unhampered by the outcome of the charge against the plaintiff of the public offense or by the conclusions of the trial court." However, in that case as in this, the court concluded that the defendants were justified in detaining the plaintiff, and reversed a judgment for the latter. In 3 Cal.Jur. 120, 121, the rule is stated as follows: "When the facts in reference to the alleged probable cause are admitted or established beyond controversy, then the determination of their legal effect is absolute, and the jury are to be told that there was or was not probable cause, as the case may be. When, however, the facts are controverted, and the evidence is conflicting, then the determination of their legal effect is necessarily hypothetical, and the jury are to be told that if they find the facts in a designated way, then that such facts, when so found, do or do not amount to probable cause." The above quotation appears to embody a correct statement of the law.

[8] The instructions given in the instant case defined probable cause, telling the jury that: "Probable cause is a defense in actions of this kind and if you believe from the evidence before you that the person making the arrest had probable cause to believe the plaintiff guilty of a public offense, then there existed probable cause for the detention of the plaintiff for a reasonable time for the purpose of investigation in a reasonable manner." It is doubtless true that, under the rule hereinbefore mentioned, the instructions should have informed the jury in more detail, just what facts would or would not constitute probable cause in the particular case, leaving it to the jury to decide whether such facts existed. Such error, however, must be deemed harmless in the present case for the reason that, as heretofore indicated, the evidence discloses that the appellant's acts, committed in the presence of the respondent, afforded adequate and probable cause to believe that appellant was then and there committing a public offense or offenses which demanded immediate restraint of the actor. In other words, had the trial court been more explicit on the subject of probable cause, or had the court decided the question as a matter of law, the instructions

then given would have been much less favorable to the appellant's case than were the instructions complained of.

Neither in respect to the sufficiency of the evidence to support the verdict, nor in reference to the instructions given, can appellant's contentions be sustained. The judgment appealed from is therefore affirmed.

YORK, P. J., and WHITE, J., concur.

71 Cal.App.2d 565

JUDSON v. HERRINGTON.

Civ. 3298.

District Court of Appeal, Fourth District, California.

Nov. 8, 1945.

1. Appeal and error 🔑**1097(1), 1195(1)**
Courts 🔑**99(1)**

The application of the law of the case rule is somewhat a matter of discretion.

2. Mines and minerals 🔑**26**

The validity of a location notice could not be challenged on the basis of a location notice filed the previous year by the same claimant which prior notice contained nothing indicating that it covered the same land as that covered by notice in issue particularly where evidence indicated that prior notice referred to different land. 30 U.S.C.A. § 28.

3. Mines and minerals 🔑**26**

Generally, where the required assessment work is not done, mining claim is open to location in the same manner as though no prior location had been made. 30 U.S.C.A. § 28.

4. States 🔑**4**

A law passed by a state cannot limit or abridge a constitutional federal enactment and, where the two come into conflict, the federal law must control.

5. States 🔑**4**

The section of the Public Resources Code providing, in effect, that, if a locator fails to do required development work on his claim, he shall be disqualified from relocating the same ground or any part thereof for three years is in conflict with and must give way to the federal act providing that, where required assessment work is not done, claim shall be open to location in same manner as though no prior location had been made. St.1939, p. 1085, § 2321; 30 U.S.C.A. § 28; Act Cong.Sept. 9, 1850, § 3, 9 Stat. 452.

6. Mines and minerals 🔑**29(6)**

Proof that plaintiff and his predecessors possessed and worked mining claim for limitation period of five years obviated necessity of proof of valid location notices and was equivalent to proof of valid location. 30 U.S.C.A. § 38.

7. Mines and minerals 🔑**27(1), 29(6)**

Where plaintiff and his predecessors had possession of mining claim and mined, shipped and sold bentonite for more than five years after January 4, 1930, plaintiff had right to a patent without proof of valid locations by his predecessor and thereafter claims were lawfully in possession of plaintiff and were not open to location, by others. 30 U.S.C.A. § 38.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by Paul Judson against E. H. Herrington to quiet title to two mining claims. Judgment for plaintiff and defendant appeals.

Affirmed.

Willedd Andrews, of Los Angeles, for appellant.

Vincent & Eaton and Eldred L. Eaton, all of Whittier, for respondent.

MARKS, Justice.

This is an appeal from a judgment which quieted plaintiff's title to two mining claims, Brandywine No. 1, and Brandywine No. 2, in San Bernardino County.

The case has been here before. Judson v. Herrington, 55 Cal.App.2d 476, 130 P.2d 802. There is no serious difference in the material evidence introduced at the two trials and the issues argued now were covered in the earlier opinion where there is a detailed statement of facts which need not be repeated here.

Defendant claims there is a material difference in the evidence introduced in the second trial from that before the court in the first. He stresses the testimony of W. L. Page, the original locator of the two claims, to the effect that prior locations had been made by him in 1928. An examination of the record discloses that the date "1928" occurred only in the questions propounded to Mr. Page by counsel for defendant which were answered in such a manner as to indicate that he had located the property covered by the Brandywine claims in 1928, two years prior to the locations of the claims on January 4, 1930, under which plaintiff claims. Later in the cross-examination Mr. Page realized that he had been led into testifying concerning these locations as though they had been made in 1928. He then corrected his testimony and said that he first located the claims under other names in 1927, did no assessment work on them and again located them on January 4, 1930. No location notices filed in 1928 were introduced but the location notices of 1927 were produced and we are satisfied that Mr. Page did not locate these claims in 1928, nor at any other times other than 1927 and in 1930. It is also clear that he did no assessment work on the property following the 1927 locations but built the necessary monuments, posted and recorded the location notices and otherwise conformed to the federal laws in locating the properties in 1930 as placer claims containing bentonite.

[1] The questions presented by defendant were decided on the former appeal upon practically the same evidence which we now have before us. As the application of the rule of the law of the case seems now to be somewhat a matter of discretion vested in the courts (England v. Hospital of the Good Samaritan, 14 Cal.2d 791, 97 P.2d 813) we will consider the questions presented and briefly outline the evidence necessary to understand them.

On March 17, 1933, Page and his wife conveyed the two claims to E. T. Webb, and on August 8, 1933, Webb conveyed them to Paul Judson, plaintiff in this action.

Early in 1930, Page leased the property to Lewis Thompson who went into possession, had the property surveyed, erected posts at the sites of the monuments and commenced mining operations, shipping and selling four car loads of bentonite. His workings ran into sandstone and he abandoned the property in the fall of 1930. Page then leased the claims to Martinez and Becker who went into possession early in 1931, and conducted active mining operations for several years. It seems clear that mining operations were carried on for a number of years by the respective owners or their lessees from early in 1930 to 1938 or 1939 and that bentonite was mined, shipped and sold from the claims during that period. Further, the owners took advantage of the various moratorium statutes although mining operations were continued so that the annual assessment work was done. See Judson v. Herrington, supra.

On July 1, 1935, H. E. Herrington and his associates posted and recorded location notices on property which included the two claims in question here. Later Herrington acquired whatever interest his associates had in the property. On July 27, 1939, Judson started this action to quiet his title to the two Brandywine claims. At the first trial in February, 1941, judgment was rendered in favor of the defendant Herrington which was reversed on appeal. At the second trial in April, 1944, plaintiff had judgment quieting his title to the two bentonite claims.

[2] Defendant introduced in evidence a location notice signed by Page, dated May 7, 1929, recorded May 11, 1929, and argues that this is fatal to the claim of plaintiff under the 1930 locations. There is nothing in the 1929 location notice indicating that it was upon the property covered by either of the Brandywine locations. Page testified, "* * * but it didn't cover this ground where the Brandywine was at all. * * * It was different ground." We fail to see how the 1929 location can have any bearing on this case.

Defendant's brief is largely devoted to arguments based on purported 1928 locations, which were not made, and on the 1929 location which was on property not involved here. He concludes his argument by reference to section 1426s of the Civil Code, now section 2321 of the Public Resources Code, St.1939, p. 1085, which provides in effect that if a locator fails to do the required development work on his claim he shall be disqualified from relocating the same ground or any part thereof for three years and that any attempted location thereof by him within such time shall be void. As the 1927 locations were made within three years prior to January 4, 1930, and as we assume that the location covered all or a part of the same property we should consider that question.

It is the contention of defendant that the locations of the two claims by Page in January were void under the California law because Page had located the same claims within the prior three years and had failed to do any assessment work under the earlier locations.

[3] Section 2324, U.S.Revised Stats., sec. 28, Ch. 2, Title 30 U.S.C.A., provide in effect that where the required assessment work is not done the claim shall be open to location in the same manner as though no prior location had been made. Kramer v. Gladding, McBean & Co., 30 Cal.App.2d 98, 85 P.2d 552. Defendant admits this general rule but urges that the provisions of the California statute prohibit the original locator from again locating the claims within three years but that under the federal rule any other person may locate the property within that time.

The right of an original locator who had done no assessment work to again locate the claim, was before the court in Rohn v. Iron Chief Mining Co., 186 Cal. 703, 200 P. 644, 645, and was disposed of as follows: "We are of the opinion that the language of section 2324 does not have the effect contended for by the learned author above mentioned. It expressly declares that, if the work required is not done within the year specified, the claim or mine 'shall be open to relocation as if no location of the same had ever been made.' In other words, it is then to be considered as vacant public land of the United States, subject to entry by any qualified person, as provided in section 2319 [30 U.S.C.A. § 22]. If the original locator is a qualified person, he is eligible to make a relocation under this language as a stranger would be."

[4] The effect of the California Code provisions now before us were not considered in the Rohn case. It is well settled that a law passed by one of the States of the Union cannot limit or abridge a constitutional federal enactment; that the federal law must control where the two come into conflict. Belk v. Meagher, 104 U.S. 279, 26 L.Ed. 735; State of Florida v. Mellon, 273 U.S. 12, 47 S.Ct. 265, 71 L.Ed. 511; City of San Diego v. Van Winkle, 69 Cal. App.2d 237, 158 P.2d 774.

Section three of the Act of Congress of September 9, 1850, 9 U.S.Stats. at Large, 452, admitting California into the Union contained the following: "That the said State of California is admitted into the Union upon the express condition that the people of said State, through their legislature or otherwise, shall never interfere with the primary disposal of the public lands within its limits, and shall pass no law and do no act whereby the title of the United States to, and right to dispose of, the same shall be impaired or questioned; * * *." See, Donnelly v. United States, 228 U.S. 243, 33 S.Ct. 449, 57 S.Ct. 820, Ann.Cas.1913E, 710.

[5] It seems clear that an attempt by the California legislature to limit the right of a citizen, given by federal law, to locate mineral claims on property which is part of the public domain of the United States cannot be upheld. This was expressly held in Dalton v. Clark, 129 Cal.App. 136, 18 P.2d 752.

[6] Another reason for upholding the judgment in favor of plaintiff is found in section 38, Ch. 2, Title 30 U.S.C.A., Sec. 2332, U.S.R.S., which provides in effect that when a person or an association and their grantors have held and worked their claims for the period of the State statute of limitations (in California five years), evidence of such possession and working the claims shall establish the right to a patent. This section has been frequently construed by the courts of this State which have consistently held that proof of possession and working claims for five years obviates the necessity of proof of valid location notices and is equivalent to proof of valid locations. See Altoona etc. Co. v. Integral, etc., Co., 114 Cal. 100, 45 P. 1047; Dalton v. Clark, supra; McLean v. Ladewig, 2 Cal.App.2d 21, 37 P.2d 502; Lind v. Baker, 31 Cal.App.2d 631, 88 P.2d 777; Judson v. Herrington, supra.

[7] Here, Page and his successors in interest had possession of the property and mined, shipped and sold bentonite from it for more than five years after January 4, 1930. Proof of these facts is sufficient to establish the right to a patent without proof of the valid locations by Page. Defendant and his associates did not attempt to locate the claim until July 1, 1935, after the expiration of the five year period. At that time the claims were lawfully in the posses-

sion of plaintiff and were not open to location. The attempted locations of the claims by defendant and his associates could create no valid rights in them. Belk v. Meagher, supra; Ring v. United States Gypsum Co., 62 Cal.App. 87, 216 P. 409; Lind v. Baker, supra; Judson v. Herrington, supra.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

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71 Cal.App.2d 538

GRIMES v. NICHOLSON.

Civ. 14891.

District Court of Appeal, Second District, Division 2, California.

Nov. 5, 1945.

Rehearing Denied Nov. 27, 1945.

1. Contracts 🔑28(3)

Evidence that electrical contractor stated that he would work on jobs as directed by defendant on cost-plus basis and that he wanted a minimum of $500 a month, and that defendant answered "O.K.", sustained finding that there was a binding contract on contractor's terms, since "O.K." means "correct", "all right", and indicates approval.

See Words and Phrases, Permanent Edition, for all other definitions of "O. K."

2. Evidence 🔑445(7)

Evidence of oral contract whereby electrical contractor agreed to work on jobs as directed by defendant on cost-plus basis with guaranteed monthly minimum was not inadmissible as varying a written contract on theory that such written contract consisted of purchase orders subsequently issued by defendant, ordering work on various jobs.

3. Contracts 🔑141(1)

In electrical contractor's action on oral contract valid on its face to do work on jobs as directed by defendant, burden was on defendant to prove facts to overcome statutory presumptions of regularity of transactions and obedience to law, and to prove contention that contract violated O.P.A. regulations. Code Civ.Proc. § 1963, subds. 19, 33.

4. Appeal and error 🔑1107

In electrical contractor's action on contract to work on jobs as directed by defendant-appellant, who contended that contract violated O.P.A. regulations because of charges for use of contractor's equipment, where defendant on appeal conceded inapplicability of regulations relied on at trial, Court of Appeal would not investigate other regulations, though having judicial knowledge thereof, when first presented in defendant's closing brief.

5. Appeal and error 🔑882(3)

An appellate court will not consider theory of case different from that urged at trial and first presented on appeal.

6. Appeal and error 🔑882(3)

Where cause is tried and evidence introduced on theory that pleadings raised material issue and court renders judgment on that theory, parties cannot say for first time on appeal that there was no such issue.

7. Appeal and error 🔑181

If case is tried, submitted, and decided on certain theory, party cannot first raise on appeal an objection that could have been obviated if made below.

8. Appeal and error 🔑181

Errors not taken advantage of at trial cannot be relied on in appellate court.

9. Appeal and error 🔑179(2)

In electrical contractor's action on contract to work on jobs as directed by defendant, who offered no evidence to support contention that contract violated O.P.A. regulations because of charges for use of contractor's equipment, defendant could not claim on appeal that contract was illegal because violating certain other regulations.

10. Appeal and error 🔑110

Order denying new trial is not appealable.

◆

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Action by Harold M. Grimes, as administrator of the estate of Richard Grimes, deceased, substituted for Richard Grimes, doing business as Grimes Electric, against H. M. Nicholson, on an oral contract relating to installation of electrical equipment on jobs as directed by defendant, who filed a cross-complaint. From a judgment for plaintiff and an order denying a new trial, defendant appeals.

Appeal from order dismissed and judgment affirmed.

Richard A. Haley, of Los Angeles, for appellant.

Forgy, Reinhaus & Forgy, of Santa Ana, for respondent.

WILSON, Justice.

Appeal from a judgment in favor of plaintiff in an action based on an oral contract entered into on or about June 1, 1943, whereby respondent agreed to furnish to appellant equipment and labor for the performance of work in installing electric wiring and other equipment on jobs as directed by appellant. The complaint alleges that defendant agreed to pay "the cost of the work done and the reasonable rental value of the equipment, plus five per cent of the sum of said costs and reasonable value of rentals for plaintiff's equipment as profit, plus an additional ten per cent of the cost of said work and labor done and reasonable value of equipment, for overhead expenses, with the further agreement that at all times during the continuance of said contract the percentage for profit and overhead would amount to $500.00 per month." The answer admitted a contract whereby respondent would furnish to appellant equipment and labor for doing work on jobs as directed by appellant, and according to plans and specifications and usage and custom of electrical contractors generally (an allegation not contained in the complaint); denied that appellant agreed that the profit and overhead would amount to the minimum sum alleged in the complaint; and alleged that there was a cost-plus contract based upon the general usage and custom of the trade. There was no other denial of respondent's allegation as to the terms of the contract. In his cross-complaint appellant alleged a contract whereby respondent agreed to accept for his services the cost of the work done plus five per cent of said cost as profit, plus an additional ten per cent as overhead. Respondent denied this allegation.

Upon the issues thus made by the pleadings the trial court made a finding of fact that the agreement was in the terms alleged in the complaint. Appellant attacks the finding as not being sustained by the evidence, and further asserts that such a contract, if entered into, was illegal and void for the reason that it was in violation of the regulations of the Office of Price Administration.

[1] 1. *Sufficiency of the evidence.* The finding of fact that the contract entered into by the parties provided that the overhead and profit should be not less than $500 per month is sustained by the evidence. Referring to the provision in the contract for a minimum charge for overhead and profit, plaintiff testified:

"Q. It was mentioned in the first conversation? A. Yes; I told him we wanted a minimum of $500.00 per month for equipment and organization.

"Q. What did he say to that? A. He was agreeable. He did not say yes or no, but he said, 'O.K. we will go to work.' That was on the first day. * * *

"Q. Did you have any conversation in which five and ten were mentioned? A. Yes; I told him since we had so many jobs, and we knew the first job would run the minimum, and I said, 'We will bill you on the basis of 10-5 cost plus until we get through with the job, and we will make a final accounting settlement on the basis of $500.00 a month.'

"Q. What did he say? A. 'O.K.'"

Respondent's superintendent related a conversation with appellant as follows:

"Q. Was there anything said about minimum? A. Very definitely about minimum.

"Q. What was said? A. $500.00 a month.

"Q. Who said that? A. Mr. Grimes said—it was Mr. Nicholson first.

"Q. What did Mr. Nicholson say? A. The thing I recall that Mr. Nicholson said was, when he wrote the purchase order for the first job, he called his bookkeeper into the office and told him that it would be on a cost plus basis, and that Mr. Grimes felt that it should be $500.00 minimum charge for equipment and services of Grimes Electric for the 'shop,' as he called it."

Respondent's statement of the terms upon which he would perform the work, followed by appellant's answer "O.K." and "O.K. we will go to work," constituted a valid and binding contract between the parties whereby appellant agreed to the conditions as stated by respondent. "O.K." means "correct," "all right," and indicates approval. Muegler v. Crosthwait, Mo.App., 179 S.W.2d 761, 763; Keel v. Wynne, 210 N.C. 426, 187 S.E. 571, 572; International Filter Co. v. Conroe etc. Co., Tex.Civ.App., 269 S.W. 210, 214; Wright v. Matters, 204 Ill.App. 398; Rosser v. Cole, Tex.Civ.App., 226 S.W. 510, 511; Board of Com'rs of Gunnison County v. Hider, 47 Colo. 443, 107 P. 1068, 1069; Indianapolis, etc., Co. v. Sands, 133 Ind. 433, 32 N.E. 722, 724.

[2] By the various purchase orders issued by appellant to respondent the performance of work on each of the several jobs was ordered on a cost-plus basis, no reference having been made to a minimum monthly profit and overhead. Appellant contends that the purchase orders constituted a contract in writing between the parties, and that the evidence concerning a minimum amount for overhead and profit was inadmissible in that it was an attempt to vary the terms of a written contract by oral evidence. This contention is without merit. The contract was oral and was entered into prior to the issuance of any of the purchase orders. The latter were merely directives from appellant to respondent stating the places and character of the work to be performed under the contract previously made. Furthermore, the oral testimony was admitted subject to a motion to strike and such motion was not made.

[3] 2. *Validity of the contract.* Appellant's contention that the contract is in violation of the regulations of the Office of Price Administration by reason of the fact that it provided for charges for the use of respondent's equipment not allowed by said regulations, is not sustained by the record. It is presumed "that private transactions have been fair and regular" and "that the law has been obeyed." Code Civ.Proc. § 1963, subds. 19 and 33. The contract is valid on its face. If facts existed that tended to prove its invalidity and to overcome the presumption the burden rested on appellant to prove such facts. He failed to do so.

The case was tried on the theory that certain regulations of the Office of Price Administration controlled the contract and the work performed thereunder, and said regulations were presented to and considered by the trial court. It now appears, and appellant concedes in his brief, that the same were not applicable to work of the character of that which was performed for appellant by respondent. Appellant, in his closing brief, has presented other regulations to this court and asks us to find that the work was controlled thereby and to reverse the judgment upon appellant's claim that the same were not complied with by respondent.

[4-8] The theory adopted by counsel for appellant and respondent at the trial charts the course of the case in this court. Such regulations, if any, as were applicable to the contract here under consideration and to the work performed by respondent, were public documents and were available and could have been drawn to the attention of the trial judge. We refuse to embark upon an investigation of regulations that have been discovered by appellant since the rendition of the judgment, even though they, like statutes, are within the judicial knowledge of this court, and by the same token were before the trial court. Where a contract is claimed to be invalid under the preemption laws of the United States, of which the court is bound to have knowledge, if the question was not raised in the trial court, the point is not available on appeal. King v. Meyer, 35 Cal. 646, 649. The law is well settled in this state that "an appellate court will not consider a theory of a case different from that urged in the trial court and which is presented for the first time on appeal." Title Ins. & Trust Co. v. Graham, 44 Cal.App.2d 660, 662, 112 P.2d 935, 936. When a cause is tried and evidence introduced on the theory that a material issue has been raised by the pleadings and the court renders judgment on that theory, the parties will not be allowed to say for the first time on appeal that there was no such issue. Schroeder v. Mauzy, 16 Cal.App. 443, 447, 118 P. 459; Sprigg v. Barber, 122 Cal. 573, 579, 55 P. 419; Illinois Trust & Savings Bank v. Pacific Ry. Co., 115 Cal. 285, 297, 47 P. 60; National Union Fire Ins. Co. v. Nason, 21 Cal.App. 297, 299, 131 P. 755. If a case is tried, submitted, and decided on a certain theory, a party will not be permitted to raise for the first time on appeal an objection that could have been obviated if it had been made in the court below. Milwaukee Mechanics' Ins. Co. v. Warren, 150 Cal. 346, 353, 89 P. 93. Errors not taken advantage of at the trial cannot be raised in the appellate court. Morgan v. Hugg, 5 Cal. 409, 410.

[9] It is obvious that if the regulations now asserted to be controlling had been presented at the trial, respondent would have been accorded the privilege of offer-

ing evidence to show, if he so claimed, that the same were not pertinent to the case. Appellant relied at the trial on the regulations there presented, and, albeit unwittingly and unintentionally, led the court and respondent to believe that he depended solely thereon. The court rendered its judgment upon the record before it. Appellant cannot now insist that this court consider regulations proffered for the first time in his closing brief. The presumption of fairness, regularity, and legality of the contract has not been controverted. Appellant, having failed to present any evidence showing a violation of the regulations, cannot now advance the claim of illegality of the contract. H. Daroff & Sons, Inc. v. Vitullo, 350 Pa. 501, 39 A.2d 595, 599.

[10] Appellant attempted to appeal from the order denying a new trial. Such an order is not appealable. Kellett v. Marvel, 6 Cal.2d 464, 476, 58 P.2d 649; Joseph v. Vogt, 35 Cal.App.2d 439, 442, 95 P.2d 947.

The judgment is affirmed. The purported appeal from the order denying a new trial is dismissed.

MOORE, P. J., and FOX, Justice pro tem., concur.

71 Cal.App.2d 535

PEOPLE v. MacFARLANE et al.

Civ. 14912.

District Court of Appeal, Second District, Division 1, California.

Nov. 5, 1945.

Hearing Denied Jan. 3, 1946.

1. Costs 🔑185

Under statute, the successful parties were entitled to have taxed as part of the costs the mileage actually traveled by the witnesses for each day's actual attendance at court, notwithstanding that the witnesses were in attendance on consecutive days. Pol.Code, § 4300g.

2. Costs 🔑207

An affidavit supporting appellant's memorandum of costs averring that witnesses named therein were actually in attendance on the day set opposite their respective names and actually traveled the number of miles claimed for each, sufficiently complied with statute so as to authorize taxation as part of the costs of mileage actually traveled by the witnesses. Pol.Code, § 4300g.

◆

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Action by the People of the State of California against Nowland MacFarlane and Rosa MacFarlane and others. From an order retaxing costs in accordance with plaintiff's motion, after judgment in favor of defendants, the defendants appeal.

Reversed with directions.

Martin Forrest, of Los Angeles, for appellants.

Ray L. Chesebro, City Atty. for City of Los Angeles, and Louis A. Babior, Deputy City Atty., both of Los Angeles, for respondent.

YORK, Presiding Justice.

In an action brought to enjoin defendants and to abate a nuisance, judgment was rendered in favor of defendants, who within the time allowed by law served and filed their memorandum of costs and disbursements for notary's fees, witnesses' fees and mileage amounting to $148.60. Thereafter, plaintiff served and filed its notice of motion to tax costs, which was aimed at striking from defendants' cost bill certain items of mileage claimed for witnesses for consecutive days of attendance in court, thereby effecting a reduction of $16.60 in said costs.

When the matter came on for hearing, plaintiff took the position that a witness in attendance on the court on consecutive days is not entitled to mileage for each day's attendance under the provisions of section 4300g of the Political Code which reads: "Witness' fees * * * For each day's actual attendance, when legally required to attend upon the superior court, per day, two dollars in civil cases. * * * Mileage actually traveled, one way only, per mile, ten cents * * *."

This appeal is prosecuted by defendants from the order of the trial court retaxing costs in accordance with plaintiff's motion, and is presented upon an "engrossed settled statement in lieu of both transcripts on appeal."

Appellants urge that section 4300g, Pol. Code, supra, makes "no provision or distinction between consecutive days or nonconsecutive days in allowing witness' fees and mileage for each day's attendance in court, and the prevailing party is therefore entitled to charge mileage actually traveled as well as witness' fees for each day's actual attendance in court of his witnesses whether for consecutive days of attendance or not * * *. A witness acting in good faith in attending court should be entitled to have and receive the fees and mileage provided for him by law."

Respondent, on the other hand, argues that since "the statute makes no reference at all to daily repetitions of travel * * * the legislature did not contemplate daily trips to and from court and home * * * and if the witness made visits to his home during the period of his attendance as a witness, such visits must be deemed to have been made for his own convenience, comfort or economy, or to attend to his own private affairs."

No authorities are cited which pass upon the particular point here raised, although respondent calls attention to the fact that fifty years ago, "the District Attorney of Los Angeles County transmitted his opinion to the County Clerk of Los Angeles County, construing the provisions of said 1895 Act pertaining to mileage for *jurors*, as covering the payment of mileage only for nonconsecutive days of attendance. That construction and practice has been consistently and continuously followed since. The gist of this opinion is that on intervening days, when the juror would not be attending court, and consequently not receiving his *per diem*, the juror would be entitled to return to his home, and in coming back to court he would be entitled to mileage again. * * * The same construction and practice has been and is followed in Los Angeles County in respect to witnesses' mileage. * * * Such construction and practice should therefore be approved, and the court, too, take judicial notice thereof."

In discussing such practices, the court in Engel v. Ehret, 21 Cal.App. 112, 115, 130 P. 1197, 1198, had the following to say:

"The first point made for reversal is that the court struck out all items of mileage, as it was the practice of the court to refuse mileage of witnesses residing in San Francisco.

"The section of the Code, in so far as it is applicable to the subject matter under discussion and is determinative of that point, is as follows: Political Code, § 4300g: 'Witness fees, except as in this title otherwise provided * * * Mileage actually traveled, one way only, per mile 10 cents.'

" 'The right of a witness to mileage and other fees in civil cases is primarily and solely of statutory creation.' Naylor v. Adams, 15 Cal.App. 353, 114 P. 997.

"While this practice of the court is no doubt very gratifying to defeated litigants, it is correspondingly unfair to witnesses who, by the mandate of the court, are compelled to leave their personal pursuits and assist in determining controversies in which they have no individual interest or concern. There is no justification or warrant in the law for this 'practice'. A mere reading of this statute affords an unanswerable confirmation of this view. If the no mileage limitation may be carried by arbitrary construction of the court to the exterior boundaries of the city, why not to the exterior boundaries of the township or any other territorial subdivision of the county? There is as much reason and logic to sustain the one position as the other. These are matters entirely within the legislative control and over which the courts exercise no discretion. * * * The orders of the superior court, disallowing the items of mileage * * * in each case is reversed * * *."

There appears to be no ambiguity in the wording of section 4300g, supra. It provides that for each day's actual attendance in court in a civil case, the witness shall receive $2, and 10 cents per mile for mileage actually traveled, for one way only.

[1, 2] As so interpreted, the appellants were entitled to mileage actually traveled by their witnesses for each day's actual attendance in court. The affidavit supporting appellants' memorandum of costs and disbursements avers that the witnesses named therein "*were actually in attendance* on the dates set opposite their respective names, and *actually traveled the number of miles claimed for each.*" (Emphasis added.) This was sufficient compliance with the statute.

For the reasons stated, the order appealed from is reversed with directions to the trial court to enter an order in conformity with the views herein expressed.

DORAN and WHITE, JJ., concur.

Hearing denied; SCHAUER and SPENCE, JJ., dissenting.

71 Cal.App.2d 455

BROPHY v. EMPLOYEES RETIREMENT SYSTEM et al.

Civ. 12855.

District Court of Appeal, First District, Division 1, California.

Oct. 31, 1945.

Hearing Denied Dec. 27, 1945.

1. Officers 🔑94

Provisions for pension of public employees do not provide a gratuity, but become a part of the contemplated compensation for services and are in a sense a part of the contract of employment. Const. art. 4, § 31.

2. Officers 🔑94

Under provision authorizing pension to public employee, right to pension becomes a vested one on acceptance of employment by an applicant, but the right to pension does not become vested until the happening of the contingency on which the pension becomes payable, usually retirement for disability or for length of service.

3. Officers 🔑94

The amount of pension of public employee may be increased or decreased after retirement in accordance with salary of rank held by the pensioner at time of his retirement.

4. Municipal corporations 🔑200

Right of fireman, who was appointed to civil service position under San Francisco Charter in 1909, to a pension did not become vested until he retired in May 1942, and hence 1932 amendment of charter adding provision for reduction in retirement allowance if pensioner engaged in gainful occupation prior to attaining age of 62 was applicable to such fireman. St.1907, Ex. Sess., St.1909, p. 21; St.1931, p. 3073, § 163.

5. Appeal and error 🔑1107

Where decree rendered in action for declaratory judgment fixing retirement rights of fireman would act on rights of the parties in the future as well as in the past, appeal would be decided in the light of the statutory law as it existed when appellate court rendered its opinion and not as it existed when decree below was entered.

6. Statutes 🔑263

Statutes are interpreted to operate prospectively unless the language clearly compels an interpretation that they were intended to operate retroactively.

7. Municipal corporations 🔑49

The 1945 amendment to San Francisco Charter rendering inoperative, "during" existing war and for six months after termination of war, section providing for reduction of monthly pension to a pensioner engaged in a gainful occupation prior to attaining age of 62, does not operate retroactively and includes only the period of the war from the date of the amendment to six months after end of the war. St.1931, p. 3073, § 163; St.1945, p. 2895, § 163(b).

See Words and Phrases, Permanent Edition, for all other definitions of "During".

8. Municipal corporations 🔑200

City could raise or lower amount of pension payable in future to retired fireman, but city could not lawfully raise or lower retirement allowance that had already accrued.

9. Municipal corporations 🔑871

Right of city under charter providing for reduction in retirement allowance payable to pensioner engaged in gainful occupation prior to attaining age of 62 became fixed when retired fireman started to work and attempt, retroactively, to pay to retired fireman difference between the smaller amount payable under such provision and the maximum retirement allowance would constitute "gift of public funds" in violation of constitution. St.1931, p. 3073, § 163; Const. art. 4, § 31.

See Words and Phrases, Permanent Edition, for all other definitions of "Gift of Public Funds".

10. Statutes 🔑72

San Francisco Charter provision operating to reduce part of pension provided by contributions of city and county to those retired employees who are under 62 years of age and whose income over a certain amount is derived from gainful occupation but not affecting those over 62, those who were under 62, but retired for disability, or those under 62 whose income is not derived from gainful employment, is not invalid as based on arbitrary classification. St.1931, p. 3073, § 163; Const. art. 1, § 11.

11. Constitutional law ⚿48

Presumption exists that legislative classification is reasonable and, unless classification is clearly arbitrary, classification must be sustained.

12. Constitutional law ⚿48

A court should not set aside a statutory provision unless the classification is palpably arbitrary.

13. Action ⚿6

In an action for declaratory relief, trial court is empowered to make a binding declaration of rights and duties of parties and such declaration has force of a final judgment. Code Civ.Proc. § 1060.

14. Action ⚿6

Municipal corporations ⚿200

Where San Francisco charter provided that fireman, after 25 years of active service, could retire on monthly retirement allowance equal to one-half amount of salary attached to rank held by him for three years prior to retirement, allowance of retired captain was to be based on whatever salary was fixed for the rank of captain for the particular month in which payment was made and declaratory judgment requiring retirement board to fix allowance on fixed salary which captain was receiving at time of retirement was improper. St.1931, p. 3073, § 163; Code Civ.Proc. § 1060.

◆

Appeal from Superior Court, City and County of San Francisco; George W. Schonfeld, Judge.

Action by John M. Brophy against the Employees Retirement System and others for a declaratory judgment fixing plaintiff's retirement rights. From the judgment, plaintiff appeals.

Judgment modified and as modified affirmed.

Joseph T. Curley and Marvin C. Hix, both of San Francisco, for appellant.

John J. O'Toole, City Atty., and Norman Sanford Wolff, Deputy City Atty., both of San Francisco, for respondent.

PETERS, Presiding Justice.

Plaintiff, a retired fireman, appeals from a declaratory judgment fixing his retirement rights under the provisions of the San Francisco charter. The action, except for one minor point, was tried upon stipulated facts.

Plaintiff was appointed to the civil service position of fireman in October, 1909, under the then provisions of the charter. In December, 1925, he was appointed captain, which position he held until his retirement in May, 1942. At the time of his retirement his salary was $250 a month. On July 1, 1944, the salary for the rank of captain was increased to $300. Judgment in this action was filed August 15, 1944.

In 1909 the city charter provided that a fireman, after 25 years of active service, could retire on a monthly retirement allowance equal to one-half the amount of salary attached to the rank held by him for three years prior to retirement. St.1907, Ex.Sess., St.1909, p. 21. In 1932 a new charter was adopted. St.1931, p. 2973. It contained a provision similar to the above 1909 provision but added an entirely new provision, § 163 (now numbered § 163b) reading as follows: "Should any retired person, except persons retired for service prior to January 8, 1932, * * * engage in a gainful occupation prior to attaining the age of sixty-two, the retirement board shall reduce that part of his monthly pension or retirement allowance which is provided by contributions of the city and county, to an amount which, when added to the amount earned monthly by him in such occupation, shall not exceed the compensation on the basis of which his pension or retirement allowance was determined." So far as firemen are concerned the city has made all the contributions to pay the retirement allowances. Plaintiff has made no contributions for that purpose.

After judgment was entered, the above-quoted section was amended. This amendment became effective in January, 1945. It provides: "The provisions of paragraph (b) of this section shall be inoperative during the existing war between the United States and the axis powers, and for six (6) months after the termination of said war."

It is stipulated that in June of 1942 plaintiff, then under the age of 62 and not disabled, accepted gainful employment.

Since that date the retirement board has paid him as his retirement allowance the difference between the amount he so earned and the amount he would have earned in the fire department had he not retired. This has resulted in materially reducing his retirement allowance from a maximum of $125 a month to as low as $8.08 a month. Plaintiff thereupon instituted this action for declaratory relief to determine whether § 163 is applicable to him. The trial court held that this section was applicable to plaintiff, and that, so long as plaintiff remains gainfully employed and earns more than one-half of $250 per month, the retirement board is required to pay him a retirement allowance equal to the difference between the amount of his monthly earnings and $250. From this judgment plaintiff appeals.

Plaintiff asserts that the 1909 civil service retirement provisions, under which he was first employed, constituted a contract for wages for services rendered, and that the 1932 amendment has no application to him; that to apply the 1932 amendment to him would be to impair the obligation of his contract with the city and interfere with his vested rights. It is next asserted that even if § 163 is applicable to plaintiff, inasmuch as in 1932 when that amendment was adopted plaintiff had worked under the 1909 provision for 22 years, he had earned 22/25 of his retirement allowance, and his right had vested as to that proportion of it. Neither contention can be sustained.

[1-4] It must be conceded that there has been some confusion in the California cases as to the exact legal status of public employees' pensions. The majority of states hold that such pensions are gratuities that can be modified or terminated at the will of the donor. See cases collected and commented upon 54 A.L.R. 943; 98 A.L.R. 505; 112 A.L.R. 1009; 137 A.L.R. 249. Although there are a few early cases in California holding that a pension is a gratuity, if that rule were now followed it would mean that pension laws would be invalid, being in violation of Art. IV, § 31, of the Constitution prohibiting gifts by government to any individual. To obviate this difficulty it is now well-settled in this state that pension provisions do not provide for a gratuity but "become a part of the contemplated compensation for those services, and so in a sense a part of the contract of employment itself," O'Dea v. Cook, 176 Cal. 659, 661, 169 P. 366, 367, and that "the right to a pension becomes a vested one upon acceptance of employment by an applicant." Dryden v. Board of Pension Comm'rs, 6 Cal.2d 575, 579, 59 P.2d 104, 106; see, also, Riggs v. District Retirement Board, 21 Cal.2d 382, 132 P.2d 1; Aitken v. Roche, 48 Cal.App. 753, 192 P. 464; Snyder v. City of Alameda, 58 Cal.App.2d 517, 136 P.2d 857; Groat v. Walkup Drayage etc. Co., 14 Cal.App.2d 350, 58 P.2d 200. However, the determination that a pension right becomes a part of the contract of employment and is a vested right, does not settle the question as to when the right vests and what the extent of this vested right may be. It is now too well-settled to require extended discussion that the right to a pension does not become vested until the happening of the contingency upon which the pension becomes payable, usually retirement for disability or length of service. McCarthy v. City of Oakland, 60 Cal.App.2d 546, 141 P.2d 4; Risley v. Board of Civil Service Comm'rs, 60 Cal.App.2d 32, 140 P.2d 167; Brooks v. Pension Board, 30 Cal.App.2d 118, 85 P.2d 956; Pennie v. Reis, 80 Cal. 266, 22 P. 176; Klench v. Board of Pension Fund Comm'rs, 79 Cal.App. 171, 249 P. 46; Jordan v. Retirement Board, 35 Cal.App.2d 653, 96 P.2d 973; Sweesy v. Los Angeles, etc., Retirement Bd., 17 Cal.2d 356, 110 P.2d 37. But even though the right becomes vested upon the happening of the contingency, the right so accruing is not to any fixed and certain sum, it being the law that the amount of the pension may be increased or decreased after retirement in accordance with the salary of the rank held by the pensioner at the time of his retirement. McCarthy v. City of Oakland, 60 Cal.App.2d 546, 141 P.2d 4; Brooks v. Pension Board, 30 Cal.App.2d 118, 85 P.2d 956; Carr v. Fire Commission, 30 Cal.App.2d 208, 85 P.2d 959; Jordan v. Retirement Board, 35 Cal.App.2d 653, 96 P.2d 973; Murphy v. City of Piedmont, 17 Cal.App.2d 569, 62 P.2d 614, 64 P.2d 399; Casserly v. City of Oakland, 6 Cal.2d 64, 56 P.2d 237. In view of these cases the contention that the right and the extent of the right of appellant became fixed and vested before 1932 is without merit. It must be held that plaintiff's right to a pension did not become vested until May of 1942 when he retired, and hence, that the 1932 amendment to the charter adding § 163 thereto is applicable to him. This con-

clusion also answers plaintiff's contention that his right to 22/25 of the pension became vested prior to the 1932 amendment. The right is not thus severable. The right did not become vested in 1932 but became vested in May of 1942 when the contingency upon which the vesting depended—i. e., retirement—occurred.

[5] Plaintiff next contends that the 1945 amendment providing that § 163b (1932, § 163) "shall be inoperative during the existing war" is retroactive to December 7, 1941. While this charter provision was not adopted until after judgment was entered herein it would seem quite clear that this appeal should be decided in the light of the statutory law as it now exists and not as it existed when judgment was entered. This is an action for declaratory relief. The action was brought to settle the rights of this plaintiff to his pension. The decree, by its very nature, acts on the rights of these parties in the future as well as in the past. For that reason the law in effect when the appellate court renders its opinion must be applied. Tulare Dist. v. Lindsay-Strathmore Dist., 3 Cal. 2d 489, 526, 45 P.2d 972.

[6, 7] The contention that the 1945 amendment should be given retroactive effect is unsound. It is elementary law that all statutes are interpreted to operate prospectively unless their language clearly compels an interpretation that they were intended to operate retroactively. See Chaney v. Los Angeles County Retirement Bd., 59 Cal.App.2d 413, 138 P.2d 735, and Holmberg v. City of Oakland, 55 Cal.App. 270, 203 P. 167, applying this rule to pension statutes. There is no such compelling language here. While the word "during" is susceptible of the interpretation that the amendment should apply throughout the period of the war, it is far more reasonable, particularly when the future tense "shall be" immediately precedes it, to interpret the word as only including the period of the war from the date of the statute to six months after the end of the war. In Holmberg v. City of Oakland, 55 Cal.App. 270, 271, 203 P. 167, a charter provision that a police officer injured in the performance of his duty "shall be entitled to receive * * * such medical * * * treatment * * * as may be required during the continuance of his disability * * *" was held not retroactive and therefore not applicable to an officer disabled by injuries sustained prior to the effective date of the charter provision.

[8, 9] There is another reason why this section should not be construed to operate retroactively, and that is so to construe it would probably result in declaring it unconstitutional. As already held, plaintiff's right became vested in May of 1942 when he retired. Each month the extent of that right became fixed. Although the city could raise or lower the amount of the pension in the future by changing the salary of captain, they could not lawfully raise or lower the retirement allowance that had already accrued. After plaintiff started to work in June of 1942 the right that accrued each month thereafter was no longer $125 per month, but varied from $8.08 per month to $88.72 per month. If the city, after plaintiff's right to such amounts became fixed, attempted, retroactively, to pay plaintiff the difference between these smaller amounts and $125 per month, it would constitute a clear gift of public funds in violation of the constitutional provision.

[10-12] Plaintiff also argues that § 163 (now § 163b) is a general law which does not operate uniformly, and is therefore invalid under Art. 1, § 11, of the Constitution. In this connection it is pointed out that the section operates to reduce the part of the pension provided by the contributions of the city and county to those retired employees who are under 62 years of age, and whose income, over a certain amount, is derived from gainful employment. It does not affect those over 62, those who were under 62 but retired for disability received in the course of their employment, or those under 62 whose income is not derived from gainful employment. Plaintiff argues that this classification is arbitrary and unreasonable, and, for that reason, invalid. With this contention we cannot agree. The presumption is that the legislative body acted properly, and unless the classification is clearly arbitrary, the legislation must be sustained. A court will not and should not set aside a statutory provision unless the classification is palpably arbitrary. See cases collected 5 Cal.Jur., p. 832, § 193. The section was obviously passed to make retirement less attractive to those under 62. Retirement was to be permitted after 25 years of service, but to restrain men to a limited extent from retiring in their forties and fifties it was provided that if they did so they could not engage in lucrative employment without having their allowance proportionally reduced. Apparently, those who drafted the charter felt that no such limitation should be placed on those over 62, it apparently being felt that it was not in the public interest to induce men of that age or older to remain in the service. A similar obvious distinction exists between those who retire for a service incurred disability and those who do not. Thus, it is perfectly clear that the classification between those over and those under 62, and between those who retire for service disability and those who are not disabled, is based upon a reasonable and sound distinction.

The reason for distinguishing between those under 62 who retire and who then take another job, and those under 62 who retire and receive an independent income, is not so clear. It perhaps was felt that it would be too difficult to enforce the rule against those who had an independent income because of the difficulty of securing information, while in the case of most gainfully employed persons that is a relatively easy matter. Perhaps it was found that the number of retired firemen who had independent incomes was too small to affect the purpose desired. Perhaps it was felt that in discouraging retirements of the able-bodied under 62 the purpose could be accomplished without extending the rule to the few firemen who might have independent incomes. In view of the presumption that the classification is reasonable and that the legislature acted properly we cannot hold, as a matter of law, that the classification is so arbitrary that it renders the whole section unconstitutional. The case of Mansur v. City of Sacramento, 39 Cal. App.2d 426, 103 P.2d 221, relied upon by plaintiff, is not in point. In that case the trial court held, and the appellate court affirmed the holding, that a charter provision providing that where one spouse was employed by any governmental agency supported by tax revenues the other was not eligible to a civil service appointment in Sacramento was arbitrary and invalid. There was no basis for the classification there involved and the trial court so held. Here the classification has been upheld by the trial court and there appears to be support for its determination. For that reason the determination of the trial court must be affirmed.

Plaintiff's final contention is that the judgment was erroneous in declaring that under § 163 the board "was and is required * * * [to reduce plaintiff's pension] * * * to an amount which, when added to the amount earned monthly by John M. Brophy in his outside gainful occupation, shall not exceed $250 per month, which was the compensation on the basis of which John M. Brophy's pension or retirement allowance was determined * * *." Respondents concede that the amount of the pension is not based on a fixed salary of $250, but may vary as the salary attached to the rank of captain increases or decreases. In fact, some six weeks before judgment was entered, the salary of a captain was increased to $300.

[13, 14] The judgment is obviously too limited. This was an action for declaratory relief. Among other things plaintiff prayed "that it be declared and determined that plaintiff is entitled to a pension equal to one-half of the compensation attached to the rank of Captain * * *." The action was instituted to secure a determination of plaintiff's pension rights not only as to the past but also as to the future. As already pointed out in another connection, the judgment necessarily affects the rights of the parties in the future as well as in the past. In an action for declaratory relief the trial court is empowered to make a binding declaration of the rights and duties of the parties and such declaration has the force of a final judgment. § 1060, Code Civ.Proc. The judgment as entered declares that the board "is required" to fix plaintiff's retirement allowance on a fixed salary of $250 per month, which is not the fact, the allowance admittedly being based on whatever salary is fixed for the rank of captain for the particular month in question. The findings and judgment are modified to so provide. As so modified, the judgment is affirmed, respondents to recover costs.

WARD, J., and SCHOTTKY, Justice pro tem., concur.

71 Cal.App.2d 463

AGDEPPA et al. v. GLOUGIE et al.

Civ. 15024.

District Court of Appeal, Second District, Division 2, California.

Oct. 31, 1945.

1. Evidence ⚿14

The propensity of small children to wander from their premises into the streets is a matter of common knowledge.

2. Death ⚿24

In determining liability for death of child struck by truck on street, parents are chargeable with duty of exercising ordinary care in protection of their minor children.

3. Death ⚿24

Parent and child ⚿7(9)

Where failure of parents to exercise ordinary care in protection of their minor children proximately causes or contributes to injury or death of child, parents' action for damages is defeated.

4. Appeal and error ⚿1008(1)

Whether mother of boy three years and five months old, who was killed by a truck while crossing city main thoroughfare, was guilty of negligence which proximately caused the death, was a question of fact for trial court.

5. Death ⚿24

A father, although not at home on morning when small boy was killed by truck, was chargeable with mother's alleged negligence.

6. Death ⚿75

In action for death of plaintiffs' boy three years and five months old who was killed by a truck while crossing city main thoroughfare, evidence warranted judgment denying recovery on ground that plaintiffs were negligent and that their negligence proximately caused the accident.

7. Appeal and error ⚿712

Where negligence of parents suing for death of their minor child was an issue under pleadings and evidence and was specifically drawn to court's attention during cross-examination of the mother, official determination of such issue was to be found in formal findings of trial court and not in some preliminary memorandum which was no part of the record.

8. Trial ⚿404(1)

All findings must be read together and liberally construed as to uphold the judgment, and any inconsistency in findings is to be resolved if reasonably possible in favor of sustaining the judgment.

◆

Appeal from Superior Court, Ventura County; Pat R. Parker, Judge.

Action by Bernard T. Agdeppa and another against Homer Edward Glougie and another to recover damages for the death of plaintiffs' infant son, who was killed by a truck. From a judgment for defendants, plaintiffs appeal.

Affirmed.

William T. Selby, of Ventura, for plaintiffs and appellants.

Kermit J. Morgan, of Los Angeles, and Don R. Holt, of Ventura, for defendants and respondents.

FOX, Justice pro tem.

Plaintiffs brought this action to recover damages for the death of their infant son, Louis, aged three years and five months. They have appealed from a judgment in favor of the defendants rendered by the court sitting without a jury.

The tragedy occurred a few minutes before noon on June 7, 1944, at the intersection of Meta and Oak Streets in the city of Ventura. Meta Street is U. S. highway 101 and is the main thoroughfare and truck highway through said city. Oak Street intersects Meta Street at right angles. On Meta Street is a crosswalk marked by concrete inserts which are on the prolongations of the sidewalk lines on the east side of Oak Street. Meta Street is divided into six traffic lanes. Defendant Glougie was driving a truck and semi-trailer which were owned by defendant Suglio. He was traveling west, at not over twenty miles per hour, on Meta Street, in the second traffic lane from the north curb. When he was between ten and twenty feet east of the crosswalk he first saw Louis as he jumped off the curb on the northeast corner of the intersection. The child ran very rapidly in a southerly direction in attempting to cross Meta Street and join his two companions who had already run diagonally across said street. However, as Louis crossed the second traffic lane he was hit by the truck and killed.

The plaintiffs' house was located at 336 Front Street in the city of Ventura. This street is parallel to and one block south of Meta Street. The main line of the Southern Pacific Railroad runs down the center of Front Street. The plaintiffs' home was about one and a half blocks from the scene of the accident; that is, one block south and one half block west. The mother testified that prior to the time of the accident she and her three children, Louis, Jacqueline, aged two years, and Gerald, aged five months, were in their home. The father was uptown. The mother further testified that she and Louis had been playing in the bedroom. After their play Louis made his exit into the uninclosed back yard. She was unaware of the child's intentions and made no effort to ascertain the same; nor did she keep track of him or know of his whereabouts. It was necessary for Louis to cross the Southern Pacific tracks and Meta and Oak Streets to get to the scene of the accident. He had been gone from the house about ten minutes when his mother was informed of the accident.

It is necessary to determine only two questions on this appeal: (1) Is the evidence sufficient to support the finding that the death of Louis was proximately caused by the negligence of the plaintiffs, and (2) must the judgment be reversed because of inconsistent findings?

[1-6] The conduct of small children is unpredictable and their propensity to wander from their premises and into the streets is a matter of common knowledge. Springer v. Sodestrom, 54 Cal.App.2d 704, 129 P.2d 499. Parents are therefore chargeable with the duty of exercising ordinary care in the protection of their minor children. Seperman v. Lyon Fire Proof Storage Company, 97 Cal.App. 654, 275 P. 980; Healy v. Market Street Railway Company, 41 Cal. App.2d 733, 107 P.2d 488. Where the failure of the parents to exercise such care proximately causes or contributes to the injury or death of their child the action of the parents for damages is thus defeated. De Nardi v. Palanca, 120 Cal.App. 371, 8 P.2d 220; Seperman v. Lyon Fire Proof Storage Co., supra. Whether or not the mother was guilty of negligence which proximately caused the death of Louis was a question of fact for the trial court. Fox v. Oakland Consolidated Street Railway, 118 Cal. 55, 50 P. 25, 62 Am.St.Rep. 216; Daly v. Hinz, 113 Cal. 366, 45 P. 693; De Nardi v. Palanca, supra. Although the father was not at home on the fateful morning he is nevertheless chargeable with any negligence in this respect on the part of the mother. Springer v. Sodestrom, supra. Guided by these principles it must be held that there is substantial evidentiary support for the trial court's finding that the plaintiffs were negligent and that their negligence proximately caused the accident. Consequently the plaintiffs cannot recover.

[7] Plaintiffs argue, however, that the trial court did not intend to find that they were guilty of negligence. This contention is based on the circumstance that the trial judge in his memorandum to counsel directing the preparation of findings and the judgment indicated that the defendant truck driver was not guilty of any negligence that proximately caused the accident. The plaintiffs' negligence was not mentioned in the memorandum. Their negligence, however, was an issue in the case under the pleadings and the evidence and was specifically drawn to the court's attention during the cross-examination of the mother. It was therefore necessary to have a determination of this issue, and such official determination is to be found in the formal findings of the trial court and not in some preliminary memorandum which is no part of the record on appeal. In re Estate of Finkler, 7 Cal.2d 97, 103, 59 P.2d 801; Falk v. Falk, 48 Cal.App.2d 772, 777, 778, 120 P.2d 720.

[8] Plaintiffs' contention that the judgment must be reversed because of inconsistent findings is not well founded. It is an established rule that all the findings should be read together and so construed as to uphold rather than defeat the judgment, and to that end the findings are to be liberally construed and any inconsistency therein is to be resolved, if reasonably possible, in favor of sustaining the judgment. Hotaling v. Hotaling, 193 Cal. 368, 385, 224 P. 455, 56 A.L.R. 734; Jones v. Pleasant Valley Canal Company, 44 Cal.App.2d 798, 806, 113 P.2d 289; 24 Cal.Jur. sec. 230, pp. 1009–1010. Reading the findings in light of these principles, it is clear that the court intended to and did exonerate the defendants of any negligence proximately causing the death of Louis and placed the responsibility therefor on the plaintiffs.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

71 Cal.App.2d 325

PEOPLE v. GERBEL.

Cr. 3893, 3894.

District Court of Appeal, Second District, Division 1, California.

Oct. 26, 1945.

1. **Criminal law** ⚿736(2)

Whether a proffered confession was voluntarily made by accused must be determined by trial court, not by jury.

2. **Criminal law** ⚿1153(6)

The propriety of admission of a confession must be determined by reviewing court in view of discretion lodged in trial court and where evidence is conflicting trial court's decision will not be reversed.

3. **Criminal law** ⚿517(1), 531(2)

The admissibility of a confession is controlled by particular circumstances which must be considered by trial court in determining whether confession was voluntary.

4. **Criminal law** ⚿531(3)

That a confession differs from testimony of other witnesses does not conclusively show that it was untrue and hence involuntary.

5. **Criminal law** ⚿531(1), 696(3)

Before introduction of a proffered confession, prosecution must present prima facie evidence that confession was voluntary, but a court need not strike out a confession because accused testifies that it was made involuntarily; his credibility being for jury.

6. **Criminal law** ⚿532(2)

Admitting confession was not an abuse of discretion in view of conflict in evidence regarding method by which confession was obtained and what occurred at time of accused's arrest.

7. **Criminal law** ⚿1168(2)

Where state introduced confession as part of the case in chief, no prejudice resulted when it became necessary on rebuttal to use accused's statements made to and related by police officer.

8. **Larceny** ⚿65

Evidence supported conviction for grand theft.

Appeals from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Joe B. Gerbel was convicted of grand theft after he had been convicted of burglary, and from the judgments of conviction of burglary and grand theft and from an order revoking the probation and from an order denying his motion for new trial he appeals.

Affirmed.

Paul E. Tapley and E. W. Miller, both of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Carl S. Kegley, Deputy Atty. Gen., for respondent.

YORK, Presiding Justice.

In the cause presented by appeal numbered 3894, the trial court sitting without a jury found defendant guilty of the crime of grand theft and denied his motion for a new trial, as well as his application for probation. Appeal numbered 3893 arises out of a prior conviction of the crime of burglary, wherein proceedings were suspended and defendant was placed on probation for a period of fifteen years from and after July 2, 1938. By reason of defendant's conviction of the crime of grand theft (appeal 3894), the court found he had violated the terms of his probation, and revoked the same and entered judgment for burglary (appeal 3893), the sentences imposed in the two causes to run concurrently.

Defendant here appeals from the judgment of conviction of grand theft in the principal cause and from the order denying his motion for a new trial therein. He also appeals from the order revoking probation in the prior case and from the judgment of conviction of burglary of which he was found guilty in 1938. The appeals in both causes have been consolidated by stipulation of counsel and are presented to this court upon one set of briefs.

It is here contended by appellant that excluding the "involuntary verbal confession" which was forcefully and unlawfully extracted from him, there is no competent legal evidence to sustain his conviction of the crime of grand theft; that errors committed at the trial based upon the alleged inadmissibility of the said confession were prejudicial to his cause, and the conviction based upon the alleged confession is violative of the 14th amendment to the Federal Constitution.

An examination of the reporter's transcript of the evidence reveals that on the night of April 7, 1944, a Buick automobile bearing license No. 1F7924 was taken from the used car lot of the Taylor Automobile Company at 911 West Pico Street, Los Angeles, without the consent of the owner.

Radio officer Jos. F. Meade, who identified the appellant as the person whom he arrested at about 1:00 a. m. of April 8th, testified that his attention was first attracted to appellant by the erratic manner in which the Buick car bearing the license above referred to, was being driven and in which appellant was then seated. The witness stated that he first saw this car going north on Main Street; that it "went right through" the stop signal and turned east on 9th Street, whereupon said witness and his brother officer operating a radio car pursued the Buick which "turned north on Los Angeles Street to 7th; then east on 7th to Alameda"; ran through the stop signs at 7th and San Pedro and at 7th and Central, turned south on Alameda, traveling at a speed of 80 or 85 miles per hour; that the Buick continued south on Alameda picking up speed and "ran through two boulevard stops." That the officers in the radio car turned their spot light on the Buick and two motorcycles which took up the chase "had their red lights and sirens on directly behind us." The witness further testified that he shot at the Buick five times but it did not stop; that "at 25th and Alameda there is a Pacific Electric right of way crossing there, and the arm for the safety stop on the right of way came down, and their car ran through that arm, that barrier, and knocked the barrier out of the way, and then went onto the railroad tracks where Alameda divided at 25th, and they ran straight out on the railroad tracks, and then they looped to the right out of the railroad tracks into the regular automobile right of way, and at that time we came alongside of them and they hit us and knocked us into the right of way, * * * struck our car on the right-hand side and knocked us from the regular automobile right of way into the railroad right of way," putting the radio car out of commission. Thereafter, "the car we were pursuing struck another car, sideswiped another car that was parked on Alameda, and then * * * they came to a skidding stop down about 27th and Alameda, and just before they came to a stop one fellow jumped out of the left-hand side of the car and ran east across the tracks and the other fellow jumped out of the right-hand side of the car and ran into a vacant lot south of the Pacific Freight Lines yard. That was the defendant. We later captured him. * * * The two cars were almost a block apart at the time they stopped, and he, the defendant, got out into the bushes and humps and valleys where some trash had been dumped, and he fell down in the bushes. He was ducking when he ran, and we had flashlights, and he fell down, and my partner overtook him and shot at him twice, and the second time he shot at him he fell down." That they then overtook appellant who "was lying perfectly still, then I made a start to look for the other fellow, and in the meantime this fellow jumped up and made at attempt to escape and my partner took him back to the car; * * * and on the way back over to the road the defendant turned and struck my partner on the side of his face with his fist," whereupon the witness' partner, Officer Lober, "immediately hit him and knocked him down"; that they then handcuffed him and took him to Central Police Station. Officer Meade then testified regarding a conversation he had with appellant around 1:45 or 2:00 that morning at the station, Officers Simkins, Lober and Rickets being present; that no force or violence was used on appellant and no promises of immunity or hope of reward were extended to him; that the statements then made by appellant were free and voluntary. The conversation as related by Officer Meade follows: "We asked the defendant where he had gotten the car, and he stated that they had got the car on Figueroa Street. We asked whose car it was, and he said at first that it was the other fellow's car, a friend of his, but he couldn't tell who the friend was, didn't know who he was. Then later he changed the story and said they got it on Pico Street; that they had stolen it off a lot on Pico Street; that they first had tried to steal a Ford off another lot and couldn't get it started, then they went to this lot and got the Buick started and were headed toward home at East Los Angeles somewhere at the time we saw them." Upon cross-examination, said officer testified that the only time he saw appellant struck was when Officer Lober struck him at the time of the arrest; that appellant's face at that time was dirty or dusty but it was not bruised; that appellant had been drinking but that he was then sober.

The above testimony constituted the so-called confession which appellant claims was erroneously admitted because it was induced by force and fear.

Appellant took the stand in his own defense and testified that he left home to buy his wife an Easter present; that he started drinking at various "taverns" in downtown Los Angeles finally reaching 5th and Hill Streets where he remained until around midnight drinking beer and finishing a bottle of whiskey which he bought early in the evening; that he felt "pretty wobbly" and tried to find transportation to his home but failing in this he hailed a passing automobile, got in the car and "must have went to sleep. I finally woke up, there was a thud and somebody opening the door, and the police officer took me out of the car and he hit me in the jaw and I went down, he knocked me down." That he was then handcuffed and taken to the police station where "they started giving me the once-over"; that "they asked me where I got the car, and I told them exactly what happened, and they didn't seem to believe it, so they started getting kind of rough. They knocked me off—I was sitting on a swivel chair, and they knocked me off that, and took my wrists, they were still handcuffed behind me, so one on each wrist started twisting them, and another one lifted up my head by my hair and hit me on the ground that way, on the floor rather, and there was either a lieutenant or a sergeant in there, he had a pair of white gloves, gray colored gloves he put them on and started cracking me in the jaw, and I was sitting on the chair, and one of them came up and kicked me in the shin, I had a deep gash in that, so finally * * * I told them that it was my brother's car." On cross-examination, appellant testified that he did not believe Officer Lober struck him while he was in the police station; that Sergeant Ricketts hit him "one good one" in the jaw; that Officer Meade hit him several times "fist and hand slap." Appellant further testified that at the time of his arrest he was sitting on the right-hand side of the automobile; that Officer Lober jerked him out and struck him on the left side of his jaw cutting the inside of his lip enough to make him bleed; that when he got to the police station he "was struck all over" and that his head was bleeding; that he received a gash in the shin about an inch long which was bleeding badly; that his shirt was torn to shreds and had a couple of drops of blood down the front of it. He recalled a conversation he had with Officer Ricketts, to-wit: "He asked me whose car it was and I told him I didn't know, I was bumming a ride; and it seems as though he was the fellow that looked at my record and he says, 'With a record like this, do you expect us to believe you?' Then there was more names and more punches." He remained at the police station "two or three hours, probably" and was then "taken to Georgia Street Receiving Hospital" for a medical examination.

The Chief Clerk of the Georgia Street Receiving Hospital was placed on the stand and read a certified copy of an original record of the hospital to the following effect:

"It shows that Joseph Gerbel, aged 24, who lives at 640 South Gearhart Street, was brought into the Receiving Hospital on April 8, 1944, at 4:08 a. m., brought in by radio car No. 11 * * * from Central Jail. The statement of the accident was he had been in a fight and he remained in the Receiving Hospital from 4:08 a. m. until 5:14 a. m., and was taken out with the officers. The doctor who examined him and treated him was Dr. Martchenko, who gave a diagnosis of possible contusion to the scalp, occiput, and the left temple, contusion and abrasion of the dorsum of the right hand. 'H. B. D. three plus, admitted.'

"Q. What does H. B. D. mean? A. Had been drinking very much. And tincture of benzoin was applied to his injuries, these contusions and abrasions of the right hand and his left temple. He went out with the officers."

Sergeant Ricketts of the Los Angeles Police Department testified in rebuttal as follows: That he first saw appellant on April 8, 1944, at approximately 1:30 a. m., at the entrance to the police station; that about 45 minutes later he questioned appellant in the presence of officers Simkins, Meade and Lober, and that appellant remained in the room there in the station until about 3:00 a. m. This witness denied that he saw anyone strike appellant; denied that he himself punched him or kicked him in the shin; and that appellant stated to him that "he got this automobile off the lot at Figueroa and Pico."

[1] "The question as to whether a proffered confession was freely and voluntarily made by the defendant is one which is

to be determined by the trial court, not by the jury.

[2] "The propriety of the court's decision in resolving the question as to admissibility of the confession is to be determined by the reviewing tribunal in view of the discretion with which the trial court is clothed. Where the evidence bearing on the question is conflicting, the decision will not be reversed." 4 Cal.Jur.Ten Yr.Supp. 1943 Rev. 663, and authorities there cited, including People v. Ellis, 33 Cal.App.2d 616, at page 621, 92 P.2d 431, at page 433, in which case it was stated: "In view of the fact that the trial court is clothed with considerable discretion in determining whether or not the confession was free and voluntary, where the evidence, as here, is conflicting on the subject, it must be assumed that the testimony concerning defendant's admissions was properly admitted. (Citing authorities.)"

[3] "The circumstances of the case are determinative of the question as to admissibility of the proffered confession; the issue is not to be resolved by reference to any rule of law. The scope of the inquiry extends to all circumstances attending the making of the confession, and all such facts are to be considered by the court in determining the question as to whether the confession was made voluntarily or involuntarily.

[4, 5] "Facts not showing involuntary making of a confession have frequently been noted by the reported cases. These include the circumstances that the confession was made to an officer of the law, that the defendant was under arrest, that he was not in possession of his faculties, that his condition was affected by his having taken intoxicating liquor, or drugs; that he was highly excited, or that he was actuated by a purpose to free another from suspicion of guilt. The fact that a confession differs from the testimony of other witnesses does not conclusively show that it was untrue and hence involuntary." 4 Cal.Jur.Ten Yr. Supp., 1943 Rev., 664. Again, in the same work, p. 667, it is stated: "Preliminarily to the introduction of a proffered confession, the prosecution must present evidence which shows, prima facie, that the confession was freely and voluntarily made by the defendant. This is true only with respect to a defendant's statements which are technically confessions, and only in respect of the introduction of a confession at the trial. * * * The prosecution need not, in the first instance, present proof of the circumstances—time, place and persons present—attending the making of the confession. On the contrary, a witness may be asked as to whether the confession was 'free and voluntary'—although technically the question calls for the statement of a conclusion. The recognized practice, after such a question has been answered in the affirmative, is for the defendant to show, by a cross-examination which he may at once conduct, the entire circumstances surrounding the making of the confession. * * * Nor is the court required to strike out the confession because the defendant testifies that it was made involuntarily, his credibility being a matter for the jury's determination. * * * The propriety of the court's conclusion as to whether the confession was or was not voluntarily made is to be determined by the appellate tribunal in view of the discretion with which the trial court is vested; nor will a reversal be ordered unless an abuse of discretion has been established by the appellant. The conclusion will not be disturbed where it has support in the evidence, or where the evidence is conflicting."

[6] In view of the conflict in the evidence, not only as to the method by which the confession was obtained, but also with respect to what occurred at the time of appellant's arrest, there was no abuse of discretion on the part of the trial judge in admitting the confession in evidence; hence, the situation here presented is not one in which a reversal of the judgment of conviction is warranted.

[7] Appellant contends that the use of additional evidence of his confession by Sergeant Ricketts in rebuttal constituted prejudicial error, citing in support of such contention the case of People v. Rodriguez, 58 Cal.App.2d 415, 419, 136 P.2d 626, in which the court criticized the failure of the State to introduce the alleged confession as a part of its case in chief. In the instant case, the State introduced the confession, brief though it was, as a part of the case in chief, thus avoiding that phase of error condemned in the cited case. Therefore, when it became necessary on rebuttal to use appellant's statements made to and related by Sergeant Ricketts, no prejudice resulted.

[8] While there is some support in the record for appellant's claim that he had

been drinking heavily over a period of six hours or so, and therefore did not know what occurred while he was riding in the automobile, the evidence also discloses that when the car finally stopped, he jumped out and ran in an attempt to secrete himself from the arresting officers. In other words, the evidence revealed by the record herein is sufficient as a matter of law to support an inference of guilt. In such circumstances, it is well settled that the judgment will not be disturbed on appeal.

For the reasons stated, the judgment of conviction of grand theft and the order denying motion for new trial in cause numbered 3894 are, and each of them is, affirmed. In view of the affirmance of the judgment and order in cause numbered 3894, it follows that the judgment of conviction of the crime of burglary and the order revoking probation in cause numbered 3893 must also be affirmed. It is so ordered.

DORAN and WHITE, JJ., concur.

71 Cal.App.2d 502

MEIER et ux. v. MEIER et al.

Civ. 3403.

District Court of Appeal, Fourth District, California.

Oct. 31, 1945.

1. Appeal and error 🔑518(1)

Where a statute of limitations or a prescriptive title is involved, the dates of filing the original pleadings should be disclosed by the record, and usually appellant should include in the record the original pleadings showing the dates on which they were filed.

2. Adverse possession 🔑13

To establish title by adverse possession, the possession must be actual occupation, open and notorious, hostile, and held under a claim of title, exclusive of any other right, and it must be continuous and uninterrupted for a period of 5 years prior to commencement of action, and it must appear that claimant has paid all taxes levied or assessed.

3. Adverse possession 🔑43(3)

To establish title by adverse possession it is not necessary that one person be in possession for the full five years to establish the prescriptive title if there is privity between the adverse possessors who together have held the property adversely for the full period.

4. Adverse possession 🔑57

Privity of estate in respect to adverse possession may be shown by proof that the earlier possessor passed his claim to his successor by agreement, gift, devise, or inheritance.

5. Adverse possession 🔑43(4)

Where defendant claiming title to land by adverse possession had acquired title by a deed from purchaser of the land at execution sale, the adverse possession of defendant could be added to predecessor in determining whether such adverse possession had continued for the required period.

6. Appeal and error 🔑197(3)

Where cross-complaint alleged that cross-complainant and predecessor in interest had held adverse possession and paid all taxes and assessments for 5 years prior to filing of cross-complaint, fact that complaint to quiet title had been filed 6 months previously did not show interruption of the running of the statute or show a material variance, particularly where the cross-complaint could have been amended so as to correct the variance. Code Civ.Proc. § 469, 475.

7. Adverse possession 🔑109

Where title by prescription had ripened about July 1, 1942, when the amount of the 1942–1943 taxes were still unknown, permitting the taxes to thereafter become delinquent could not defeat the title by prescription, particularly where the property was redeemed before the cross-complaint alleging title by prescription was filed.

* * *

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by John W. Meier and Helen Meier, husband and wife, against Adolph Meier to quiet title to certain land and to collect damages for its wrongful use, wherein the defendant Anna Hunzicker filed a cross-complaint alleging title by adverse possession. Judgment for cross-complainant, and plaintiffs appeal.

Affirmed.

Monte C. Fiscus, of Los Angeles, and Eldred L. Eaton, of Whittier, for appellants.

Best, Best & Gabbert, of Riverside, for respondents.

MARKS, Justice.

Plaintiffs brought this action to quiet their title to five acres of land planted to cherries in the city of Beaumont, in Riverside County, and to collect damages for its wrongful use. Defendants answered denying plaintiffs' title and pleading various statutes of limitations. Anna Hunzicker filed a cross-complaint alleging title by adverse possession and seeking to quiet her title to the property. The trial judge found in her favor and quieted her title to the property thus approving her claim to a prescriptive title.

Plaintiffs in their briefs argue various matters such as the bars of the statutes of limitation to either of their causes of action, which it may be unnecessary to consider. If the evidence supports the findings of a prescriptive title in the cross-complainant and if the findings support the judgment in her favor, the other questions become immaterial.

On February 4, 1937, Adolph Meier commenced an action in the Superior Court of Orange County against John W. and Helen Meier on two promissory notes aggregating something more than $2,000. A default judgment was entered against them on March 6, 1937. On April 15, 1937, they filed a notice of motion to set aside this judgment and to permit them to answer, which motion was granted on October 18, 1937. On February 21, 1939, a demurrer to the answer was sustained with leave to amend and Adolph Meier filed a demurrer to the amended answer on March 10, 1939. On April 18, 1942, John W. and Helen Meier filed a notice of motion to dismiss the action on the ground that it had not been brought to trial within five years after the complaint was filed. The motion was denied and a writ of prohibition was issued restraining the Superior Court from proceeding with the trial of that action. Meier v. Superior Court, 55 Cal.App.2d 675, 131 P.2d 554.

Execution was issued on the default judgment and on May 12, 1937, the real property involved here was sold by the sheriff of Riverside County on execution sale to Adolph Meier. On May 12, 1938, the property was conveyed by sheriff's deed to him and on May 21, 1938, he conveyed it by grant deed to Anna Hunzicker.

[1] The record is silent as to the date on which the original complaint in this action was filed. There is a second amended complaint in the record which was filed on October 7, 1943. The cross-complaint of Anna Hunzicker was filed on November 27, 1943. Counsel for plaintiffs state in their brief that the complaint was filed on May 8, 1943. As this is not questioned, we will assume the correctness of this statement, as the exact date of the filing is not controlling under the view we take of the case. However, it should be noted that where a statute of limitations or a prescriptive title is involved, the dates of filing the original pleadings should be disclosed by the record, as those dates may be determinative of an appeal. Young v. Young Holdings Corporation, Ltd., 27 Cal.App.2d 129, 80 P.2d 723. Usually, when the pleas of the statute of limitations is involved, the appellant should include in the record the original pleadings showing the dates on which they were filed.

Adolph Meier and his then attorney went onto the property some time between the date of the sheriff's sale and July 1, 1937, probably on June 27, 1937, and posted the following notice:

"Tenant in possession. You are hereby notified to quit and deliver up to the undersigned, Adolph Meier, the certain real property known and described as: (Description) which you now hold, on the First day of July, 1937."

This notice bore the name of Adolph Meier at the bottom, which was written by the attorney at the direction of Mr. Meier.

Under date of June 21, 1937, the same attorney notified Golden State Cherry Orchard, under which fictitious name Francis Dowling was doing business, that the plaintiffs John Meier and Helen Meier had no further interest in the property. John Meier testified that Mr. Dowling transmitted this information to him probably before July 1, 1937. Mrs. Meier also admitted knowledge of the same facts although she was uncertain when she gained the information. Neither John nor Helen

Meier were on the property nor did they publicly claim any interest in it between July 1, 1937, and the time this action was filed.

Adolph Meier took possession of the property on or before July 1, 1937. He paid all taxes and water assessments when due, paid all costs of cultivation, irrigation and care of the property, sold the crops therefrom and received the returns after that date and up to the time he deeded the property to Anna Hunzicker. Thereafter Anna Hunzicker did the same things and exercised the same control over the property, receiving the receipts from the crops, except that the taxes for the fiscal year 1942-1943 went delinquent and she did not redeem the property until November 3, 1943.

[2] There are five elements necessary to establish adverse possession that will ripen into a title by prescription. In Comstock v. Finn, 13 Cal.App.2d 151, 56 P.2d 957, 959, they were set forth as follows:

"(1) The possession must be actual occupation, open and notorious, and not clandestine. (2) It must be hostile to the true owner's title. (3) It must be held under a claim of title, exclusive of any other right, as one's own. (4) It must be continuous and uninterrupted for a period of five years prior to the commencement of the nation, not, however, necessarily the next before the commencement of the action. (5) It must appear that the claimant has paid all taxes levied or assessed upon the land. As a general rule there must be a concurrence of all these elements. 1 Cal.Jur. 522."

[3, 4] It is also true that it is not necessary that one person be in possession for the full five years to establish the prescriptive title if there is privity between the adverse possessors who together have held the property adversely for the full five years. Saner v. Knight, 86 Cal.App. 347, 260 P. 942. That case holds that a deed from a prior adverse possessor, not the owner of the record title, establishes sufficient privity to permit the tacking of one adverse possession onto the other. It is also held that privity of estate in respect to adverse possession may be shown by proof that the earlier possessor passed his claim to his successor by agreement, gift, devise or inheritance. McAnally v. Texas Co., 124 Tex. 196, 76 S.W.2d 997; 2 C.J.S., Adverse Possession, § 130, p. 687.

[5, 6] In the instant case the evidence shows that there was a privity of estate between Adolph Meier and Anna Hunzicker so that the adverse possession of the one may be tacked onto that of the other. It also fully appears that during their possession they fulfilled all of the five requirements necessary to establish title by adverse possession.

In her cross-complaint Anna Hunzicker alleged that she and her predecessor in interest had held adverse possession and had paid all taxes and assessments for five full years prior to the filing of the cross-complaint on November 27, 1943. Plaintiffs urge that this pleading is insufficient to support the findings and judgment because, by filing their complaint to quiet title on May 8, 1943, they interrupted the running of the statute and that, as a matter of law, Adolph Meier and Anna Hunzicker did not have quiet and peaceable adverse possession of the property for five years prior to filing the cross-complaint.

This question is presented here for the first time. It was not raised during the trial when an amendment of the cross-complaint would have been a simple matter if such amendment would have been regarded as advisable.

The proof is clear that the adverse possession started not later than July 1, 1937, probably about June 27. The full five years of adverse possession was completed about July 1, 1942, almost ten months before plaintiffs filed their complaint.

The foundation for this technical argument amounts to nothing more than a variance between the pleadings and the proof. There is nothing in the record to indicate that plaintiffs were taken by surprise or misled by this variance. Their failure to object to the introduction of evidence or to stress the point during the trial points strongly to such conclusion. Bancroft Co. v. Haslett, 106 Cal. 151, 39 P. 602; Yule v. Miller, 80 Cal.App. 609, 610, 252 P. 733; Firebaugh v. Burbank, 121 Cal. 186, 53 P. 560. Thus it seems to us that the variance was immaterial so it does not furnish a sufficient reason for a reversal of the judgment. Secs. 469 and 475, C.C.P.

[7] Plaintiffs urge that the failure to pay taxes for the fiscal year 1942–1943 is fatal to the cause of cross-complainant. As we have already seen, her title by prescription ripened about July 1, 1942. Taxes for the fiscal year 1942–1943 were not then computed, their amount was then unknown, and they could not then be paid. The law does not require the impossible, and because

taxes due and unpayable after she had acquired title to the property became delinquent cannot defeat that title except through a sale held under the tax laws. Further, she redeemed the property before her cross-complaint was filed.

We have reviewed the other arguments made by plaintiffs, and as Anna Hunzicker acquired a valid title to the property by prescription it is unnecessary to consider them in detail. We have given them due attention and find them without merit.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

71 Cal.App.2d 382

PEEBLER et al. v. OLDS et al.

Civ. 14917.

District Court of Appeal, Second District, Division 2, California.

Oct. 29, 1945.

Rehearing Denied Nov. 19, 1945.

Hearing Denied Dec. 27, 1945.

1. Malicious prosecution ⇨64(2)

In action by purchasers of cemetery property at judicial sale of dissolved cemetery partnership's assets for malicious prosecution of actions to quiet corporation's title to property, recover damages, and impress lien on property and voluntary bankruptcy proceeding on corporation's behalf, evidence warranted finding that such prosecutions were malicious and without probable cause.

2. Malicious prosecution ⇨32

In action for malicious prosecution, malice may be inferred from want of probable cause and from defendants' hostile acts and declarations evincing ill will toward plaintiffs, coupled with showing of defendants' resolution to prosecute unfounded lawsuits for purpose of gaining financial advantage over plaintiff.

3. Malicious prosecution ⇨34

The pendency of action for damages against purchasers of dissolved cemetery partnership's assets at judicial sale when they filed complaint in action for malicious prosecution of such pending action and other actions, did not bar their right to recovery because of unsuccessful prosecution of previous action on same allegations of damages.

4. Conspiracy ⇨19

In action for malicious prosecution, evidence of all defendants' participation in one or more of several unsuccessful lawsuits against plaintiffs, use of name of partnership, of which plaintiffs were members, as that of corporation organized by defendants for purpose of appropriating partnership business, and defendants' intimate association in conduct of such corporation's cemetery business, warranted inference of conspiracy by defendants.

5. Malicious prosecution ⇨42

A woman, not shown by substantial evidence to have actually participated in conspiracy to deprive others of cemetery property, purchased by them at judicial sale of dissolved partnership's assets before or at time of institution of actions against such purchasers for such purpose, was not liable to them for damages, though she took possession of and asserted right to such property immediately after her husband and another conspirator were enjoined from going thereon.

6. Corporations ⇨493

A corporation, which became willing tool of two individuals in appropriating dissolved partnership's good will, using its assets, simulating its name and selling grave plots in cemetery owned thereby, promptly on corporation's organization just before partnership's dissolution, was liable to purchasers of partnership's assets at judicial sale for malicious prosecution of unsuccessful actions against such purchasers by corporation and such individuals for purpose of depriving purchasers of cemetery property.

7. Conspiracy ⇨14

Each of participants in conspiracy is liable for wrongful acts of all of them and responsible as joint tort-feasor for damages ensuing from such acts.

8. Malicious prosecution ⇨41, 42

Persons against whom fictitious actions were prosecuted unsuccessfully were entitled to joint recovery of damages against all parties shown to have co-operated in malicious prosecution of such actions.

9. Malicious prosecution ⚿64(1)

In action for malicious prosecution of actions against plaintiffs, evidence of sums necessarily expended by them in calling on their counsel and in attendance at court and costs necessarily incurred by them in such actions supported findings that plaintiff suffered special damages.

10. Appeal and error ⚿1010(1)

The trial court's determination of fact question on substantial evidence will not be disturbed on appeal.

11. Attorney and client ⚿140

The trial court may determine value of plaintiffs' attorney's services without aid of expert testimony.

12. Appeal and error ⚿717

The trial court's opinion has no bearing on correctness of its adjudication of special damages recoverable for malicious prosecution.

13. Appeal and error ⚿717

The trial court's opinion in conflict with its findings must be disregarded by appellate court.

◆

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by Byron Peebler and another against B. C. Olds, J. M. Danziger, Edith W. Danziger, the Olive Lawn Cemetery, a corporation, and others for malicious prosecution. From a portion of a judgment for plaintiffs assessing special damages, named defendants appeal.

Modified, and affirmed as modified.

See, also, 66 Cal.App.2d 76, 151 P.2d 901.

J. M. Danziger, of Los Angeles, for appellants.

Roland Maxwell, of Pasadena, for plaintiffs and respondents.

MOORE, Presiding Justice.

From only that portion of the judgment assessing special damages resulting from the wrongful prosecution of civil suits, defendants appeal. They maintain that there is not sufficient proof of malice, of want of probable cause or of the special damages.

The facts undisputedly alleged and found are as follows: about 1923 plaintiffs and defendant Olds formed a partnership which owned and operated a cemetery known as the Olive Lawn Memorial Park on five acres which will be hereinafter referred to as "Memorial Park." In 1932 they drilled a well to provide water for their cemetery but inadvertently it was located about four feet north of the northerly boundary line of their property. The partnership was dissolved on March 20, 1940. But just prior to such dissolution defendants incorporated the Olive Lawn Cemetery, defendant herein, for the purpose of defrauding the partnership of its cemetery business or of destroying it. To this end they appropriated for defendant corporation a name composed of the distinctive words of the partnership name and acquired the lands, hereinafter referred to as "parcel B," lying to the north of and adjacent to Memorial Park, knowing that it contained the well theretofore mistakenly drilled off their land by the partnership. After dividing parcel B into cemetery lots defendants took possession of Memorial Park and made use of it to promote sales of grave places upon their own land.

Some differences among the partners having arisen out of the dissolution of the partnership, pursuant to the agreement creating it arbiters were appointed and a hearing was conducted on June 20, 1940. Their findings and award were filed in the Superior Court and on motion of the Peeblers judgment thereon was entered on February 20, 1942. Appeal therefrom, taken by defendant Olds, was affirmed December 8, 1942. By such judgment one H. M. Head was appointed commissioner to sell the assets of the partnership at public auction. Pursuant thereto, after one unsuccessful effort, he sold Memorial Park to respondents who have continuously owned the five acres. While it is not disclosed by the findings it appears from the "settled statement" that appellant Edith Danziger purchased the small office at the sale.

Following the entry of the judgment on the arbitration award four actions and one proceeding were instituted by defendants in all of which defendant Danziger acted as their attorney, as follows: (1) Graceland, a corporation v. Byron Peebler, Ethel Peebler, B. C. Olds and Belle Utterbach, doing business under the name of Olive Lawn Memorial Park. This action filed October 30, 1940, was brought to quiet title of the Graceland corporation in and to the same five acres theretofore sold to respondents by Commissioner Head. Judgment on the pleadings was awarded to the defendants and became final March 18, 1942. (2) Mahurin v. Byron Peebler, Ethel Peebler and B. C. Olds, a partnership doing business as Olive Lawn Memorial Park, filed October 30, 1940. This was an action to recover damages and to impress a lien on Memorial Park. A trial on May 2, 1941, resulted in a judgment in favor of the defendants therein which judgment became final upon the abandonment of his appeal by Mahurin. (3) B. C. Olds v. Byron Peebler, Ethel Peebler and H. M. Head. This action was filed September 11, 1942, for alleged damages and for fraudulent conspiracy of the defendants in connection with the unsuccessful judicial sale of the partnership property under the arbitration judgment. A demurrer having been sustained without leave to amend, final judgment was entered on February 18, 1943. (4) Olds v. Byron Peebler and Ethel Peebler. This action, filed May 26, 1943, was for damages alleged to have been caused by the named defendants in connection with the sale of the property under the arbitration judgment. It was evidently intended to cover the same matters embraced in the lawsuit mentioned in item (3) above. It is now pending in the Superior Court. (5) On the same day defendant Danziger as president and attorney filed a voluntary petition in bankruptcy on behalf of the Graceland corporation in the United States District Court. He listed as the sole asset of the bankrupt the five acres comprising Memorial Park, the property of plaintiffs. In addition to the foregoing actions and proceeding, defendant Olds, acting through J. M. Danziger as his attorney, filed his petition for a writ of supersedeas to stay all proceedings in an injunction action which these respondents had filed against Olds, Andrews and J. M. Danziger in March 1942. Such petition was denied.

In response to the allegation of the malice of defendants herein the court below found (a) that Graceland's charter had been suspended many years prior to the filing of the bankruptcy petition and that it had owned no interest in Memorial Park since November 9, 1926; (b) that the filing of the bankruptcy petition was only a part of the general program of defendants to involve Memorial Park in litigation for the purpose of depriving plaintiffs of ownership thereof; (c) that all defendants were participants in the plan and conspiracy to deprive plaintiffs and other lot owners in their cemetery of having it known by its true name, "Olive Lawn Memorial Park"; (d) that all claims of defendants to Memorial Park are entirely fictitious and have been asserted with the sole object of depriving plaintiffs of their property which they had acquired by purchase at the judicial sale under the arbitration judgment; (e) that the value of Memorial Park and the cemetery business depends upon the continuous operation thereof by plaintiffs under the name long used and acquired with the land and upon the availability of the well drilled on parcel B by the partnership for the use of the cemetery; (f) that in the action brought by the Peeblers in March, 1942, defendants Olds, Andrews and Danziger were enjoined from going upon Memorial Park, and subsequently Olds was punished for violating such injunction; (g) that in the last-mentioned action Danziger filed two separate affidavits: in one of them he impliedly averred himself to be owner of Memorial Park; in the other he declared the land was owned by Graceland. These averments were made despite the indisputable facts that Graceland had by its president, J. M. Danziger, conveyed the five acres to Wake Development Company in 1926, that Wake by its president, J. M. Danziger, had conveyed the property to Olds in 1929, and that Olds and respondents had as a partnership operated it as the Olive Lawn Memorial Park Cemetery until March 1, 1940; (h) that after the latter date, ignoring the rights of respondents as tenants in common of Memorial Park, appellants occupied the land and used other assets of the partnership until they were acquired by respondents and thereafter used them to their profit until they were enjoined from committing further trespasses.

[1] That the evidence warranted the findings that the prosecutions of the actions and proceedings were malicious and without probable cause cannot reasonably be gainsaid. The uniformity of defendants' conduct in commencing groundless lawsuits is readily apparent. The action on behalf of Graceland 16 years after it had transferred its title can be neither excused nor explained upon any reasonable hypothesis. No explanation of Mr. Danziger's instituting the action on behalf of Mahurin against the partnership (the Peeblers and Olds) can be found. Its viciousness is ac-

centuated by the fact of Olds' threat, prior to the dissolution, to break the Peeblers "wide open" if they should not put up the money to buy more land surrounding Memorial Park. No excuse appears for the lawsuit against respondents and the commissioner named in the arbitration judgment for the sale of the partnership's assets. The bankruptcy proceeding could have had no purpose other than to becloud respondents' title to the five acres they had purchased at the judicial sale. It was a reasonable inference that all of these actions resulting in final judgment for respondents were wholly unfounded and the conspiracy and hostility of defendants are clearly indicated thereby. The act of filing the unwarranted petition for supersedeas was another display of malice as was likewise the collusive co-operation of Olds with Danziger in having himself made a party defendant in the Graceland and Mahurin actions. In operating their cemetery on parcel B, in appropriating the water well, in utilizing Memorial Park in the conduct of their cemetery, in selling grave places in Memorial Park, by giving defendant corporation a name of such distinctive resemblance to that of the partnership,—these facts warrant the finding of malice. Nor was such finding discounted by the warning by Danziger on June 4, 1943, that the suits already filed were but a modicum of defendants' litigious program. Not one of appellants had any interest in Memorial Park at the time of the filing of any of the lawsuits. Neither had any damage been suffered by Olds or by any other defendant as a result of any of the acts described in the several complaints.

[2] Malice is properly inferred from want of probable cause. It may also be inferred from hostile acts and declarations of the defendants evincing ill will toward plaintiffs, coupled with a showing of defendants' resolution to prosecute unfounded lawsuits for the purpose of gaining financial advantage over plaintiff. Mills v. Friedman, 119 Cal.App. 74, 80, 5 P.2d 901. Want of probable cause herein is established by the facts found and by the evidence above recited and inferences reasonably drawn therefrom. Id. The ill will of appellants and their zeal to gain material advantage over respondents by the lawsuits were facts in proof from which the trial court might reasonably infer malice. Burke v. Watts, 188 Cal. 118, 123, 204 P. 578.

[3] The actions had all terminated prior to the filing of the complaint herein. While the second action for damages alleged to have resulted from the judicial sale of the partnership assets is still pending, that fact does not bar respondents' right of recovery upon the final judgment in the first action based upon the unsuccessful prosecution of the first action upon the same allegations of damages. Hurgren v. Union Mutual Life Ins. Co., 141 Cal. 585, 75 P. 168. If the refiling of an unfounded lawsuit might abate an action for the malicious prosecution of the original action, the wrongful party might wholly defeat such an action by a postponement of his filing a second suit beyond the statutory period of limitation. Id.

[4, 5] Conspiracy of the defendants was properly inferable (1) from the participation of all of them in one or more of the lawsuits, (2) in using the name "Olive Lawn Cemetery" for the corporation which they organized for the purpose of appropriating the business of the partnership, and (3) in their intimate association in connection with the conduct of the cemetery business of defendant corporation. While Mrs. Danziger had no nominal part in the institution of the actions, yet after her husband and Olds had been enjoined from going upon Memorial Park and Olds had been punished for violating the injunction Mrs. Danziger took immediate possession of respondents' cemetery and asserted right thereto. However, although her boldness and promptness in taking up the campaign of harassing respondents after the injunction had defeated the unlawful acts of Messrs. Danziger and Olds are suspicious circumstances when taken in connection with the fact that her husband was the chief actor in the events that harassed respondents, yet no substantial evidence of her actual participation in the conspiracy prior to or at the time of instituting the actions has been designated and we find none. Therefore, the award of damages against her must be reversed.

[6-8] But this is not true as to the corporate defendant. Promptly upon its organization it became the willing tool of two of its codefendants in appropriating the good will of the partnership, in using

its assets, in simulating its name and in selling grave places in Memorial Park. The argument that the corporation could not have been organized to acquire the grave lands of respondents because it was organized two years before the Peeblers purchased Memorial Park is wholly without merit. Immediately following the incorporation of Olive Lawn Cemetery the old partnership was dissolved. Its cemetery name and good will still belonged to the partners. At the judicial sale of the partnership's assets to respondents its good will as well as the five acres of Memorial Park became their property subject to the easements of those who had purchased burial plots. That the charter of the corporate defendant was suspended in January, 1942, makes it none the less liable for its share in the ignoble and illegal wrongs. The conspiracy having been established, each of the participants became liable for the wrongful acts of all and each is responsible as a joint tortfeasor for such damages as ensued from their wrongful acts. Frost v. Hanscome, 198 Cal. 550, 246 P. 53; Revert v. Hesse, 184 Cal. 295, 301, 193 P. 943. The plaintiffs were entitled to joint recovery of damages against such defendants as were shown to have co-operated in prosecuting the fictitious actions against them. Id.

[9-11] The findings that respondents suffered the special damages are supported by the evidence of the sums necessarily expended by respondents in calling on their counsel and in their attendance at court and costs necessarily incurred in the actions "filed by Mr. Danziger" in the sum of $77. As to the expenditure of such sums in preparing defenses to the actions, the determination thereof by the trial court upon substantial evidence will not be disturbed on appeal. Bellman v. San Francisco High School Dist., 11 Cal.2d 576, 81 P.2d 894. As to the value of the attorney's services, the court may determine their value without the aid of expert testimony. City of Los Angeles v. Los Angeles-Inyo Farms Co., 134 Cal.App. 268, 274, 25 P.2d 224. Having been compelled to expend such sums respondents were entitled to recover them by a judgment establishing the malicious prosecution. Stevens v. Chisholm, 179 Cal. 557, 564, 178 P. 128.

[12, 13] The "opinion" of the trial court has no bearing upon the correctness of the adjudication of the special damages. In re Estate of Finkler, 7 Cal.2d 97, 102, 59 P.2d 801. However, in explanation of the court's opinion, at the time of filing it the court had evidently overlooked the amendment to the complaint alleging the special damages. The findings and conclusions are the conventional instruments for expressing the court's determination and decision. Id. Where there is a conflict between the court's opinion and its findings the opinion must be disregarded. It is no part of the record on appeal and therefore cannot alter the decision. Falk v. Falk, 48 Cal.App.2d 772, 778, 120 P.2d 720.

It is ordered that paragraph IV of the judgment be modified to read as follows:

"That plaintiffs recover from the defendants other than Edith Danziger the sum of $977 and that they recover costs of suit against all the defendants in the sum of $34.75."

As thus modified the portion of the judgment appealed from is affirmed.

McCOMB, J., and FOX, J. pro tempore, concur.

71 Cal.App.2d 415

ZUMWALT et al. v. HARGRAVE.

Civ. 14812.

District Court of Appeal, Second District, Division 1, California.

Oct. 30, 1945.

Hearing Denied Dec. 27, 1945.

1. Pleading 🔑**43, 49**

In considering sufficiency of complaint, court is not concerned with question of proper designation of action, nor with prayer for relief, but must determine from allegations whether complaint states cause of action entitling plaintiff to any relief at law or in equity.

2. Judgment 🔑**248**

Court has jurisdiction to grant any relief consistent with case made by complaint and embraced within the issue. Code Civ.Proc. § 580.

3. Landlord and tenant 🔑**34(5)**

A complaint alleging that written lease entered into between parties contained provision authorizing plaintiffs to terminate lease upon bona fide sale of leased property, that plaintiff made a bona fide sale, that notice of termination of lease was served upon defendant, together with a tender of sum specified in lease, and that defendant refused to deliver possession of premises, pleaded sufficient facts to entitle plaintiffs to a judgment for recovery of possession of property and cancellation of the lease.

4. **Landlord and tenant** ⟹34(5)

Evidence failed to show that terms of provision in written lease for termination of lease upon bona fide sale of leased property were so uncertain, as to preclude enforcement of termination clause by lessors.

5. **Attorney and client** ⟹77

An attorney generally has express authority to bind his client by all acts which are expressly authorized by contract of employment and, in addition, he has, merely by virtue of retainer or employment alone, the general implied authority to do on behalf of his client all acts, in or out of the court, necessary or incidental to prosecution or management of a suit or defense, or accomplishment of purpose for which he was retained.

6. **Landlord and tenant** ⟹94(2)

A provision requiring notice of exercise of an option to terminate a lease must be complied with unless waived.

7. **Landlord and tenant** ⟹94(3)

A provision requiring notice of exercise of an option to terminate a lease is not construed strictly, but it is sufficient if intention of party to exercise the option is fairly communicated.

8. **Attorney and client** ⟹82

By virtue of his employment by lessors, attorney had general implied authority to execute notice of termination of lease in their behalf pursuant to provision in lease requiring notice of exercise of option to terminate the lease.

9. **Landlord and tenant** ⟹34(5)

In lessors' action to recover leased property upon exercise of option to terminate lease and deposit of sum provided as condition to terminate, a judgment for recovery of possession and for cancellation of lease, together with holding that sum was deposited by the plaintiffs represented proper amount due defendant, was not objectionable upon ground that it failed to dispose of entire controversy or to do equity between the parties.

◆

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Wade Zumwalt and another against Jacob C. Hargrave to recover possession of real property. From a judgment for plaintiffs, the defendant appeals.

Affirmed.

Joseph Ball and Kenneth Sperry, both of Long Beach, for appellant.

Will H. Winston, of Long Beach, for respondents.

YORK, Presiding Justice.

On June 4, 1941, respondents, as lessors, and appellant, as lessee, entered into a lease covering the Wade Apartments located at Long Beach, California, for a period of seven years at a stated rental per month. Said lease provided, among other things, the following:

"The landlord hereby reserves the right to terminate this lease and the terms thereof, in case of a bona fide sale of said property, upon giving ninety (90) days' notice in writing to the tenant, mailed to the tenant at the demised premises, of their intentions so to terminate the same; and this lease and the terms hereof, shall cease, determine and end at the expiration of ninety (90) days from the day when such notice shall have been mailed, and thereafter, the Lessors may take possession of the demised premises and every part thereof, either by force or otherwise, without being liable to prosecution or damages therefor, and enjoy the said premises as of their former estate, free, clear and discharged of this lease, and of all the rights of the tenant hereunder, but that in the event of such cancellation of this lease, in the manner hereinbefore provided, the Lessors shall pay to the Lessee, the sum of Fifteen Hundred Dollars ($1500.00) for any furniture purchased by the Lessee herein, in this transaction, a bonus of Five Hundred Dollars ($500.00), and such portion of Seven Hundred Fifty Dollars ($750.00) as the balance of said lease bears to the said Seven Hundred Fifty Dollars (750.00), as consideration for the surrender of said premises."

On June 20, 1943, the property was sold, whereupon respondents on June 21, 1943, mailed notice of termination of the lease to appellant, which contained an offer to pay "the sum of $1500.00 for any furniture purchased by you in the transaction of June 4, 1941, also a bonus of $500.00 and also such proportion of the sum of $750.00 as the balance of said lease bears to the said sum of $750.00, which said sums of money will be paid immediately upon your vacating said premises as consideration for the surrender thereof."

Appellant refused to vacate the premises, whereupon respondents brought the instant action to recover possession thereof. The trial court found in favor of respondent lessors and entered judgment for recovery of possession of the property and for cancellation of the lease.

This appeal is prosecuted by the lessee, who urges the following grounds in support of a reversal of the judgment:

1. That the complaint fails to state a cause of action;

2. That the uncertainty of the agreement was conclusively established by the evidence;

3. That the notice of termination was defective in that it was not signed by the lessors or any duly authorized agent;

4. That the judgment fails to dispose of the entire controversy or to do equity between the parties.

It is here contended by appellant that "while the action is ostensibly one in unlawful detainer, the true import of the proceeding is one to specifically enforce the terms of an option upon the part of the lessors to terminate the leasehold estate and to repurchase any furniture purchased by the lessee. It is likewise obvious that it is impossible to ascertain from a literal reading of that portion of the lease which is quoted in paragraph IV of the complaint, the exact amount of money which lessors are required to pay to the lessee in the event they seek to enforce the option or the time that such payment is to be made." Also, that assuming that respondents intended to state a cause of action in ejectment, "the complaint is fatally defective in that it affirmatively appears from the specific allegations thereof that plaintiffs' right to possession was not absolute, but was conditional upon the payment of certain sums, the amount of which could not be determined from the terms of the contract"; and that the complaint fails to allege performance or offer of performance upon the part of respondents of such condition.

[1, 2] As was so aptly stated in the case of Samuels v. Singer, 1 Cal.App.2d 545, 548, 36 P.2d 1098, 1099, 37 P.2d 1050: "In considering the sufficiency of a complaint, the court is not concerned with the question of proper designation of the action, nor with the prayer for relief. The duty devolving upon the court is that of determining from its allegations whether the complaint states any cause of action entitling plaintiff to any relief at law or in equity. Hayden v. Collins, 1 Cal.App. 259, 81 P. 1120; Keele v. Clouser, 92 Cal.App. 526, 268 P. 682; Luckey v. Superior Court, 209 Cal. 360, 287 P. 450. And the court has jurisdiction to grant 'any relief consistent with the case made by the complaint and embraced within the issue'. Section 580, Code Civ.Proc.; Hinkel v. Crowson, 83 Cal.App. 87, 256 P. 479."

[3] The complaint herein alleges a written lease entered into between the parties hereto and alleges in haec verba the termination clause heretofore quoted in this opinion. The complaint then alleges a bona fide sale of the property, service of notice of termination of the lease by respondents and the tender by them to appellant of the following sums: $1,500, together with the $500 bonus provided for in the lease; $508.92, the proportionate share of the $750 mentioned in said lease, making a total of $2,508.92, less the sum of $82.50 rent to September 25, 1943, and less the sum of $263.66 the balance due respondents on a promissory note for the purchase of said premises, making a total credit due respondents of $346.16 and leaving a balance due appellant of $2,162.76, "which sum the plaintiffs herein herewith deposit with the Clerk of the above entitled Court for the defendants in accordance with the statutes made and provided therefor." The complaint further alleges failure and refusal of appellant to deliver possession of the premises, and that respondents were entitled to possession thereof.

It conclusively appears that sufficient facts were pleaded by respondents to entitle them to the judgment rendered herein, i.e., recovery of possession of the property and cancellation of the lease.

[4] With respect to appellant's point that the uncertainty of the agreement was conclusively established by the evidence, appellant testified that at the time the lease was prepared he understood that the money provided to be paid to him under the

termination clause would be paid at the time notice of termination was served upon him so that he could use it to get another place, and also that he was to be paid in addition to the amounts specified in the lease an amount to compensate him for any improvements or new furniture that he put into the apartment house. Respondents, on the other hand, testified that there was no discussion at the time the lease was prepared as to when the money provided by the termination clause should be paid, and nothing was said with respect to reimbursement for furniture that appellant might put into the apartment after he went into possession. In the words of respondent Wade Zumwalt: "There was no place to put it. The apartments were full when he went there. * * *

"The Court: He said he paid you $1,500.00 for the furniture? A. Yes, sir. * * *

"The Court: * * * And you agreed to pay him $1,500.00 for the furniture, that is in the lease itself, which was cancelled? A. Yes, sir.

"The Court: Was there any discussion about why you should pay $1,500.00 for furniture that had depreciated? A. No, there was not.

"The Court: That wasn't discussed. You were to pay $1,500.00 for the furniture, the same price he paid you? A. That is right.

"The Court: Even though it had depreciated over a period of several years? A. That is right.

"The Court: No discussion about that; no discussion about what would happen to the replacements? A. No, sir.

"The Court: All right."

An examination of the reporter's transcript reveals that in so far as the parties to the action are concerned, their sole argument was over the furniture in the apartments and the additions or replacements which were made by appellant. The lease provided for a payment to appellant by respondents of $1,500 for the furniture upon cancellation or termination of the lease. After argument and discussion of this point, the trial court commented as follows: "I will take the plaintiff's version that these were largely replacements. The place was full of furniture anyway and I don't think he is getting his furniture in much better condition—he won't be much ahead on it anyway because that kind of furniture depreciates rapidly." The lease itself provided that the various sums of money should be paid to lessee "as consideration for the surrender of said premises"; and the notice of termination stated: "said sums of money will be paid immediately upon your vacating said premises as consideration for the surrender thereof." In view of what has been said, there is no merit in appellant's second point.

The notice of termination of lease is signed by "Wade Zumwalt and Madge Zumwalt by Will H. Winston, Their Attorney." Appellant contends that the notice is defective because not signed by the lessors or their duly authorized agent.

[5] "* * * an attorney generally has express authority to bind his client by all acts which are expressly authorized by the contract of employment; and, in addition, he has, merely by virtue of the retainer or employment alone, the general implied authority to do on behalf of his client all acts, in or out of court, necessary or incidental to the prosecution or management of a suit or defense * * *, or the accomplishment of the purpose for which he was retained." 7 C.J.S., Attorney and Client, p. 896, § 79.

[6, 7] "A provision requiring notice of exercise of an option to terminate a lease must be complied with unless waived * * * and the rule seems to be that such a provision is not construed strictly, but it is sufficient if the intention of the party to exercise the option is fairly communicated." 32 Am.Jur. 713, sec. 837.

[8] By virtue of his employment by respondents, their attorney had the general implied authority to execute the notice of termination of the lease in their behalf.

[9] With respect to appellant's final point, that the judgment fails to dispose of the entire controversy, an examination of the record discloses that the trial court found on all the issues raised by the pleadings; that the sum of $2,162.76 was deposited with the court; that the court decided that such sum was due the appellant, and it is now held by the clerk of the court for appellant.

For the reasons stated, the judgment appealed from is affirmed.

DORAN, and WHITE, JJ., concur.

71 Cal.App.2d 444

PULLEN v. HEYMAN BROS. et al.

Civ. 12831.

District Court of Appeal, First District,
Division 1, California.
Oct. 31, 1945.

Hearing Denied Dec. 27, 1945.

1. Appeal and error 🔑930(1)

Evidence was construed on appeal most favorably to the prevailing litigant.

2. Fraud 🔑49, 58(1)

Evidence of fraudulent representations sufficiently conformed to the complaint and warranted recovery for fraud inducing plaintiff to join with defendants in construction projects.

3. Fraud 🔑49

Generally, fraudulent representations relied upon must be pleaded, but not all allegations must be proved.

4. Fraud 🔑49

In absence of demurrer, fraud may be alleged in substance and effect and the evidence must conform thereto, but the proof need not be a verbatim recitation of allegations of complaint.

5. Fraud 🔑64(1)

Whether a statement is an expression of opinion or affirmation of fact is ordinarily for jury, particularly if there is other evidence that party who makes the statement has made other false statements in reference to the subject matter or has performed or neglected without reasonable explanation to perform an act which indicates intent to suppress vital information and thereby deceive some interested party.

6. Fraud 🔑64(5)

In action for fraud inducing plaintiff to join with defendants in construction projects, whether plaintiff proceeded with reasonable expedition in investigation of the projects was for jury.

7. Fraud 🔑64(5)

In action for fraud, whether plaintiff relied on defendants' statements in joining with defendants in construction projects was for jury in view of plaintiff's admitted knowledge that some of the projects had been underbid.

8. Appeal and error 🔑1066
Trial 🔑253(7)

In action for fraud, formula instructions which were loosely and incompletely drawn, in permissive and not directive form, omitted language generally required in formula instructions, and omitted basic factor of reliance in one instruction and factor of reasonable reliance in another, but by implication covered necessary elements of the cause of action, were improper but not, standing alone, ground for reversal.

9. Appeal and error 🔑1026

The question of miscarriage of justice, unlike the problem of determining error, must depend upon particular facts.

10. Appeal and error 🔑1064(4)
Trial 🔑228(3)

In action for fraud, use of word "presumption" instead of "inference" in instructions on presumption that false representations induced plaintiff's reliance was error and, where facts were evenly balanced and other instructions faulty, prejudicial.

11. Trial 🔑241

Generally, an excerpt from a law book or court's opinion is intended to declare the law relative to particular matters under discussion, and practice of extracting excerpts and changing them into instructions is condemned.

12. Appeal and error 🔑1064(1)
Trial 🔑241

In action for fraud, instruction in language copied from legal treatise that one may be guilty of fraud even if he acts "under the honest impression that he is violating no obligation or invading no right" if he negligently, carelessly "or with lack of foresight" makes representations which will deceive, without definition of quoted phrase in other instructions or any wording limited to failure to foresee events which should reasonably have been foreseen, was erroneous and prejudicial.

13. Appeal and error 🔑1064(1)
Fraud 🔑65(1)

In action for fraud, instruction in effect that in lieu of actual intent to deceive, gross negligence might furnish "conclusive" evidence of fraudulent intent was erroneous and prejudicial. Code Civ.Proc. §§ 1837, 1978.

14. Evidence ⚷596(1)

Evidence is not "conclusive" evidence, which may not be contradicted, unless so declared by the Code. Code Civ.Proc. §§ 1837, 1978.

See Words and Phrases, Permanent Edition, for all other definitions of "Conclusive Evidence".

15. Fraud ⚷4

Gross negligence does not conclusively constitute fraudulent intent in lieu of actual intent to deceive.

16. Appeal and error ⚷1064(1)

Whether errors in instructions were prejudicial must depend upon closeness of the case on its facts, nature of the erroneous instructions and of other instructions given, and other factors.

17. Fraud ⚷59(1), 62

In action for fraud inducing plaintiff to join with defendants in construction projects, plaintiff could recover only original investment, less losses, plus interest, and verdict for $23,491.55 was excessive under evidence.

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Appeal from Superior Court, San Francisco County; Edmund P. Mogan, Judge.

Action by Roy C. Pullen against Heyman Brothers and others for fraud. From a judgment for plaintiff, defendants appeal.

Reversed and remanded.

M. Mitchell Bourquin, of San Francisco, for appellants.

Vincent W. Hallinan and James Martin MacInnis, both of San Francisco, for respondent.

WARD, Justice.

This is an appeal by defendants from a judgment for plaintiff in an action for fraud. The amount of the verdict was fixed by the jury at $23,491.55, no exemplary damages being assessed.

The plaintiff's claim was based upon alleged fraudulent misrepresentations in relation to certain construction projects which the plaintiff and defendants had undertaken by reason of two agreements entered into in December of 1942, and certain other construction projects into which the profits of the original projects had been reinvested, which representations induced plaintiff to ratify such reinvestment and enter into a contract in July, 1943, relating to the latter construction projects. The plaintiff alleged that the defendant Alvin Hayman, the agent of Heyman Brothers, a corporation, and Heyman Brothers Construction Co., a co-partnership, and of all other Heymans appearing as defendants and appellants, told him in the month of June, 1943, that all of the construction projects covered by the first agreement had been completed and had resulted in a large profit; that plaintiff's original investment and the profit had been reinvested in other projects which either had been completed or had so far progressed toward completion as to insure a large profit, wherefore the plaintiff entered into the contract ratifying the reinvestment. With respect to these representations the answer affirmatively alleged that at the time of the July, 1943, agreement "plaintiff was informed and knew that the performance of said war contracts therein mentioned would result in a substantial loss, the exact amount whereof was not then definitely known," and "that on the 12th day of July, 1943, all of said contracts either had been completed or were so near completion as to insure a large loss to the defendants Heyman Brothers, a corporation, and Heyman Brothers Construction Co., a co-partnership, and to the plaintiff if he were held as party to said agreement, but in that regard said answering defendants allege that the aggregate amount of such loss was not then ascertainable and could not be ascertained until all of said contracts were completed; admit that said projects and contracts resulted in a large loss to the defendants, Heyman Brothers, a corporation, and Heyman Brothers Construction Co., a co-partnership, and to plaintiff as a party to said agreement; admit that the loss so incurred was such as to result in a loss of all the sums invested therein, including the moneys belonging to and so invested therein by plaintiff; admit that an inspection of said accounts would not have shown that all of said projects were highly successful financially or had made a large profit or that any of them then uncompleted had so far progressed as to be proof against any possible loss." An examination of these allegations reveals that the basic issues on the trial concerned (1) whether any false representations, known by Hayman to be false, concerning profits, were ever made by Hayman, and (2) assuming such representations were ever made, whether plaintiff was justified in relying on them. In support of the allegation of fraud plaintiff testified:

"Q. [At the time of the consideration of the new contract] was anything said as to whether or not the projects were making money? A. Yes.

"Q. What did Mr. Hayman say on that subject? A. Mr. Hayman said, 'We were not making a lot of money, we were not getting rich, but we were doing all right.' He said that we were probably making, he judged, about $40,000."

Plaintiff further testified that he had confidence in Hayman; that he believed his statements and, relying upon them, signed the July 12, 1943 contract. Defendants' evidence on the trial was sufficient, if believed, to establish that plaintiff personally knew that two of the construction contracts had been materially underbid; and that plaintiff did not rely on any statements made by Hayman in entering into the last agreement.

[1-4] The first contention of defendants on appeal concerns the sufficiency of the evidence to support the allegations of fraud in the complaint. It must be concluded that there is evidence from which a reasonable inference might be drawn that defendants made a representation in regard to a material fact; that such representation was false, known to defendants to be false, and made upon a subject upon which the plaintiff was ignorant. There is also evidence from which the facts that defendants intended that plaintiff should act upon the misrepresentation and that plaintiff relied upon defendants' statements to his damage could be deduced. When the evidence is construed most favorably to the prevailing litigant, the plaintiff, it is sufficient to establish all of the essential requirements from an evidentiary standpoint of a cause of action based upon fraudulent representations. Hobart v. Hobart Estate Co., 26 Cal.2d 412, 159 P.2d 958. There is no merit in the contention that the representations proved did not conform to the complaint. The general rule is that the fraudulent representations relied upon must be pleaded. Mayer v. Mayer, 207 Cal. 685, 279 P. 783. This does not mean that all of the allegations of the complaint must be proved. Thomas v. Hacker, 179 Cal. 731, 178 P. 855; Neff v. Engler, 205 Cal. 484, 271 P. 744; Klutts v. Rupley, 58 Cal.App. 2d 560, 137 P.2d 496. In the absence of a demurrer, fraud may be alleged in substance and effect and the evidence must conform thereto, but the proof need not be a verbatim recitation of the allegations of the complaint. Hick v. Thomas, 90 Cal. 289, 27 P. 208, 376; Peterson v. Wood, 119 Cal.App. 731, 7 P.2d 359. Here the substance and effect of the representations proved conformed to the allegations of the complaint.

[5, 6] Other deficiencies in proof are asserted by defendants. Defendants claim that statements of financial condition and statements of value are statements of opinion only. The determination that a statement is an expression of opinion or an affirmation of a fact ordinarily is a question to be decided by the jury, particularly if there is other evidence showing that the party who makes the statement has made other false statements in reference to the subject matter or has performed or neglected without reasonable explanation to perform an act which indicates an intent to suppress vital information and thereby deceive some interested party. Willson v. Municipal Bond Co., 7 Cal.2d 144, 59 P.2d 974; Hobart v. Hobart Estate Co., supra. The part of the answer and cross-complaint heretofore referred to admitted that a large loss would occur, but the amount was not ascertainable until all contracts should be completed. Whether plaintiff proceeded with reasonable expedition in the investigation of the affairs of the original and subsequent contracts is a question of fact for the jury to decide. The pleadings admit that an inspection of the books would not have shown whether the projects were financially prosperous or misadventures.

The main question on appeal concerns the propriety of certain instructions in view of the fact that basically the evidence in the case presents a test of credibility between plaintiff and defendant Alvin Hayman. As above noted the two basic conflicts related to whether any representations had been made, and whether, if any representations had been made, the plaintiff relied upon, or was justified in relying upon, them. Plaintiff knew that there had been underbids on several construction jobs within the July, 1943, agreement. Financial statements, except in general form, were unobtainable. There is evidence that when plaintiff sought information relative to the financial success or failure of the construction projects from the superintendent of construction that defendant Alvin Hayman instructed the superintendent not to give the requested information.

In the Hobart case, supra, the court said, 159 P.2d at page 977: "In passing upon the sufficiency of the evidence to support the verdict all conflicts must be resolved in favor of the implied findings of the jury, since it is the sole judge of the credibility of the witnesses and the weight of the evidence; but in determining whether a judgment must be reversed because of errors in instructions, we are required to examine the entire cause including the evidence and decide whether in our opinion the errors have resulted in a miscarriage of justice."

[7] Whether plaintiff in the present case relied on defendant Hayman's statements, in view of plaintiff's admitted knowledge that at least two of the construction projects had been underbid, presents a question to be decided solely by the jury. A verdict in favor of plaintiff or of defendants might be upheld, but the question of reliance is a vital legal requisite to the fraud charge herein. Under such circumstances the framing of the instructions becomes important as the wording may have caused the jury to reach a conclusion based on the contents of an instruction irrespective of other instructions which may state the law correctly.

[8] The first instructions attacked are two instructions submitted by plaintiff, referred to as formula instructions. They are rather loosely and incompletely drawn. They are couched in permissive and not in directive form and certain language which is generally required in formula instructions is omitted. It must be noted that in one instruction the basic factor of reliance was omitted and in the other the factor of reasonable reliance was omitted. In Mazzotta v. Los Angeles Ry. Corporation, 25 Cal.2d 170, 153 P.2d 338, at page 341, after considering a formula instruction, the court says: "Accordingly, it has been held that although an instruction may not include all of the factors essential to a recovery by the plaintiff, its use does not constitute prejudicial error where, considered together in their entirety, the instructions fully and fairly charge the jury with the law applicable to the case." The two instructions, if not in fact, by implication cover the necessary elements of the cause of action here alleged. The form and substance should be condemned but in the present case, standing alone, they should not be used as a ground for reversal.

[9, 10] The objection to the next instruction is that the jury was permitted to "presume" proof, which is not in the evidence. The instruction reads: "If false representations were in fact made to the plaintiff by the defendant Heyman, and those representations were of a nature calculated to induce the plaintiff to alter his position to his risk or injury, by entering into the contract of July 12, 1943, and that plaintiff did thereupon alter his position, to his loss, and entered into the said contract, a presumption arises that the false representations induced him to do so, and that he relied upon them in so changing his position and entering into said contract." The use of the word "presumption" instead of "inference" in instructions to juries, except when the presumption is a statutory and not a judicial presumption, often causes difficulty on appeal to the party proposing the instruction. The use of the words "presume" or "presumption" instead of "infer" or "inference" has been approved in a few cases, condemned in many, but generally forgiven. One of the most notable cases in which the perpetration of such error has been pardoned is Mudrick v. Market Street Ry. Co., 11 Cal.2d 724, 81 P.2d 950, 118 A.L.R. 533. The legal problem of determining error is distinct from the question of miscarriage of justice. The latter question of necessity must depend upon the particular facts of each case. In the present case the facts are so evenly balanced that a reversal is warranted on the "presumption" instruction. It appears from its repeated use that little or no heed is given by attorneys who prepare and present this or similar instructions, to the admonitions of the appellate courts. In support of the view here taken that the use of the word "presumption" on the facts of this case constituted prejudicial error, it should be noted that in another part of the instructions the jury was told that "A presumption is a deduction which the law expressly directs to be made from particular facts." It is to be noted again that the error relates to one of the most sharply disputed facts in this case—plaintiff's reliance on the representation. In view of all the circumstances, and the

holding on the next instruction attacked, and in view of the holding in the Hobart case, supra, the use of the word "presumption" instead of "inference" is prejudicially erroneous as applied to the facts of this case.

[11, 12] At the request of plaintiff the court instructed the jury as follows: "You are instructed that, even if one acts under the honest impression that he is violating no obligation or invading no right, nevertheless he is guilty of fraud if, knowing the circumstances, he negligently, carelessly or with lack of foresight, makes representations the natural and necessary consequence of which will be to deceive another. In this connection, you are instructed that gross negligence alone upon the part of a person making a representation may furnish conclusive evidence of fraudulent intent even where there is no actual intent to deceive." The case cited to the trial judge as authority for the correctness of this instruction was Rialto Construction Co. v. Reed, 17 Cal. App. 29, 118 P. 473. Even in that case such an instruction as appears herein was not approved. Plaintiff also seeks to justify the instruction because it was copied from a legal treatise of the law. As a rule an excerpt from a law book or from a court opinion is intended to declare the law relative to the particular matters under discussion. The courts of this state have condemned the use of extracting excerpts and changing them into instructions. Relative to a similar instance it was said in Hall v. City and County of San Francisco, 188 Cal. 641, 643, 644, 206 P. 459: "The instruction is an illustration of the dangers of attempting to frame a charge to the jury upon isolated extracts from opinions of this court." See, also, Rosander v. Market Street Ry. Co., 89 Cal.App. 710, 265 P. 536; Long v. Barbieri, 120 Cal.App. 207, 7 P.2d 1082. The first error in this instruction is the use of the words "or with lack of foresight." Note that it appears as a disjunctive. There is no definition of that phrase given in other instructions and at no place called to attention on appeal is the wording limited to a failure to foresee future events which should reasonably have been foreseen. As it stands, it may indicate that unless the defendant has the sagacity or spiritual gift of prevision, any statements he may make, even if he acts "under the honest impression that he is violating no obligation or invading no right," nevertheless, he is guilty of fraud.

[13-15] The second objection to the instruction is that in lieu of an actual intent to deceive, the jury was told that gross negligence might furnish conclusive evidence of fraudulent intent. Evidence is not conclusive unless so declared by the code. Code Civ.Proc. § 1978. Conclusive evidence may not be contradicted. Code Civ.Proc. § 1837. There is no rule of law which declares that gross negligence conclusively constitutes a fraudulent intent in lieu of an actual intent to deceive. Recently the same word was used in an instruction in the Hobart case, supra. The Supreme Court held: "We find no California statute or decision which requires that knowledge of facts that would prevent reliance must be established by conclusive or unanswerable evidence, and the instructions that such evidence is necessary were erroneous." The court then listed cases using the word "conclusive," and said: "Many other decisions, however, and in particular the more recent ones, have omitted the word 'conclusive,' employing instead such terms as 'clear and convincing,' 'satisfactory,' and 'unequivocal,' and it must now be regarded as settled that, whatever the proof necessary, it need not be 'conclusive.' See Beeler v. American Trust Co., 24 Cal.2d 1, 7, 8, 147 P.2d 583; Stromerson v. Averill, 22 Cal 2d 808, 815, 141 P.2d 732; Chard v. O'Connell, 7 Cal.2d 663, 665, 666, 62 P.2d 369; Carlson v. Robinson, 7 Cal.2d 235, 236, 60 P.2d 426; 12 Cal.Jur. 832; 17 Cal.Jur. 756, 757; 25 Cal.Jur. 247–249; and cases cited therein."

Even if that part of the instruction here under consideration containing the word "conclusive" had been correct, it was not necessary to give it in this case in view of Hayman's admission that at the time the contract was signed he knew there would be a loss. The issue before the jury on the evidence was, Did Hayman make a deliberate misrepresentation or did he not? The entire instruction stating that "lack of foresight" could constitute fraud and that "gross negligence" might "furnish conclusive evidence of fraudulent intent" was calculated to place upon the defendants a greater duty of care in making representations and a greater burden of proof in rebutting evidence of negligent misrepresentations than that required by law.

[16] Error was committed in the giving of the above instructions. Were such errors prejudicial? The answer to that question must depend upon the closeness of the case on its facts, the nature of the erroneous instructions, the nature of the other instructions given, and on other factors. This was a very close case on its facts, particularly on the issue of reliance. The nature of the erroneous instructions has already been discussed. After reading the entire record, including the entire charge to the jury, it is difficult to say whether the errors were prejudicial. Were the question one of first impression, it might well be held that the particular errors in this case were not prejudicial. The question is, however, not one of first impression. Substantially the same problem was presented in the Hobart case, supra. In that case the majority of this court was of the opinion that substantially similar errors in instructions were not prejudicial. Hobart v. Hobart Estate Co., Cal.App., 148 P.2d 41. This holding was reversed by the Supreme Court. As an intermediate appellate court we are bound by the decision of the Supreme Court. The instant case appears to be much closer on its facts than the Hobart case. The instructions as a whole in the Hobart case were much more favorable to the defendants than in the present case. If the erroneous instructions in the Hobart case were prejudicial, there is no escape from the conclusion that the erroneous instructions in the present case were also prejudicial.

[17] In view of the reversal necessitated by this conclusion with respect to the points made by appellants on the erroneous nature of the instructions, it is unnecessary to determine the precise amount which the evidence would have warranted the jury to find due the plaintiff. It is sufficient to say that the complaint, so far as fraud is concerned, is based solely upon the July, 1943, contract and not the December, 1942, agreement. $20,000 was put up by plaintiff in December, 1942; subsequently $150 as part of the salary for an "estimater." The two December agreements provided that the respective parties "shall share ratably the profits or losses attendant upon the execution of said contracts." The evidence relative to losses on the December, 1942, contracts at the date of the new agreement in July, 1943, stands without contradiction in the record even though there is also evidence that in March, 1943, the contracts were operating at a profit. Hence on the record before this court, the verdict is excessive. If the evidence remains the same upon the retrial, and the jury believes it, the verdict can be only the amount of plaintiff's original investment, less losses, plus any interest due thereon.

The judgment is reversed and remanded for a new trial in accordance with the foregoing expressed views.

PETERS, P. J., and SCHOTTKY, J. pro tem., concur.

Hearing denied; CARTER, J., dissenting.

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SECURITY-FIRST NAT. BANK OF LOS ANGELES v. SCHAUB.

Civ. 14578.

District Court of Appeal, Second District, Division 3, California.

Oct. 31, 1945.

1. **Marriage** 🔑58(7)

Agreement to marry was a representation that the obligations of marriage would be faithfully kept. Civ.Code § 155.

2. **Deeds** 🔑211(3)

Evidence justified finding that at time of making representation that defendant would be a good and faithful wife to plaintiff, the defendant had no intention of fulfilling such representation and concealed such fact from plaintiff, and justified annulment of deed which plaintiff was induced to execute to defendant by such false representation. Civ.Code, §§ 155, 1572.

3. **Contracts** 🔑94(2)

The fact represented or suppressed, allegedly constituting fraud, is deemed material if it relates to a matter of substance and directly affects the purpose of the party deceived in entering into the contract. Civ.Code, § 1572.

4. **Contracts** 🔑94(5)

A party deceived may be relieved from his contract upon proof that he would not have entered into it if he had known the facts and the performance of it would give him substantially less than he bargained for. Civ.Code, § 1572.

5. **Marriage** ⚷58(7)

The only fraud which will support a proceeding for annulment of marriage is one which goes to the essence of the marriage relation. Civ.Code, § 82.

6. **Marriage** ⚷58(7)

Neither of the contracting parties may question the validity of the marriage upon ground of reliance upon the express or implied representations of the other with respect to character, habits, chastity, business or social standing, financial worth or prospects, since it is conclusively presumed that each of the parties made his or her own independent investigation with respect thereto. Civ.Code, §§ 82, 155.

7. **Marriage** ⚷58(7)

Although the parties, by the marriage itself, impliedly promise to fulfill the commonly understood obligations of husband or wife, the failure to fulfill them does not make out a case of a promise made without intention to fulfill it within the meaning of statute authorizing annulment where consent is obtained by fraud. Civ.Code, §§ 82, 155, 1572.

8. **Marriage** ⚷58(7)

Where the fraud of one of the parties to marriage contract is so grievous that it places the injured party in a relationship that is intolerable because it cannot honorably be endured, it robs the contract of marriage of all validity. Civ.Code, §§ 82, 155, 1572.

9. **Marriage** ⚷58(7)

Equity will not deny relief where a plan of deceit has been laid out and consummated which must inevitably defeat the essential purposes of the deceived party in entering into the marriage relationship. Civ.Code, §§ 82, 155, 1572.

10. **Marriage** ⚷58(7)

Where trial court found, on sufficient evidence, that defendant married plaintiff for only purpose of acquiring an interest in his property, at the same time intending to continue with her intimate relations with another, and that after acquiring an interest in plaintiff's property defendant continued to carry on the intimate relations with the other, marriage was properly annulled for fraud. Civ.Code §§ 82, subds. 3, 4, and §§ 155, 1572.

11. **Adultery** ⚷14

Generally, evidence of sexual inclinations and of reasonable opportunities is accepted as sufficient proof of adultery.

12. **Marriage** ⚷60(7)

Evidence supported finding that not until a few days prior to filing petition to annul marriage did husband discover that wife was carrying on illicit relations with another in accordance with intention formed prior to marriage, and that husband's belief six months earlier that such relations were being carried on was based on mere suspicion and that husband did not waive right to have marriage annulled by continuing to live with wife during the six months. Civ.Code, §§ 82, subds. 3, 4, and § 155.

13. **Marriage** ⚷37

Suspicion or a belief of a spouse's adultery founded on inclusive circumstances is not the "full knowledge of the facts constituting the fraud" which constitutes ratification of a voidable marriage. Civ.Code, § 82, subds. 3, 4.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by Amiel R. Schaub against Ellen Schaub to annul a marriage contract and a deed whereby plaintiff conveyed realty to himself and defendant as joint tenants, wherein defendant counterclaimed for divorce. After recovering judgment, plaintiff died, and the Security-First National Bank of Los Angeles, as administrator of his estate, was substituted as plaintiff. From the judgment, defendant appeals.

Affirmed.

Lawrence Paul Scherb, of Culver City, for appellant.

W. Blair Gibbens, of Santa Monica, for respondent.

PER CURIAM.

Plaintiff Amiel R. Schaub obtained a judgment annulling a marriage contract between himself and Ellen Schaub and annulling a deed whereby he conveyed real property to himself and Ellen Schaub as joint tenants. After this appeal was taken, Amiel R. Schaub died and the Security-

First National Bank, the administrator of his estate, was substituted as plaintiff. He will be referred to herein as the plaintiff. Defendant Scott was named as co-respondent in a cause of action for divorce. Defendant Ellen Schaub has appealed from the judgment. She will be referred to herein as the defendant.

Plaintiff and defendant were married on July 8, 1941, and at that time he was 60 years of age and she was 34 years of age. The first cause of action alleged that defendant, for the purpose of inducing the plaintiff to consent to said marriage and for the purpose of obtaining his property, falsely represented to plaintiff that she would be a good and faithful wife and would fulfill all the obligations of a wife; that at the time of making said representations she had no intention of fulfilling them; that she was not at any time a good or faithful wife, but immediately before the marriage she, without plaintiff's knowledge, entered into a conspiracy and a fraudulent scheme with defendant Scott by which it was agreed as follows: That she should enter into the marriage contract with plaintiff with the intent that she would not consummate said marriage, that she would falsely represent to plaintiff that she would fulfill all the obligations of a wife, that after said marriage she and Scott would continue their sexual relations which had existed for some time prior to the conspiracy, and through the fraudulent scheme she would obtain from plaintiff the title to certain real property in joint tenancy; that in furtherance of said scheme she entered into the marriage contract with plaintiff with the intent that she would not consummate the marriage and with the secret intention not to fulfill all the obligations of a wife; that after the said marriage she and Scott did continue their sexual relations from the date of the marriage to and including May 1, 1943, and that plaintiff, relying upon her promise to be a good and faithful wife, did on August 13, 1941, execute a deed conveying certain described real property to himself and her as joint tenants; that at the time she made said false representations she knew plaintiff would and did rely upon them, and he was induced thereby to consent to said marriage; that if said representations had not been made to him or if he had had knowledge of said conspiracy and fraudulent scheme he would not have consented to said marriage; and that immediately upon discovering the conspiracy and the falsity of said representations on May 1, 1943, he ceased to cohabit with her.

The second cause of action included the allegations of the first cause of action and in addition thereto alleged that at the time she made said false representations she knew plaintiff would and did rely upon them, and he was induced thereby to execute said deed; that if said representations had not been made to him or if he had had knowledge of said conspiracy and fraudulent scheme he would not have executed said deed; and that he did not discover the conspiracy and fraudulent scheme and the falsity of the representations until May 1, 1943.

The third cause of action was for divorce upon the ground of cruelty. The fourth cause of action was for divorce upon the ground that defendant committed adultery with Scott.

Defendant denied the above-mentioned allegations of the complaint, and filed a cross-complaint for divorce upon the ground of cruelty. Plaintiff denied the allegations of the cross-complaint as to cruelty.

The court found that the above-mentioned allegations of the complaint were true, and also found that there was no community property and no "joint property" of the plaintiff and defendant.

Defendant contends that the evidence does not support the findings or judgment. Her argument is that there was no direct evidence that she said she would be a good and faithful wife and would fulfill all the obligations of a wife; that, although such representations are made impliedly when a woman accepts a proposal to marry, there was no evidence that such representations were false or made for the purpose of obtaining plaintiff's property or that they were made with the intention of not fulfilling them; that the mere fact that a year after the marriage the defendant fell from wifely virtue does not support inferences that she made such representations, as set forth in the findings, or any representations, for the purpose of inducing plaintiff to consent to the marriage or for the purpose of obtaining his property; that the evidence showed she was a very satisfactory wife for a year, and therefore the findings should have been the opposite of the findings which were made; and that the finding that she would not consummate the marriage is without evidentiary support since both parties testified that the marriage was consummated.

Defendant testified that she and plaintiff were married on July 8, 1941, and they lived together until May 1, 1943; that on May 1, 1943, defendant Scott called her by telephone while she was at plaintiff's home and they (she and Scott) planned to meet on a street corner about 1:30 p.m. of that day; that they met as planned and then went to Scott's house, arriving there about 2 p.m. and then they "laid around"; that she sat on a couch in the living room about 15 minutes, took off all her clothes, hung them in a closet in the bath room, and then went to bed in the living room; that Scott sat in a chair in the living room for "some time," then took off some of his clothes, went to the bath room and returned to the living room with some of his clothes on (but she could not remember what clothes he was wearing), and then he stood around on the floor; that after they had been in the house "some time" three men and a woman broke into the house and entered the room where she and Scott were; that she took her clothes off in Scott's house in order to rest; and that was the first time she had disrobed at Scott's house. After her attention was called to her deposition wherein she had testified that it was not "always her custom" to disrobe at Scott's house and that on some occasions when she was there she would disrobe and go to bed and that sometimes Scott would take his clothes off too, she testified that there were other occasions (other than May 1st) when she disrobed there. She testified further that on other occasions when she was at Scott's house he took his clothes off, but he was not in the nude in her presence; and that she had not seen Scott every ten days or two weeks from the time of the marriage to the separation. After her attention was called to her deposition she testified that during the time from the marriage on July 8, 1941, to the separation on May 1, 1943, she saw Scott on an average of every week or ten days, and on those occasions she met him on a street corner about 1:30 p.m. and then she went with him to his house or to see "some friends"; that by the expression "some friends" she meant only one person, that is, Scott's sister-in-law; that on those occasions when she went with him they went to Scott's house more often than they visited the friend; that on two or three occasions when they went to his house other persons were there, but she did not remember who they were; that on the days when she went with Scott she returned to plaintiff's home about 4 p.m. and did not tell plaintiff where she had been, but she told him she had been shopping; that her visits with Scott were without her husband's knowledge; that she had known Scott about 15 years; that prior to her marriage with plaintiff she kept company with Scott, went to dances with him, went deer hunting with him every season over a period of approximately 10 years, and went rabbit hunting with him; that she had known plaintiff about a year before the marriage; and that at the time plaintiff made the proposal of marriage he said he would take care of her, but he did not mention the West Los Angeles property (which was part of the property described in the joint tenancy deed). After her attention was called to her deposition, she testified that he did say, as a part of the proposal, that if she would marry him he would put the West Los Angeles property in joint tenancy. She testified further that she accepted plaintiff's proposal of marriage about two or three months before the marriage; that she saw Scott once a week or once in two weeks while she was engaged to plaintiff, and saw Scott at a dance hall about a week before the marriage.

Mrs. Buck, an investigator who had been employed by plaintiff, testified that she, two men (who were detectives), and the plaintiff entered the living room of Scott's house on May 1, 1943, and at that time the defendant was in bed, and Scott was "just getting out of bed" and was undressed; that plaintiff went to the bed, pulled the blanket off defendant and she (defendant) did not have any clothes on; that defendant's clothes and Scott's clothes were on a chair in the living room; that Scott put his clothes on and went into the kitchen, and the defendant then got out of bed and put her clothes on; that when she (this witness) served the papers (presumably the complaint and summons) on defendant on May 19, 1943, she said to defendant, among other things, "Well then, you did marry him [referring to plaintiff] to try to get some of his property?" and she replied, "Yes, I wanted it." She testified further that when she served the papers she said to defendant, "In other words, you and Dennis Scott planned that you were to marry Mr. Schaub and get some of his property, is that right?" and defendant replied, "Well, we talked about it, yes. He thought it was all right for me to marry Mr. Schaub."

Dennis Scott testified that he had known defendant about 15 years; that he kept company with her before the marriage; that he saw her at a dance hall about one week before the marriage and he took her home from the dance, but he did not remember whether he brought her to the dance; that she never told him that she expected to marry plaintiff; that she never told him anything about plaintiff's property; that she was not at his home before the marriage; that the first time he took her to his home was about 9 or 10 months after the marriage; that he could not say whether she removed her clothing on that first occasion; that she had been to his house on the average of once in two weeks, and on some of those occasions she took her clothes off and he took his clothes off; that when they were both in the nude in the same room she sat or lay on the couch and he sat in a chair, and sometimes when she was in bed in the nude he sat on the side of the bed or in a chair; and that he never had sexual relations with her.

It was stipulated that if Mrs. Jetty Dall were called as a witness she would testify that she had called at Scott's house on Sunday mornings at 9 or 10 o'clock about a year before the marriage and on those occasions defendant was there cooking dinner, and that on the night preceding each of those calls defendant and Scott had been at a dance hall.

It was stipulated that another investigator employed by the plaintiff, if called as a witness, would testify substantially the same as Mrs. Buck had testified, except as to conversation.

Plaintiff testified that he had four grown sons; that defendant considered his proposal of marriage for a period of approximately ten days, and during that time he told her he "would be glad to make joint tenancy" of the West Los Angeles property; that they were married on July 8, 1941, and he made the joint tenancy deed on August 13, 1941, conveying the West Los Angeles property and certain desert property to her and himself; that after the marriage they were on a trip about two weeks, and then, after staying at home a short time, they went away again and were gone about a month; that soon after they returned home from the last trip he suspected that she was not loyal to him, and the reasons for his suspicion were that she wanted to have a dress shortened, that she took the dress to Scott's sister-in-law to have it shortened and stayed there all day, that she went to the same place on the same day of the following week and stayed all day, and that one evening defendant said to him that as she was walking home she "saw this other party"; that in June, 1942, he suspected her again by reason of the "way she acted," the "way she was going out," the "way she dressed," and telephone calls she received; that he employed Mrs. Buck, the investigator, about October 1, 1942, and she reported to him in October, 1942, that defendant was keeping company with Scott, but he (plaintiff) did not say anything to defendant about the report because an attorney told him to let the detectives follow her; that Mrs. Buck made reports to him about three times each month from November, 1942, to May 1, 1943; that in November, 1942, he believed that defendant was having illicit relations with Scott, but he (plaintiff), on advice of counsel, did not say anything to her about it; that plaintiff had sexual intercourse with defendant after November, 1942; that she was a very satisfactory wife for a year after the marriage, and that they lived as husband and wife from the time of the marriage until the separation.

[1, 2] The marriage in itself was a contract under which each of the parties undertook the obligations of mutual .espect, fidelity and support. Civil Code, sec. 155. The agreement to marry was a representation that the obligations of marriage would be faithfully kept. The finding that defendant represented "that she would be a good and faithful wife to said plaintiff and fulfill all the obligations of a wife to a husband; that at the time of making said representations said defendant, Ellen Schaub, had no intention of fulfilling the same" was justified by the evidence. Prior to the marriage plaintiff pointed out to defendant one property which he had deeded to his sons, reserving a life estate, and stated that he would put other properties in the joint tenancy of himself and the defendant. The inducement for the deeds was the implied representation by defendant that she would faithfully keep her marriage obligations; the fraud consisted of her secret intention not to perform those obligations and the concealment of that fact from plaintiff. Five weeks after the

marriage the property was placed in joint tenancy without knowledge upon plaintiff's part of defendant's secret intentions. The parties then stood in a confidential relationship toward each other, with all of the obligations which that relationship entails. Under the rule stated in Murdock v. Murdock, 1920, 49 Cal.App. 775, 194 P. 762, defendant's concealment of any illicit relations with Scott after the marriage would have furnished a sufficient ground for the rescission by the court of plaintiff's deed. We need not go so far in the present case to find good grounds for annulment of the deed. There was no evidence that within the five weeks intervening between the date of marriage and the date of the deed defendant had resumed her former relations with Scott, but there was ample evidence that she intended to do so. Plaintiff's right to a decree annulling the deed was so clear and complete as to preclude the existence of any reasonable argument against it. The judgment must be affirmed as to the provision which decreed annulment of the deed. The remaining question is whether it should also be upheld as to the provision which annulled the marriage.

[3-9] Section 82 of the Civil Code allows the annulment of a marriage where the consent of one of the parties has been obtained by fraud. Under section 1572 of the Civil Code false representations made with intent to deceive, the willful suppression of material facts, and the making of promises without intention to perform them constitute fraud. As a rule the fact represented or suppressed, as the case may be, is deemed material if it relates to a matter of substance and directly affects the purpose of the party deceived in entering into the contract. He may be relieved from his contract upon proof that he would not have entered into it if he had known the facts and that performance of it would give him substantially less than he bargained for. The Code does not specify the particular frauds which will justify the rescission of a contract of marriage, but it is well settled in this state, and in most other jurisdictions, that they do not cover the broad field of deceits that render voidable other types of contracts. The only fraud which will support a proceeding for annulment of marriage is one which goes to the essence of the marriage relation. Marshall v. Marshall, 1931, 212 Cal. 736, 300 P. 816, 75 A.L.R. 661; Bragg v. Bragg, 1934, 219 Cal. 715, 28 P.2d 1046; Millar v. Millar, 1917, 175 Cal. 797, 167 P. 394, L.R.A.1918B, 415, Ann.Cas.1918E, 184; Barnes v. Barnes, 1895, 110 Cal. 418, 42 P. 904; Foy v. Foy, 1943, 57 Cal.App.2d 334, 134 P.2d 29. And because of the interest of the state in the institution of marriage, our courts have announced their concurrence in certain well established rules which are said to be the offspring of the policy of the state. One of these is that neither of the contracting parties may question the validity of the marriage upon the ground of reliance upon the express or implied representations of the other with respect to such matters as character, habits, chastity, business or social standing, financial worth or prospects, or matters of similar nature. It is conclusively presumed that each of the parties made his or her own independent investigation and was satisfied with the result. Marshall v. Marshall, supra, 212 Cal. 736, 739, 300 P. 816, 75 A.L.R. 661. Another rule is that although the parties, by the marriage itself, impliedly promise to fulfill the commonly understood obligations of husband or wife, the failure to fulfill them is not actionable fraud, that is to say, it does not make out a case of a promise made without intention to fulfill it, within the meaning of section 1572 of the Civil Code, so as to furnish a sufficient ground for annulment. Bragg v. Bragg, supra, 219 Cal. 715, 28 P.2d 1046; Barnes v. Barnes, supra, 110 Cal. 418, 42 P. 904. In the latter case it was said that the doctrine of caveat emptor governs, and forecloses reliance upon express or implied representations of either of the parties as a ground for annulment. This is not too strict a rule in view of the fact that the divorce laws provide a means of escape from unsuccessful alliances. If neither party is guilty of conduct after marriage which would justify a divorce, it can seldom occur that the success of the marriage will be defeated by antecedent conditions or conduct. But where the fraud is so grievous that it places the injured party in a relationship that is intolerable because it cannot honorably be endured, it robs the contract of marriage of all validity. Equity will not deny relief where a plan of deceit has been laid out and consummated which must inevitably defeat the essential purposes of the deceived party in entering into the relationship. Such deceit goes directly to the validity of the contract. Each case must stand upon its own facts and be examined critically in order to determine, if fraud has been shown, whether

the consequences which were due to and which did ensue were wholly destructive of the purposes of the innocent party in entering into the marriage relation. The general principles which govern are well established in our state. We need not look beyond the decisions of our own courts for aid in applying them to the unique facts of the present case. It has been held that a marriage will be annulled upon proof of a secret, preconceived determination, persisted in after marriage, not to allow matrimonial intercourse. Millar v. Millar, supra, 175 Cal. 797, 167 P. 394, L.R.A.1918 B, 415, Ann.Cas.1918E 184. Also, concealment of pregnancy by a man other than the intended husband is a good ground for annulment (Baker v. Baker, 1859, 13 Cal. 87), and a representation by a woman, prior to her marriage, that she is able to bear children when she knows she is physically incapable of it, will justify a decree of annulment. Vileta v. Vileta, 1942, 53 Cal.App. 2d 794, 128 P.2d 376; Aufort v. Aufort, 1935, 9 Cal.App.2d 310, 49 P.2d 620.

The facts, as disclosed by the evidence and as found by the court, make this an exceptional case. The court found that defendant had an agreement with Scott that she would marry plaintiff, procure an interest in his property, and that she and Scott would continue their intimacies and sexual relations which had existed between them for some time prior to the inauguration of their plan. Whether they had such an agreement is immaterial; the question is whether defendant intended to break off or to continue her relations with Scott upon her marriage to plaintiff. Defendant's intentions, as established by the findings, were that she planned to marry a self-respecting old gentleman, acquire an interest in his property, and at the same time continue with her love affair. As previously stated, she discussed the matter with Scott, who "thought it was all right," but the understanding which they reached did not contemplate a severance of their relations. The manner in which defendant intended to carry them on is best judged by the way they were carried on. It was no furtive, secret assignation, nor were the intimacies the unexpected denouement of unplanned opportunities. Defendant's association with Scott was open, flagrant and continuous. She visited his home on innumerable occasions in the afternoons and was apparently indifferent as to how many people would know of her conduct, as long as she was able to keep her husband in the dark. Nothing seemed to matter to her after she had obtained an interest in the property. Such an unconventional and bold association could not fail to attract the attention of friends and neighbors. Their discussions and comments would inevitably reach the ears of plaintiff sooner or later and he would learn, as others already knew, that he had been duped into a marriage with a woman who was not only unfaithful to him, but openly and shamelessly unfaithful. It could not, within the bounds of reason, have been supposed that plaintiff would not eventually learn the truth. He did learn it and the entire affair developed in due and ordinary course and as it was destined from the beginning to develop. It was not suppression of the truth as to defendant's past, nor as to her character, that constituted the fraud. The law would have regarded plaintiff's acceptance of her in marriage as complete forgiveness if he had known of her past relations with Scott. He is presumed either to have known of them or to have willingly closed his eyes to her earlier life. But this is not true as to the secret intention which she had. He had no means of knowing the purposes which she had in mind unless she chose to disclose them to him, which, of course, was quite out of the question. Concealment was necessary in order to obtain plaintiff's consent to the marriage; if there had been no concealment there would have been no marriage. Plaintiff thought he was taking unto himself a wife but he only gave his name and his property to an imposter. Defendant did not intend to conduct herself as a wife; she withheld all loyalty and faithfulness and duped plaintiff into what he thought was an honorable relationship, but which, in truth, was one in which he could only suffer humiliation and bitter disappointment.

[10, 11] In the early case of Baker v. Baker, supra, a marriage was held void ab initio for the fraud of the defendant in concealing her antenuptial pregnancy by a stranger. Mr. Justice Field, speaking for the court, 13 Cal. at page 103, said: "Again, the first purpose of matrimony, by the laws of nature and society, is procreation. * * * The second purpose of matrimony is the promotion of the happiness of the parties by the society of each other, and to its existence, with a man of honor, the purity of the wife is essential. Its absence under such circumstances as

necessarily to attract attention must not only tend directly to the destruction of his happiness, but to entail humiliation and degradation upon himself and family. We can conceive no torture more terrible to a right-minded and upright man than an union with a woman whose person has been defiled by a stranger, and the living witness of whose defilement he is legally compelled to recognize as his own offspring, as the bearer of his name and the heir of his estate, and that, too, with the silent, if not expressed, contempt of the community. By no principle of law or justice can any man be held to this humiliating and degrading position, except upon clear proof that he has voluntarily and deliberately subjected himself to it." The sentiments expressed by the learned justice are of simple truths which time or conditions cannot modify. The words which so graphically picture the plight of the husband in that case are equally descriptive of the intolerable conditions which fell upon plaintiff herein as a consequence of his marriage. These were, in fact, somewhat more distressing than the ones which confronted Mr. Baker, for the transgression of the latter's wife was a thing of the past, and a righteous married life, which evidenced her repentance and reform, would naturally have appealed to the charity of her critics and tempered their condemnation. But in the present case there was no repentance, no reformation, and no desire to seek the shelter of an honorable married life as a means of escape from the past. Defendant planned and persisted in a course of conduct which would have made it necessary for any self-respecting man to separate himself from her and to sever the odious relationship. We are persuaded that a court of equity should not acknowledge that there was any validity in the questioned marriage and we conclude that there was no just ground for refusing a decree annulling the marriage upon the findings of fraud.

The question of the sufficiency of the evidence to support the findings may be disposed of briefly. The fact that defendant and Scott had been associating together for 15 years, and their admissions that for 10 years they had gone together on hunting trips in the mountains, which occasionally lasted for as long as 10 days, did not necessarily require a finding that they had during that time maintained sexual relations. It did, of course, prove that they had ample opportunity. But when it was proved by their own admissions that upon innumerable occasions after the marriage they met in the home of Scott and there habitually paraded before each other in the nude, their adulterous inclinations and propensities were established beyond a doubt. Acceptance of their mere denials of sexual intercourse would have required a lack of sophistication in such matters rarely to be encountered, even among judges, for evidence of sexual inclinations and of reasonable opportunities is almost invariably accepted by the courts as sufficient proof of adultery. 9 Cal.Jur. 642; 2 C.J.S., Adultery, § 24, p. 492.

[12, 13] The court found that plaintiff did not discover defendant's fraud until May 1, 1943, the date when plaintiff and the detectives broke into the Scott house. Defendant challenges the sufficiency of the evidence to sustain this finding, contending that it was shown by the testimony of plaintiff that he made the discovery some six months earlier, when one of the detectives told him that his wife was associating with Scott. Plaintiff testified upon cross-examination that he believed from these reports that his wife was carrying on an illicit relationship with Scott, but that upon the advice of his attorney he continued to live with her in the marital relationship while he was making further investigations. Defendant insists that upon this testimony the court should have found that plaintiff waived his right to have the marriage annulled. Subdivisions 3 and 4, section 82 of the Civil Code, provide that a marriage may be annulled where the consent of either party was obtained by fraud "unless such party afterwards, with full knowledge of the facts constituting the fraud, freely cohabited with the other as husband or wife." The questioned finding is not unsupported by the evidence. Notwithstanding plaintiff's testimony that he believed his wife was carrying on illicit relations with Scott, it appears that his belief was founded upon suspicion and not upon knowledge of the facts. Neither plaintiff nor the detectives had any knowledge of the character of the relationship until they entered the house and found defendant and Scott together. Suspicion or a belief founded upon inconclusive circumstances is not the "full knowledge of the facts constituting the fraud" which constitutes ratification of a voidable marriage. Plaintiff filed his action four days after he

found his wife and Scott together. It was not until defendant's deposition was taken and the case was tried that there was a full disclosure of the extent of the association of defendant and Scott before the marriage and the course of conduct which they had followed after the marriage.

The judgment is affirmed.

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71 Cal.App.2d 421

LARSON et al. v. KING.

Civ. 14739.

District Court of Appeal, Second District, Division 3, California.

Oct. 30, 1945.

Rehearing Denied Nov. 28, 1945.

Hearing Denied Dec. 27, 1945.

1. Automobiles 🔑246(20)

In action involving collision between police officer's automobile and another automobile in blackout after air raid warning, jury was properly instructed at both parties' request as to statutory prohibition against driving at greater speed than is reasonable or prudent under circumstances. Vehicle Code, § 510, St.1935, p. 176.

2. Automobiles 🔑246(40)

In action for death of police officer who, at time of head-on collision, was driving, as directed, to fire station in blackout after air raid warning, instructions in statutory language on turning of vehicle were properly given, as against contention of lack of evidence that officer violated statutes, in view of defendant's argument, reasonably based on evidence, that officer was on wrong side of road, and plaintiffs' argument that, if so, officer was turning left near fire station. Vehicle Code, § 525, St. 1941, p. 2722; § 544(a), St.1935, p. 185.

3. Appeal and error 🔑216(1)

In action involving collision between automobiles of defendant and of police officer in blackout after air raid warning, where neither party requested instruction that manner in which they were driving would or would not violate blackout ordinance, neither could complain that court submitted such questions to jury, including questions of whether officer's automobile was emergency vehicle within ordinance, and whether defendant was proceeding under paramount orders of the military. Vehicle Code, § 44, St.1941, p. 1374; § 44.1, St.1939, p. 2214.

4. Appeal and error 🔑1010(1)

If there is evidence to sustain any finding which supports verdict, Court of Appeal will not speculate as to jury's findings on the several issues submitted.

5. Automobiles 🔑244(42)

In action for death of police officer who was driving south on 60-foot street in blackout, evidence that after collision with northbound automobile, which had been proceeding on its proper side of street, rear ends of both vehicles were about on middle line of street and front ends 4 or 5 feet easterly, warranted finding of officer's contributory negligence. Vehicle Code, § 525, St.1941, p. 2722; § 544(a), St.1935, p. 185.

6. Appeal and error 🔑882(12)

Instruction given by court in automobile collision case embodied substance of three instructions requested by plaintiffs, and hence on plaintiffs' appeal court need not consider whether instructions were correct.

7. Automobiles 🔑246(60)

In action involving automobile collision in blackout, instruction giving each party benefit of presumptions that every person takes ordinary care and obeys the law was not objectionable as obliging jury to rely on its own knowledge of the law, where court fully stated the only law involved, consisting of blackout ordinance and certain statutes. Vehicle Code, §§ 510, 544(a), St.1935, pp. 176, 185; § 525, St. 1941, p. 2722.

8. Appeal and error 🔑1064(1)

In automobile collision case, instruction giving each party benefit of presumptions that every person takes ordinary care and obeys the law was not prejudicial to plaintiffs on theory that defendant, having testified to his own conduct, was not entitled to presumptions, where both defendant and his passenger, though they testified to defendant's conduct until shortly before collision, had been rendered unconscious and were unable to recall events immediately before collision.

9. Automobiles 🔑246(60)

In action involving head-on collision between automobiles, instruction giving each party benefit of presumptions that every person takes ordinary care and obeys the law was sufficient to give plaintiffs benefit of presumption that their decedent was not negligent, where plaintiffs contended that decedent, if on wrong side of road, might have been making left turn.

10. Trial ⚷244(4)

In action involving head-on collision between automobiles, instruction directing jury to apply presumption of due care and obedience to law to evidence that automobile of plaintiffs' decedent came to rest on wrong side of street was properly refused because unduly emphasizing plaintiffs' contention that decedent might have been making left turn, etc. Vehicle Code, § 525, St. 1941, p. 2722.

11. Automobiles ⚷246(60)

In action involving head-on collision between automobiles in blackout, instruction that defendant, if driving carefully, could assume that others would observe law of the road, was not objectionable on theory that defendant was not driving carefully because soldier's order to defendant to proceed did not justify defendant in continuing without lights, where such question was left to jury. Vehicle Code, § 618, St.1935, p. 201.

12. Trial ⚷203(1)

Where jury, under theories on which automobile collision case was tried, were to determine whether defendant was driving negligently, it was proper to instruct on his theories of defense.

13. Trial ⚷296(4)

In action for death in automobile collision, instruction that, if decedent was contributorily negligent, then no matter how slight such contributory negligence may have been it barred recovery, though confusing and erroneous as suggesting possibility of slight contributory negligence, was not prejudicial in view of numerous other instructions correctly stating the true rule.

14. Automobiles ⚷244(58)

If proof in negligence action, such as automobile collision case, shows that plaintiffs' failure to use ordinary care contributed proximately to happening of accident, defense of contributory negligence is established.

15. Evidence ⚷359(1)

In action for death in automobile collision, refusal to admit in evidence a photograph of decedent was not error.

16. Automobiles ⚷244(42)

In action involving head-on collision between automobiles in blackout, evidence supported verdict for defendant, in view of evidence that defendant was on right side of middle line of 60-foot street and that plaintiffs' decedent was on left side thereof allegedly for purpose of making left turn. Vehicle Code, § 525, St.1941, p. 2722; § 544(a), St.1935, p. 185.

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Action by Cecelia S. Larson and others against Thomas E. King for the death of plaintiffs' husband and father, Engebret Larson, in an automobile collision. Judgment for defendant, and plaintiffs appeal.

Affirmed.

Kenneth Sperry, of Long Beach, for appellants.

Eugene S. Ives, of Los Angeles, for respondent.

SHINN, Justice.

Plaintiffs and appellants herein are the widow and minor children of Engebret Larson, who met his death in a collision between his automobile, driven by himself, and a car owned and operated by one King. They appeal from a judgment after verdict in an action for wrongful death. The fatal accident occurred during a blackout, following air raid warnings, in the City of Long Beach, at about 2:50 a. m. on February 25, 1942. Mr. Larson was a police sergeant of the City of Long Beach and was driving his own car from his home to a fire station located on Santa Fe Avenue, after an air raid alarm signal. Under orders theretofore issued by the chief of police, directing the movements of police officers in such emergencies, it was Larson's duty to proceed to the fire station. King and his passenger, Hankins, were returning home from work at the California Ship Building Corporation. Following the accident, King and Hankins filed separate actions against the City of Long Beach; judgments were entered against them, they appealed to this court, and the judgments were affirmed. King v. Long Beach, 67 Cal.App.2d 1, 153 P.2d 445.

Santa Fe Avenue is a 60-foot paved highway. Larson was driving in a southerly direction and King in the opposite direction. The night was clear but dark; all automobile and other lights were out and there was testimony that objects on the highway could not be seen at a greater distance than 60 feet. The automobiles came to rest after what was practically a head-on collision, their rear ends being about on the center line of the street and the front ends 4 or 5 feet easterly thereof. Defendant testified that his car had been traveling northerly about 2 feet easterly of the center line, and around 20 miles an hour, while he was using the white line as a guide. Larson was killed instantly; King and Hankins were rendered unconscious.

[1] Plaintiffs' principal contention is that there was error in the giving of instructions and also in the refusal to give others which they requested. The instructions covered the general principles of negligence and, in addition, the provisions of certain sections of the Vehicle Code and some sections of a blackout ordinance of the City of Long Beach. The jury were properly instructed, at the request of both parties, as to the requirement of section 510, Vehicle Code, St.1935, p. 176, that vehicles must not be driven at a greater speed than is reasonable or prudent under the circumstances.

[2] At defendant's request, the court instructed in the language of section 525 of the Vehicle Code, St.1941, p. 2722, which requires vehicles, except under certain conditions, to be driven on the right half of, and as close as practicable to the right-hand curb or edge of, the roadway, one of the stated exceptions being "when placing a vehicle in a lawful position for, and when such vehicle is lawfully making a left turn." Section 544(a), St.1935, p. 185, also was read, this section providing that a vehicle shall not be turned unless and until it can be done with reasonable safety and after the giving of an appropriate signal in the event any other vehicle may be affected by such movement. As to section 544(a), the qualification was added that the section does not mean that before making a turn the driver must know that there is absolutely no possibility of accident, but only that he must use ordinary care under the circumstances. Error is claimed in the giving of these instructions, the argument being that there was no evidence that the deceased violated either of the sections. In view of defendant's argument that Larson was driving on the left-hand side of the road, which had a reasonable basis in the evidence as to the position of the cars when they came to rest, and of opposing counsel's argument that if Larson were so driving it was in the execution of a left-hand turn as he approached the fire station, where he intended to stop. it was not error to instruct in the language of the sections.

No instruction was given based upon section 618 of the Vehicle Code, St.1935, p. 201, which forbids the driving of vehicles at certain hours without adequate headlights. Apparently neither plaintiffs nor defendant relied upon this section. However, plaintiffs introduced and read to the jury provisions of the city's blackout ordinance, certain of which admittedly were operative at the time of the accident, that is to say, after the air raid red alert had been received and before the all-clear signal had been given. Section 717.8 of the ordinance reads in part as follows:

"(a) At the commencement of a period of air raid alarm, the operator of any vehicle, whether automobile or otherwise, shall forthwith bring such vehicle as far as possible to the side of the street, road or highway, off the main traveled portion thereof, and the operator of such vehicle and the operator of any street car or train, shall bring such vehicle, street car or train to a stop clear of any crossing, intersection, fire hose, fire plug, hospital or other emergency depot or area, and during the hours of darkness shall extinguish all lights therein and thereon and said vehicle, street car or train shall remain so situated during the period of air raid alarm, unless directed or ordered to move by a peace officer, highway patrolman or fireman."

[3-5] The provisions of this section were, by the following section, made inapplicable to blackout emergency vehicles, which included army, navy and, while on actual duty, California state guard vehicles, vehicles of voluntary personnel actually going to or from posts of duty in the operation of the aircraft warning service of the Fourth Interceptor Command, and vehicles certified by the sheriff or district attorney of the county, state highway patrol, chief of police, fire chief, or city prosecutor "when within the respective territorial jurisdictions of the certifying of-

fice, as being essential to the preservation of the public peace and safety or to the dissemination of public information or to the national defense." Also excepted were authorized emergency vehicles as defined by sections 44 and 44.1 of the Vehicle Code, St.1941, p. 1374, St.1939, p. 2214, which include vehicles privately owned, but only when the same have received a permit from the Director of the Department of Motor Vehicles, carry thereon distinguishing signs of a type approved by the Director, when operated in responding to emergency calls or in patrol duty or in the pursuit of actual or suspected violators of the law and when the state, city, or county has failed to furnish a publicly owned vehicle for the purposes above stated. At the trial it was claimed by plaintiffs that defendant King was driving his car in violation of the ordinance and that Larson was not violating the ordinance. Defendant contended that he was driving lawfully while Larson was not. The court was not asked to determine whether the Larson car, under the admitted facts, was a blackout emergency vehicle as defined by the ordinance and thus excepted from the provisions thereof. Neither was the court asked to rule whether King, as he unsuccessfully contended in King v. Long Beach, supra, was proceeding under orders of the military which took precedence over the ordinance. Those questions were left to the jury, as were also the questions whether, if either or both drivers were found guilty of violating the ordinance, such violation or violations constituted negligence. Since neither the plaintiffs nor defendant requested the court to give any instruction to the effect that the manner in which deceased or King was driving would or would not constitute a violation of the ordinance, neither can complain that those questions were submitted to the jury as questions of fact. It would be idle to speculate as to the findings of the jury upon the several issues of fact if there is evidence to support any one finding which supports the verdict. It may be that the jury found, as plaintiffs contended, that King was driving in violation of the ordinance and was guilty of negligence; also that the Larson car was a blackout emergency vehicle and not subject to the restrictions of the ordinance, but even then it could properly have returned a verdict for the defendant, since there was evidence from which it could be inferred that the Larson car was being driven on the wrong side of the street. This would have justified a finding that he was guilty of contributory negligence. The questions presented on the appeal would not be answered by any decisions we might make as to whether Larson or King was, or whether both were, under the undisputed facts, driving in violation of the ordinance.

[6] Plaintiffs requested three instructions. The first of these reads as follows:

"The violation of a penal statute or ordinance is presumptive evidence of negligence. However, such presumption may be rebutted by a showing of facts and circumstances which excuse or justify the violation of such statute. If you believe from a preponderance of the evidence that the deceased Larson was suddenly confronted with an emergency which necessitated the use by him of his automobile in the manner as shown by the evidence, and that such use was reasonably necessary in order to perform his duties as a police officer and to protect the lives and property of the residents and citizens of the City of Long Beach, and further that in so doing he was exercising reasonable and ordinary care under all of the circumstances, such conduct on his part would not amount to contributory negligence so as to bar a recovery on the part of the plaintiffs in the case at bar."

The second one, presupposing a finding that decedent acted in violation of the law, stated that if his acts "were necessarily committed by him in the performance by him of a paramount duty to protect life and property during an emergency, and that he acted with ordinary prudence under all of the surrounding circumstances, such conduct on his part would not amount to negligence," and the third one stated that a technical violation of a penal statute or ordinance, if found to be fully justified by the surrounding circumstances and the emergency, would not alone constitute contributory negligence. Although these instructions were refused, their substance was embodied in an instruction which the court gave, of its own motion, which reads as follows:

"In connection with these statutes and with this ordinance, I will instruct you:

"Conduct which is in violation of any of the statutes just read to you or of the ordinance read to you by Mr. Sperry this morning, constitutes negligence per se. This means that if the evidence supports a finding, and you do find, that a person did so conduct himself, it requires a presumption that he was negligent. However, such presumption is not conclusive. It may be overcome by other evidence showing that under all the circumstances surrounding the event, the conduct in question was excusable, justifiable and such as might reasonably have been expected from a person of ordinary prudence. In this connection, you may assume that a person of ordinary prudence will reasonably endeavor to obey the law and will do so unless causes, not of his own intended making, induce him, without moral fault, to do otherwise."

The only criticism which appellants direct toward the instruction is that it was less favorable to their contentions than the ones they requested. The instruction allowed the jurors the widest latitute to give effect to individual opinions as to what circumstances would justify a failure to obey the law, that is to say, what circumstances would justify a conclusion that failure to obey the law was not in itself negligence. It gave plaintiffs the full benefit of their claim that Larson was not guilty of negligence under the circumstances, even if he was violating the ordinance. Although the instruction was equally favorable to the contention of defendant that he also was not guilty of negligence in disobeying the provisions of the ordinance, plaintiffs cannot complain of this fact; indeed they do not complain. Inasmuch as the instruction which was given was in conformity with those which plaintiffs had requested, we have no occasion to express our opinion whether the instructions requested and the one which was given embodied a correct statement of the law.

[7-10] Another instruction given read as follows: "At the outset of this trial, each party was entitled to the presumptions of law that every person takes ordinary care of his own concerns and that he obeys the law. These presumptions are a form of prima facie evidence and will support findings in accordance therewith, in the absence of evidence to the contrary. When there is other evidence that conflicts with such a presumption, it is the jury's duty to weigh that evidence against the presumption (and any evidence that may support the presumption), to determine which, if either, preponderates. Such deliberations, of course, shall be related to, and in accordance with, my instructions on the burden of proof." Appellants criticize the instruction in several respects. It is said: "In other words, the instruction left the jury to rely upon their own knowledge of the law; whereas, the duty of supplying the law applicable rests upon the trial court [citing Sills v. Forbes, 1939, 33 Cal.App.2d 219, 91 P.2d 246]." But the only law, consisting of the sections of the Vehicle Code and the ordinance to which the instruction related, was fully stated to the jury and we think the instruction was not subject to this criticism. It is next insisted that the instruction allowed the jury to apply the presumption to the conduct of King, who, it is contended, testified as to his own conduct, and therefore was not entitled to the benefit of the presumption. Roselle v. Beach, 1942, 51 Cal.App.2d 579, 125 P.2d 77. We think the instruction was not improper for the reason assigned. It is true that defendant King and his passenger Hankins testified circumstantially as to King's conduct until shortly before the accident. But both of them were rendered unconscious and neither was able to recall any of the events after their car was passed by a small pick-up truck shortly before the accident. They did not recall seeing the Larson car approaching nor what King's actions were immediately before the collision. It would have been better in instructing on the presumption, so far as the conduct of King was concerned, to limit it to the brief period which, due to their failure of recollection, was not covered by the testimony of King or his witness Hankins. But in view of the limitation which the instruction placed upon the presumption, and the undisputed evidence as to the manner in which King was driving, it is not reasonable to suppose that any prejudice resulted from the failure of the court to so modify the instruction. We think the foregoing instruction also was sufficient to give plaintiffs the benefit of the presumption that Mr. Larson was not guilty of negligence. Plaintiffs requested an instruction which was more specific and which would have directed the jury to apply the presumption to the evidence that the Larson car came to rest upon the wrong side of the street. The instruction was objectionable in that it unduly emphasized the contention that decedent's car may have been on the left-hand side of the road "by reason of some lawful operation on his part

such as the making of a left-hand turn." This was a matter of argument and it was not error to refuse the instruction.

[11, 12] A further claim of error is predicated upon the giving of the following instruction: "If you find that the defendant, Thomas E. King, was operating his automobile in a careful and prudent manner he has the right to assume that the driver of any other vehicle on the road ahead of him would observe the law of the road and he is not guilty of negligence in acting upon such assumption unless he had knowledge to the contrary, or by use of reasonable diligence should have known to the contrary." The criticism is that there was no support in the evidence for a belief that defendant was operating his automobile in a careful and prudent manner. The argument is in accordance with our holding in King v. Long Beach, supra, that King was not acting pursuant to an order of the military and that he was not legally justified in continuing to drive without lights. But inasmuch as plaintiffs did not ask the court to decide that point in their favor as one of law, and allowed it to be submitted to the jury, it was not error to give the instruction. The criticized portion is only one part of a rule which was properly stated under the circumstances. We have mentioned that there was evidence from which the jury could have concluded that Larson was driving upon the wrong side of the road when the cars came together. The rule stated in the instruction would have had application to such a situation, but it would have been error to instruct without the qualification that defendant could rely upon the assumption only if he were not himself driving negligently. Furthermore, under the theories upon which the case was tried, the jury were to determine whether defendant was driving negligently and it was proper to instruct upon his theories of defense.

In its instructions the court defined the terms "negligence" and "ordinary care" and also defined contributory negligence as "negligence on the part of the person injured which, cooperating in some degree with the negligence of another, helps in proximately causing the injury of which the former thereafter complains." Again, the jury were instructed that they must determine whether decedent was negligent, and if so, whether his negligence contributed in any degree as a proximate cause of the accident, and it was further stated that the burden was upon defendant of proving that plaintiff (decedent) was negligent and that such negligence contributed in some degree as a proximate cause of the injury, otherwise the decision of the issue of contributory negligence should be in plaintiffs' favor. Proximate cause was also defined. The court, at defendant's request, gave the following instruction:

"If you find from the evidence that the decedent immediately prior to, or at the time of, the happening of the accident involved in this case was guilty of any act or omission constituting contributory negligence as defined for you in these instructions; that is, of any act of negligence which proximately contributed to the happening of the accident, then, no matter how slight such contributory negligence may have been, it is imputable to the plaintiff herein and bars his recovery; and in that event, the negligence of the defendant, if any such you find there was, becomes immaterial, for in such case your verdict must be for the defendant."

[13, 14] Appellants criticize this instruction because, they say, "it intimated to the jury that there were several degrees of contributory negligence." The instruction, considered by itself, was confusing. The rule in this sort of a case is that if the proof shows that the failure of the plaintiff to use ordinary care, contributed proximately to the happening of the accident, the defense of contributory negligence is established. Rush v. Lagomarsino, 1925, 196 Cal. 308, 316, 237 P. 1066. The instruction suggested the existence of "slight contributory negligence," a term which would be self-contradictory. If the instruction had been understood by the jury to mean that if the decedent was slightly careless he was guilty of contributory negligence, the error would have been serious. But we think it reasonable to believe that the jury would place a construction upon it that would harmonize it with the other instructions rather than one which would render them completely contradictory, and that they would have understood that the court was speaking of negligence which might contribute slightly to the accident as a proximate cause, rather than to the failure to use a degree of care which did not measure up to ordinary care. Although the instruction was an unsuccessful attempt to state a correct principle, the ambiguity, in our opinion, was not such as to confuse the jury or cause it to lose sight of the

true rule, which was stated correctly in numerous other instructions.

[15, 16] It is further contended that the court erred in refusing to allow plaintiffs to place in evidence a photograph of the decedent, and some argument is made that the verdict was without substantial support in the evidence. These assignments of error are not well taken. The latter does not call for particular discussion, in view of what has been said as to the sufficiency of the evidence to justify a finding of contributory negligence.

The judgment is affirmed.

DESMOND, P. J., and PARKER WOOD, J., concur.

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71 Cal.App.2d 557

MARTIN v. MUT. BEN. HEALTH & ACCIDENT ASS'N.

Civ. 3297.

District Court of Appeal, Fourth District, California.

Nov. 8, 1945.

Hearing Denied Jan. 3, 1946.

1. Insurance 🔑255

Answers to written questions set forth in application forms relative to insurance are generally deemed material representations.

2. Insurance 🔑668(6)

Where evidence is such that reasonable men may reach different conclusions as to materiality of false representations in application for insurance, question is one of fact for jury.

3. Insurance 🔑668(7)

In action on health and accident policy application for which had asked whether insured had ever applied for life, accident or health insurance, materiality of negative answer which failed to disclose that some 20 years before insured had been rejected for life insurance was one of fact. St. 1935, pp. 505, 637, 651, §§ 331, 332, 334, 338, 10113, 10380.

4. Insurance 🔑300

Insured could not recover on health and accident policy in view of court's finding based on evidence, that there was a material misrepresentation in failing to disclose in written application that insured had been rejected on a life policy by another insurer. St.1935, pp. 505, 637, 651, §§ 331, 332, 334, 338, 10113, 10380.

5. Appeal and error 🔑994(3)
Evidence 🔑588

Trial court was sole judge of credibility of witness and could believe all of his testimony or believe a part and reject parts as court was convinced of truth or falsity of such testimony.

6. Appeal and error 🔑931(1)

In passing upon merits of appeal, appellate court must accept as true all evidence tending to establish correctness of findings and must consider evidence in most favorable aspect toward prevailing party and give that party benefit of every inference that can be reasonably drawn in support of his claim.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by Dr. Ross Christman Martin against the Mutual Benefit Health & Accident Association to recover on a health and accident policy. From a judgment for defendant, plaintiff appeals.

Affirmed.

Fred A. Wilson, of San Bernardino, for appellant.

J. Edward Haley, of Los Angeles, for respondent.

GRIFFIN, Justice.

[1] On September 10, 1936, plaintiff and appellant made written application to defendant and respondent association for a policy of health and accident insurance. The application, signed by plaintiff, contained, among others, the following questions and answers: "Q. (9) Has any application ever been made by you for life, accident, *or* health insurance been declined? (Answer to each) No – No – No." "Q. (18) Do you hereby apply to the Mutual Benefit Health & Accident Insurance for a policy to be based upon the foregoing statement of facts and do you understand and

agree that the falsity of any statement in the application shall bar the right to recovery if such false statement is made with intent to deceive or materially affect either the acceptance of the risk or the hazard assumed by the association, * * * A. Yes." By the other questions in the application defendant sought to elicit from the applicant, the plaintiff, his name, age, occupation and business; whether he had previously suffered from certain diseases, the condition of his health at the time the application was made, and generally questions which would give to the defendant association full and complete information with respect to the applicant. No physical examination was required. By the question in issue, the association sought to determine whether the applicant had previously been denied life, accident or health insurance. The question was separately answered as to each kind of insurance. It was not ambiguous, as contended by plaintiff. It merely called for information relating to simple matters of fact within the knowledge of the insured. It has been held that answers to written questions set forth in application forms relative to insurance are generally deemed material representations. California Western-States Life Ins. Co. v. Feinstein, 15 Cal.2d 413, 101 P.2d 696, 131 A.L.R. 608.

It is the contention of the defendant that if he had been previously rejected for any such forms of insurance, the company would then be in a position to make its own investigation to determine whether it wished to underwrite the risk or to decline it; that this question, together with the other questions, were all important in determining the insurability of the applicant and that the applicant, by his answer to question 18, affirmed that all answers were true and correct and that the statement of facts contained in the application should be the foundation upon which a policy of insurance should be issued; that the defendant relied upon these answers; that following the issuance of the policy, it was the duty of the insured to read it and if he did not correctly state the truth in the answers in the application it was then his duty to communicate the correct answers to the insurance company; and that this was not done, citing Telford v. New York Life Insurance Co., 9 Cal.2d 103, 69 P.2d 835.

A policy of health and accident was issued on the application and delivered to the plaintiff. It provided for total and permanent disability benefits resulting from disease or accident. The premiums were paid when due.

Plaintiff's complaint alleges in count I that on July 18, 1940, he became permanently disabled from disease and sought a recovery under the disability provision of the policy. In another count he alleges that on June 8, 1941, while traveling as a passenger in a taxicab, he suffered certain described permanent injuries as the result of an accident and sought recovery thereunder.

Defendant association admitted the due execution of the application and policy, and among other defenses alleged a false answer to question (9) in the application in that plaintiff failed to disclose that in 1916 he had been rejected for insurance by two different insurance companies; that defendant relied on the answers given and in reliance thereon issued to plaintiff the policy referred to in the complaint; that had defendant known that plaintiff failed to disclose the rejections and non-renewals by the other companies referred to, it would have refused to issue to plaintiff its policy of insurance issued to him or any other policy of insurance. The prayer of the answer was that the court decree the policy of insurance unenforceable and that the association return to plaintiff, in accordance with its tender, the amount of premiums paid on the policy.

At the trial, plaintiff was examined under section 2055 of the Code of Civil Procedure. He testified that he signed the application but that it was not made out in his handwriting. He further testified:

"Q. (By Mr. Haley): I call your attention, doctor, to the question which appears in this photostatic copy of the application * * * in which the question is asked you: 'Has any application ever made by you for life, accident or health insurance been declined?' Answer to each: No, No, No. * * * A. I made application in Kokomo to the Equitable Life of Iowa and at that time I had all the insurance I could carry—

"Q. Just answer 'yes' or 'no'. A. Yes.

"Q. You were refused by the Equitable Life of Des Moines, Iowa? A. Yes, sir, at my request. * * *

"Q. Doctor, would you say you were rejected by more than one company, more than the Equitable Life of Des Moines? A. Not to my knowledge, Mr. Haley.

"Q. You remember your deposition being taken in this mattter, don't you, doctor? A. We have a copy of it there. * * *

"Q. Starting at line 5:

"Q. Do you remember making an application to the Great Northern Life Insurance Company in 1916 for a policy of insurance? A. Where are they located?

"Q. The Great Northern Life Insurance Company of Chicago. A. There are two companies that rejected me, one or two at that time. The Equitable Life of Des Moines. * * *

"Q. You don't recall that? A. No, and I don't remember the Chicago firm, but I do remember the Iowa firm.

"Q. The Equitable Company of Des Moines, Iowa? A. Yes, sir.

"Q. Did you so testify? A. Yes, sir.

"Mr. Haley: That is all."

Plaintiff further testified that the company's agent, Mr. Fox, made out the application; that the agent asked him all the questions and the answers were given as recorded, except question (9); that he told the agent "about the time I had been turned down for *life insurance* and the doctor did it at my request because I was young and had all the insurance I could carry, and I just told the doctor to turn me down. I didn't want to be bothered with insurance agents and I had to explain that to insurance companies ever since. I have been passed physically in several companies and accepted, and I told that to Mr. Fox and he wrote 'No, no, no' on there; I told him 'yes'" (italics ours); that he did not read the application before he signed it; and that he did not discover that question number (9) was so answered until the filing of the answer in this case. He then testified about his injuries and disabilities.

From this evidence the trial court found: that plaintiff was injured as a result of the accident described and was suffering from the diseases mentioned in the complaint resulting in a total disability and total loss of time; that in the written application for the policy plaintiff represented and stated that "no application ever made by him for life, accident or health insurance had been declined"; that plaintiff failed to disclose to defendant that prior to the submission of said written application for insurance "several applications for life, health *and* accident insurance had been rejected and declined by other companies" (italics ours); that defendant "relied upon the statements contained in said application submitted by plaintiff", and that in reliance thereon did issue the policy of insurance referred to and described in plaintiff's complaint; that by reason of the failure to disclose to defendant prior rejections by other insurance companies, defendant was and is entitled to rescind said policy of insurance so issued. The court then concluded that the policy was never in force or effect by reason of the misrepresentations made by plaintiff in his written application; that plaintiff take nothing by his complaint and that defendant association pay plaintiff $460 premiums paid on the policy and interest, totaling $536. Judgment was entered accordingly.

Plaintiff appealed and argues first, that the evidence does not support the finding that plaintiff failed to disclose to defendant that "several applications for life, health *and* accident insurance had been rejected and declined by other companies". It will be noted that in question (9) the written application reads in the disjunctive and the finding reads in the conjunctive. We agree that the evidence does not support the finding that plaintiff failed to disclose *several* applications for life, health and accident insurance had been rejected. The finding, stated in the conjunctive, is unhappily worded. However, the evidence would support the intended finding that an application for life insurance (Equitable Life of Des Moines, Iowa) had been rejected.

It appears to us that the only question here presented is this: Would the false representation of the fact of rejection of a life insurance policy in another company bar the right to recovery under a disability and accident policy, as a matter of law, or is the question a factual one for the trial court to determine? That is, whether (1) such false statement was made with actual intent to deceive; or (2) whether it materially affected either the acceptance of the risk or the hazard assumed by the insurer. Section 10380, Insurance Code, St.1935, p. 651.

The case of Solez v. Zurich Gen. Acc. & Liability Ins. Co., 2 Cir., 54 F.2d 523, was factually similar to the instant case. There plaintiff applied for a policy of accident insurance in which he was asked the question whether "any accident, health or life company or association ever rejected your application." The plaintiff answered "No". After an injury to plaintiff, an action on the policy resulted. It was discovered that plaintiff had previously made an application for a life insurance policy which was rejected. In the trial of the action the court left it to the jury to determine whether the plaintiff had intended to deceive the defendant by the answer quoted and whether the truth, if given, would have been material to the acceptance of the risk and the hazard assumed. After discussing and disagreeing with certain holdings in Business Men's Assurance Co. of America v. Campbell, 8 Cir., 32 F.2d 995, it stated that the materiality of the answer to the risk was of no moment, if the applicant meant to deceive, but held that the answer was not so plainly material as to hold, as a matter of law, that a directed verdict for defendant should be given. In this case a writ of certiorari was granted May 23, 1932, 286 U.S. 538, 52 S.Ct. 639, 76 L.Ed. 1277. On August 4, 1932, the case was dismissed by stipulation of counsel 296 U.S. 668, 57 S.Ct. 756.

There are cases holding that when applications are of the same kind, i. e., both for life insurance or both for accident, the courts treat suppression by the insured of an earlier rejection as necessarily material to the risk and ipso facto, avoiding the policy. Ætna Life Insurance Co. v. Moore, 231 U.S. 543, 34 S.Ct. 186, 58 L.Ed. 356; McEwen v. New York Life Insurance Co., 23 Cal.App. 694, 139 P. 242; Pierre v. Metropolitan Life Insurance Company, 22 Cal.App.2d 346, 70 P.2d 985.

In Columbian Nat. Life Ins. Co. v. Harrison, 6 Cir., 12 F.2d 986, Missouri State Life Ins. Co. v. Pater, 7 Cir., 15 F.2d 737, and Business Men's Assurance Co. of America v. Campbell, supra, it was decided that the suppression of a rejected life insurance application did not have that same effect in the case of an application for accident insurance, and held that the materiality of prior rejections of life insurance was a question of fact for the jury.

In Business Men's Assurance Co. of America v. Campbell, supra, plaintiff was a beneficiary under an accident and health policy issued by defendant company. Defendant pleaded that the policy was null and void because of false statements made by the insured in his application. The question there asked was similar to the one in the instant case, to which the insured answered "No". It developed that he had previously applied to a life insurance company for a life policy which was declined on account of high blood pressure. The Circuit Court of Appeal stated (32 F.2d at page 997): "We do not believe the proposition that rejection of an applicant for a life policy is material as matter of law to the assumption of the risk in an accident and health policy, is sustainable. The risks are substantially different, and the facts which cause a rejection of the former may or may not increase the risk of the latter; and so it becomes a question of fact and not one of law. As said in Missouri State Life Ins. Co. v. Pater, 7 Cir., 15 F.2d 737, epileptic attacks strongly predispose to accidents. That fact increases the risk in both classes,—life and accident,—likewise as to many other ailments and infirmities; but many others do not."

A writ of certiorari was denied in that case. 280 U.S. 594, 50 S.Ct. 40, 74 L.Ed. 642. See, also, Columbian Nat. Life Ins. Co. v. Harrison, supra.

[2] It has been repeatedly held that where the evidence is of such a character that reasonable men may reach different conclusions as to the materiality of the false representations, the question is one of fact for the jury. Wharton v. Ætna Life Ins. Co., 8 Cir., 48 F.2d 37; Mutual Life Ins. Co. v. Hatten, 8 Cir., 17 F.2d 889.

In 148 A.L.R. 912, the prevailing rules in the several jurisdictions are discussed. It is there said: "In some states, statutes provide that all statements purporting to be made by the insured shall, in the absence of fraud, be deemed representations and not warranties. Under such a statute, the falsity of statements which, according to the terms of the policy, are to be treated as warranties will avoid the policy if fraudulently made, irrespective of their materiality; but if statements in the nature of warranties are false and there is no showing of fraud, they will avoid the policy only if material. See 29 Am.Jur. 442, Insurance, sec. 547. Concealment, in order to avoid a policy of insurance, must involve a matter material to the risk, at least where there is no provision in the policy which can be permitted under the statute applicable in the jurisdiction to be regarded as a warranty. See 29 Am.Jur. 436, 437, Insurance, sec. 540."

Section 10380 of our Insurance Code, under the chapter relating to *disability policies,* provides: "* * * the falsity of any statement in the application for any policy covered by this chapter shall not bar the right to recovery under the policy, unless such false statement was made with actual intent to deceive or unless it materially affected either the acceptance of the risk or the hazard assumed by the insurer."

Section 10113 of the same code provides in part: "* * * and all statements purporting to be made by the insured shall, in the absence of fraud, be representations and not warranties. Any waiver of the provisions of this section shall be void."

See, also, 119 A.L.R. 779; Boyer v. United States Fidelity & Guaranty Co., 206 Cal. 273, 274 P. 57; Wilson v. Maryland Casualty Co., 19 Cal.App.2d 463, 65 P.2d 903; Pierre v. Metropolitan Life Insurance Co., 22 Cal.App.2d 346, 70 P.2d 985; Adams v. Policy Holders Life Insurance Association, 126 Cal.App. 535, 14 P.2d 775; Sections 331, 332, 334 and 338 Insurance Code.

[3-6] From the authorities cited and the provisions of our own statutes, it appears that the question of the materiality of the claimed misrepresentation was one of fact and not of law. Under either construction, in view of the findings, plaintiff would not be entitled to recovery. The trial court found, in effect, that there was a material misrepresentation in failing to disclose in the written application that plaintiff had been previously rejected on a life insurance policy by another company and that by reason of such failure to disclose such prior rejection defendant was entitled to rescind because defendant association relied upon the statement made by plaintiff, and in reliance thereon issued the policy herein described. In view of this finding of fact, which is supported by the evidence, we are unable to order a reversal of the judgment. The trial court was the sole judge of the credibility of the witness and could believe all of his testimony or believe a part and reject parts, as it was convinced of the truth or falsity of such testimony. Whitechat v. Guyette, 19 Cal.2d 428, 434, 122 P.2d 47. We are again confronted with the rule that, in passing upon the merits of an appeal, an appellate court will and must accept as true all evidence tending to establish the correctness of the findings and must consider the evidence in the most favorable aspect toward the prevailing party and give that party the benefit of every inference that can be reasonably drawn in support of his claim. Cope v. Goble, 39 Cal.App.2d 448, 453, 103 P.2d 598.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.

Hearing denied; CARTER, J., dissenting.

71 Cal.App.2d 340

BOTCHFORD v. ALT.

Civ. 14862.

District Court of Appeal, Second District, Division 3, California.

Oct. 26, 1945.

As Modified Nov. 20, 1945.

Hearing Denied Dec. 20, 1945.

1. Quieting title 🔑10(2)

Generally, holder of an equitable title may not maintain a quiet title action.

2. Trusts 🔑347

Where plaintiff was asserting an equitable title in corporate stock by virtue of an agreement in divorce decree requiring plaintiff to be paid in money, even if plaintiff's husband received stock as compensation for his services, plaintiff did not acquire any title to stock, so as to authorize her to maintain a quiet title action against purchaser from former husband before death of latter.

3. Trusts 🔑371(2)

Where plaintiff in quiet title action was asserting an equitable title to stock by virtue of agreement incorporated in divorce decree requiring plaintiff to be paid in money, even if plaintiff's husband received stock as compensation for his services, allegations were not sufficient to entitle plaintiff to have her alleged interest in the stock impressed with trust or to put purchaser of stock from husband to his defense that he was a bona fide purchaser.

4. Trusts 🔑371(2)

Even if complaint to quiet title to one-third of shares of corporate stock, which had been transferred to defendant by plaintiff's former husband, stated cause of action against former husband, now deceased, or his estate for a sum equal to the value of one-third of the stock, complaint did not state cause of action for recovery of such amount against defendant, in absence of allegation of fraud of defendant in purchase of the stock.

5. Trusts ⚿371(2)

Where complaint to quiet title to corporate stock, transferred by plaintiff's former husband, on ground that plaintiff held equitable title by virtue of agreement incorporated in divorce decree, alleged that husband's payment of $5,000 for the stock was inadequate and that other part of consideration was services rendered by husband within agreement, complaint was demurrable, in absence of allegation as to what portion of shares had been transferred to husband for services.

6. Trusts ⚿371(2)

Where complaint to quiet title to corporate stock, transferred by plaintiff's former husband on ground that plaintiff held equitable title by virtue of agreement incorporated in divorce decree, alleged that husband's payment of $5,000 for the stock was inadequate and that other part of consideration was services rendered by husband within agreement, complaint was demurrable in absence of allegation as to amount husband's employer paid for the stock.

7. Trusts ⚿371(2)

Complaint to quiet title to corporate stock, transferred by plaintiff's former husband, which alleged that plaintiff had equitable title by virtue of agreement incorporated in divorce decree, insofar as it failed to allege length of time husband had been employed by bank from which he acquired stock, was subject to demurrer for uncertainty.

◆

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action by Ruby G. Botchford against Edmund F. Alt to quiet title to one-third shares of certain corporate stock to which defendant held equal title. From an order and judgment of dismissal, following the sustaining of defendant's demurrer to amended complaint and plaintiff's refusal to plead further, the plaintiff appeals.

Affirmed.

Lindelof & Perelli-Minetti, of Los Angeles, for appellant.

George W. Manierre and Paul G. Breckenridge, both of Los Angeles, for respondent.

PARKER WOOD, Justice.

Plaintiff commenced this action to quiet title to one-third the shares of certain corporate stock to which defendant held legal title. The court sustained defendant's demurrer to the complaint, and plaintiff filed an amended complaint. Defendant demurred to the amended complaint, and the court sustained the demurrer and gave plaintiff ten days within which to amend. Plaintiff is appealing from an order and a judgment of dismissal rendered after she had failed to amend within said time.

It was alleged in the amended complaint that D. H. Botchford and the plaintiff were husband and wife for many years, and that a final decree of divorce was granted to plaintiff in 1929. A part of the final decree of divorce was set forth in the amended complaint, and in that part of the decree it was ordered that D. H. Botchford comply with the terms of an agreement between plaintiff and D. H. Botchford, dated November 26, 1924, and an amendatory agreement between said parties, dated May 17, 1928, and in particular it was ordered that D. H. Botchford pay to plaintiff one-third of the gross salary and compensation or emoluments received by him. The amended complaint alleged further in substance that copies of said agreements were attached to the amended complaint and were made a part thereof; that in 1935 and 1936 the Rich Manufacturing Company, a corporation, "was in a precarious financial condition and was indebted to the Security-First National Bank of Los Angeles in the sum of approximately $375,000.00"; that as collateral security it pledged to said bank 12,143 "out of the 13,000" shares of its capital stock; that about January, 1936, said bank foreclosed the pledge and purchased the shares; that about 1935 said bank installed Botchford as general manager of the Rich Manufacturing Company at a salary of approximately $600 per month; that about May 27, 1936, the bank sold said 12,143 shares of stock to Botchford for $5000; that $5000 was "an inadequate consideration for the purchase of said 12,143 shares of stock and was in truth and fact a means to adequately compensate David Herbert Botchford for his ability and experience and his efforts to rehabilitate the Rich Manufacturing Company" (apparently it was intended to state that the *transfer of the shares* was a means to adequately compensate David Botchford); that the transfer of said shares constituted the receipt of compensation and earnings within the meaning of the two agreements (above mentioned) and the final decree of divorce; that Botchford died about July 29, 1941; that at all times prior to his death he represented to plaintiff that the title to said 12,143 shares of stock was held by Security-First National Bank, and there was "no way that said stock or any portion thereof or interest therein could be transferred to plaintiff"; that prior to his death he transferred and sold 10,943 of the said shares to defendant Alt, and said shares are represented by certificate numbers 143, 146, 147 and 148 issued to defendant; that defendant was employed by the Rich Manufacturing Company "at all times subsequent to 1935" and was under the supervision of Botchford; that defendant was familiar with the property agreements (above referred to), the judgment of divorce, plaintiff's claim to "1/3 interest in and to" said 12,143 shares of stock, and with Botchford's representations "as to the title of said stock"; that defendant was not a bona fide purchaser of said 10,943 shares of stock; that plaintiff is the owner of one-third of said 10,943 shares of stock and that defendant's claim thereto is without right.

[1] The general rule is that the holder of an equitable title may not maintain a quiet title action. Appellant contends that the general rule is not applicable herein and that this case is an exception to that rule since it is pleaded that defendant holds legal title as a mere trustee for the benefit of plaintiff and the facts are so fully pleaded in the complaint that there can be no unfairness to the defendant. She asserts further that an equitable owner may bring a quiet title action against the legal owner when the facts are so fully pleaded that there can be no unfairness, and a declaration of legal ownership in the plaintiff may be made by the court. The question is presented therefore as to whether the complaint alleges sufficient facts to show ownership in plaintiff of a portion of the specific shares of stock acquired by defendant. Her claim to a portion of the stock is based upon the provisions of the property settlement agreement. Apparently it is her theory that under the provisions of the agreement she acquired ownership in one-third of any kind of property received by D. H. Botchford as compensation for his services, that her interest therein vested immediately in her when the property was received by D. H. Botchford, and that irrespective of the kind of property so received by him she was entitled to receive, in kind, one-third of such property. A part of the original agreement is as follows: "D. H. Botchford agrees to pay, as the same are received and in whatever form the same shall be received, one-half of the gross salary and compensation, in anywise received by him, or earned by him for his personal advices while in the employ of any person, firm or corporation or one-half of the net earnings (from which no deduction shall have been made for services rendered by him thereinabout) of any business to which he shall devote himself on his own account or upon the account of himself and others jointly or in association, and said sum so hereby agreed to be paid to said R. G. Botchford [plaintiff], is guaranteed to be at no time less than the sum of five hundred and twenty five dollars per month. Said sums so agreed to be paid in the last paragraph shall be paid upon draft by said R. G. Botchford, through any bank or banker, directed to D. H. Botchford at the Bank of California National Association, or any other bank or banker hereafter designated, on the first day of each and every month." The amendment to the agreement contained a provision that 33⅓ per cent be substituted "in the place and stead of fifty (50) per cent, as the percentage to be paid to R. G. Botchford from the earnings and emoluments of D. H. Botchford," and waived the guarantee of a minimum monthly payment.

Appellant argues that the phrases "the same as received" and "in whatever form received," explain how payment is to be made, that is, in the same form as received by D. H. Botchford; and that the agreement is a "promise to convey a stated portion in the same form as received of any property received by D. H. Botchford as compensation, whether it be money or personalty." The phrase "the same as received" mentioned in appellant's argument does not appear in the agreement. The phrase to which appellant apparently intended to refer, namely, "as the same are received," is materially different from the phrase referred to in her argument. The phrase "as the same are received," appearing in the agreement, indicates the time of payment rather than the form of payment as suggested by the phrase "the same as received," appearing in appellant's argument. The other phrase "in whatever form received," mentioned by appellant, is also different (but not materially different) from the language in the agreement, which is "in whatever form the same shall be received."

[2] The agreement as a whole shows that the parties thereto contemplated that appellant should be paid in money, and that the amount of the money to be so paid was to be determined not only by computing one-third of the money received by D. H. Botchford as compensation, but also by computing the amount of money which would be equivalent to the value of one-third of property, other than money, received by him as compensation. The paragraph of the agreement above quoted used the words "pay" and "paid" in referring to the obligations on the part of D. H. Botchford. It is therein stated that, "D. H. Botchford agrees to *pay*," that "said sum so hereby agreed to be *paid*," that "Said sums so agreed to be *paid*," and that (said sum) "shall be *paid* upon draft." In another paragraph of the agreement it is provided that "said D. H. Botchford shall not be required to *pay* any of the sums provided to be *paid* by him as his earnings" if at any time appellant shall have remarried. In the last paragraph of the agreement it is stated that the "sums due thereunder, shall be due and *payable*" either in the place where the contract was made or at any place he may be employed. (Italics added.) The amendment to the agreement, as above stated, contained a provision that 33⅓ per cent be substituted "as the percentage to be *paid*." (Italics added.) It is to be noted further that the words "sum" and "sums" are used in the above quoted portions of the contract in connection with the words "pay" and "paid." It is to be noted also that the "sums" were to be "paid upon draft," drawn by appellant on the first day of every month. The use of such words as those just mentioned, pertaining to the obligations of D. H. Botchford under the agreement, indicates that he was to comply with the terms of the agreement by the payment of money. Furthermore, there was no express provision in the agreement that any particular property, thereafter to be acquired as compensation, was to be delivered or transferred to plaintiff; and there was no provision therein that an interest in any property, thereafter to be acquired as compensation, was to vest in plaintiff immediately when it was acquired or that it was to vest in plaintiff at all. It appears therefore, since appellant was to be paid in money, that the relationship between appellant and D. H. Botchford, in the matter of her claim to a percentage of his compensation, was that of creditor and debtor; and that she did not acquire any title to property received by him as compensation.

[3] Near the close of the amended complaint there is an allegation that plaintiff is the owner of one-third of said 10,943 shares of stock and that defendant's claim thereto is without right. Although such allegation is the usual short form allegation appropriate to quiet title actions which are based upon legal ownership, it is not a sufficient allegation herein, since plaintiff's right, if any, is entirely equitable. In Strong v. Strong, 22 Cal. 2d 540, at page 546, 140 P.2d 386, at page 389, it is said: "Any rights that she might have to the cancellation of the deed or to the declaration of a constructive trust are entirely equitable * * * and it is settled that such rights cannot be established in an action to quiet title when the pleadings contain merely general allegations asserting defendant's ownership and denying that of plaintiff." Plaintiff does not rely upon the short form allegation above mentioned to state a cause of action but contends that the facts are so fully pleaded, as required in a quiet title action by an equitable owner, that a "declaration of legal ownership" in plaintiff may be made by the court. As above stated, her allegations were not sufficient to show ownership in the plaintiff; nor were they sufficient to entitle plaintiff to have her alleged interest in the stock impressed with a trust or to put Alt to his defense that he was a bona fide purchaser.

[4] If it be conceded that sufficient facts were alleged to entitle plaintiff to have recovered from Mr. Botchford or his estate a sum equal to the value of one-third of the stock, still no cause of action was stated for the recovery of money. There was no allegation of fraud on the part of Alt in the purchase of the stock and no allegation that, through any act of his, plaintiff was prevented from collecting from Mr. Botchford any sum

which might have been due to her by reason of his acquisition of the stock.

[5] It appears further that the amended complaint failed to state facts fully in other respects. The amended complaint was uncertain in that it was not alleged therein what portion of the 12,143 shares of stock was purchased by D. H. Botchford for $5000 and was not subject to plaintiff's claim, as distinguished from the portion thereof which plaintiff asserts was transferred to D. H. Botchford by the bank to adequately compensate him and was subject to her claim of ownership. In other words it appears from the amended complaint that a part of the consideration for the 12,143 shares was $5000 paid by D. H. Botchford, and the other part of such consideration was the services rendered by D. H. Botchford. Plaintiff asserts equitable ownership in one-third of all the 12,143 shares even though she alleges in effect that a portion thereof was not transferred to him as compensation for his services, but was purchased by him for $5000. She asserts equitable ownership in one-third of the 10,943 shares which were transferred to defendant Alt, and does not allege what portion thereof, if any, was purchased with the $5000, and does not allege whether the 1200 shares which were not transferred to defendant Alt were retained by D. H. Botchford and became a part of his estate, or if the 1200 shares became a part of his estate whether all of those 1200 shares constituted a part of the one-third of the 12,143 shares to which she claims she was entitled.

[6] The amended complaint was also uncertain in that it did not allege the value of the 12,143 shares at the time the bank foreclosed the pledge, and did not allege what amount the bank paid in purchasing those shares at the foreclosure. Although it was alleged the Rich Manufacturing Company was in a precarious financial condition, it was not alleged to what extent it was in such condition. In other words sufficient facts were not alleged, as to the value of the shares and the financial condition of the company, from which it could be determined that $5000 was an inadequate consideration.

[7] It was also alleged that D. H. Botchford was installed by the bank as manager of the Rich Manufacturing Company "about 1935" at a salary of $600 per month. It therefore appears that he was installed as such manager before the bank foreclosed its pledge and acquired control of the company in January, 1936. Since the bank sold the 12,143 shares (of the 13,000 issued shares) on May 27, 1936, to D. H. Botchford, it appears that the bank had control of the company less than 5 months. The amended complaint is therefore uncertain as to whether the 12,143 shares (which was the entire interest of the bank and practically all the stock of the company) were transferred to Botchford to "adequately compensate" him for his services rendered during a period of less than 5 months, or to compensate him for services rendered by him during that period and for a period of time prior thereto, that is, from the time he was installed as manager, "about 1935."

The order and judgment are affirmed.

DESMOND, P. J., and SHINN, J., concur.

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PEOPLE v. WESTMIRE et al.

Cr. 3875.

District Court of Appeal, Second District, Division 3, California.

Oct. 30, 1945.

Hearing Denied Nov. 29, 1945.

1. Rape 🔑53(1)
Robbery 🔑24(1)

Evidence sustained conviction of two defendants of attempted rape and robbery.

2. Criminal law 🔑1144(13)

On appeal from conviction, evidence must be viewed most favorably to the state.

3. Criminal law 🔑371(8)

In prosecution for robbing a woman of her purse and watch in attempted rape, jury was entitled to consider defendants' acts and designs under somewhat similar circumstances in taking a purse and money from a girl a few hours previously, as showing defendants' intent with respect to purse and watch.

4. Witnesses ⚷337(5)

In deciding credibility of witnesses, jury was entitled to consider as evidence impeaching the defendants the fact that each had been convicted of two felonies.

5. Rape ⚷57(5)
Robbery ⚷26

In prosecution for attempted rape and robbery, whether defendant who drove the automobile where offenses were committed by codefendant aided and abetted the codefendant in committing the offenses was for jury.

6. Criminal law ⚷810
Robbery ⚷27(3)

In robbery prosecution, instructions relating to intent were not erroneous as contradictory and confusing.

7. Criminal law ⚷531(3)

In prosecution for attempted rape and robbery, evidence as to officers' conversation with codefendant which was recorded was not inadmissible on ground that no foundation was laid as to its voluntary character, where officers testified that no force was used on codefendant, that no offer of reward or immunity was made to him, and that he talked voluntarily, and another officer denied codefendant's charge that officer struck the codefendant.

8. Criminal law ⚷531(3)

Evidence as to officers' conversation with codefendant which was recorded was not inadmissible on ground that no foundation was laid as to its voluntary character, where codefendant testified that questions asked and answers given in portion of record placed before jury were to the best of his recollection the questions asked and the answers given.

◆

Appeal from Superior Court, Los Angeles County; Harold B. Landreth, Judge.

Bennett R. Westmire and Russell E. Clayton were convicted of attempted rape and robbery, and they appeal.

Affirmed.

Morris Lavine, of Los Angeles, for appellants.

Robert W. Kenny, Atty. Gen. and Carl S. Kegley, Deputy Atty.Gen., for respondent.

PARKER WOOD, Justice.

In an indictment the defendants were accused of the crimes of attempted rape; robbery, while armed with a deadly weapon; and kidnaping. It was charged therein that defendant Westmire had been convicted twice in California of burglary, a felony, and that defendant Clayton had been convicted twice in California of robbery, a felony. Each defendant pleaded not guilty and admitted the charges of previous convictions. In a jury trial both defendants were found guilty of attempted rape and robbery as charged, and were found not guilty of kidnaping. The trial court adjudged that Westmire was an habitual criminal. It did not determine whether Clayton was an habitual criminal, but referred that matter to the prison board. Defendant Westmire was sentenced on each count to imprisonment in the State penitentiary for life, the sentences to run consecutively. Defendant Clayton was sentenced on each count to imprisonment in the State penitentiary for the period prescribed by law, the sentences to run consecutively. The defendants appeal from the judgments. They contend that the evidence was insufficient, that instructions were erroneous, and that evidence was improperly received.

On May 20, 1944, about 12:30 a. m., while Elizabeth Valenzula and Elvira Moreno were waiting for a bus at Avenue 26 and Figueroa Street in Los Angeles, the defendant Westmire stopped a two-door club-coupe automobile, which he was driving and in which defendant Clayton was riding in the front seat, at the place where the two girls were waiting, and Clayton invited the girls to ride in the automobile. After some conversation as to where the girls were going and where the defendants were going—the girls having said they were going to their homes near Glendale, and Clayton having said that defendants were going to Burbank and that they would take the girls to San Fernando Road and Chevy Chase Boulevard (which was about three blocks from their homes)—the girls entered the automobile and sat in the back seat, after Clayton had tilted the back of the front seat forward so that they could get in. As they proceeded along San Fernando Road for a distance of approximately three miles they were going in a direction which was toward the girls' homes. At Fletcher Drive, Westmire turned the automobile to the right and proceeded in a direction away from the girls' homes, whereupon the girls asked defendants several times to let them out of the automobile. Westmire replied that Clayton "lives up here" and that after he had let Clayton out he (Westmire) would take the girls to Chevy Chase Boulevard. The automobile was not stopped until they had gone to Eagle Rock, a distance of approximately 2½ miles from Fletcher Drive and San Fernando Road. When the automobile stopped at that place, Clayton, while remaining seated in the right front seat, opened the right front door and leaned forward, apparently for the purpose of permitting the girls to get out. Mrs. Moreno, who was sitting back of Clayton, pushed the back of the front seat forward and got out, and then while Mrs. Valenzula was attempting to get out immediately following Mrs. Moreno, Clayton, according to Mrs. Valenzula's testimony, closed the door before she could get out and then hit her on the head with a coca-cola bottle She testified further that when she was hit she screamed, called Mrs. Moreno by her nickname, and then Westmire drove away at fast speed; that Clayton jumped from the front seat to the back seat, hit her with the bottle, and while she was still screaming pushed her head down against the seat, and then she was on her back on the seat and he was on top of her; that he hit her on the head with the bottle about 15 times, choked her until she could not breathe, kept saying that he was going to kill her, and asked Westmire to give him the gun; that Westmire did not say anything in reply thereto, but kept driving fast; that Clayton took her gold watch, of the value of $35, off her wrist, and then he threw her purse into the front seat; that her purse was of the value of $5, contained about $6, and was about 12 inches long and 6 inches wide; that then, while she was on her back and he was on top of her, he pulled her dress up, said he was going to rape her, and told Westmire that she was menstruating; that Westmire told him "to make sure," and Clayton said she was flowing, and Westmire said "Throw her off"; that Westmire then stopped the automobile, and as she was getting out Clayton pushed her; that she then said, "Give me my purse and watch"; that the automobile was then driven away at fast speed; that the time when she was let out of the automobile was about 3:00 a.m., and the place was in the hills, was dark, and about one-half block from a house; that she was screaming and a woman came out of the house and took her therein. She testified further that she was menstruating at the time Clayton said he was going to rape her; that she did not regain her watch, or her purse or her money which was therein; that she and Mrs. Moreno had been to a public dance near 3rd and Main Streets, and had gone in a taxicab to Avenue 26 and Figueroa in order to catch the 12 o'clock bus which they had missed while they were downtown; and that she did not have any bruises or injuries on her head or throat when she entered the automobile, but she did have such bruises and injuries when she was let out of it.

Mrs. Moreno testified in substance the same as Mrs. Valenzula had concerning occurrences before Mrs. Moreno got out of the automobile. In addition thereto she testified that immediately after she got out of the automobile, and as she was turning around to get Mrs. Valenzula, she heard Clayton hit Mrs. Valenzula with a bottle, and heard her scream and call Mrs. Moreno by her nickname; that defendants then drove away at fast speed; that the next time she saw Mrs. Valenzula was about two hours later at the police station, and at that time Mrs. Valenzula had "two black eyes" and a bruise on her neck under her chin; that Mrs. Valenzula did not have those marks on her when she entered the automobile; and that Mrs. Valenzula had a large purse with her that night, which purse was about 10 inches long and about 8 inches wide.

A physician testified that he examined Mrs. Valenzula at her home about 2 p.m. on May 20th; that she had a large lump, about the size of a small egg, on top of her head "from being struck with a blunt object"; and that there were bruises on both sides of her throat, and the inside of her throat was "so swollen that it was virtually impossible for her to swallow."

Police officer McGarry testified that he arrested Clayton on May 23rd; that on May 24th he told Clayton that he wanted to talk to him about a robbery and that Clayton had been identified as one of two men who had robbed, kidnaped and attempted to rape a girl by the name of Valenzula; that Clayton asked him what Westmire had said; that he (the officer) told Clayton that a recording had been made of a conversation between the officer and Westmire and that he would let Clayton hear it; that later that day the record was played in the presence of Clayton, the witness (McGarry), and Officers Brown and Laas; that it required about 45 minutes to play the record, and during the playing of it Clayton made statements on two occasions; that about the middle of the record there was a question by one of the officers directed to Westmire as to whether Westmire had seen Clayton hit the Valenzula girl on the head with a coca-cola bottle; that in answer to that question the record revealed that Westmire said, "I heard him hit her"; that another question on the record directed to Westmire concerned the number of times Clayton had hit her in that manner; that the record revealed that Westmire said, "Well, he did not know, but she kicked the back of the seat several times"; that when those questions and answers came through the loud speaker, Clayton said, "Dirty stool pigeon son-of-a-bitch, he didn't need to say that, did he, he is sure pouring it on me"; that after the record was played Clayton asked the officer (witness) whether the girls told him they were drinking with Clayton and Westmire, and when the officer replied that they had not told him, Clayton said, "I don't think much of women that drink with a man and then go out and holler rape"; that after they had left the room where the record had been played, Clayton said, "As long as that guy is stooling on me I will take you over and show you where he has got some stuff."

At the trial counsel for defendants objected to the offer of testimony as to what words or statements were on the record. The court stated that the testimony of Officer McGarry as to what the record contained could not be received as to Westmire, and that McGarry's testimony as to what he heard from the record when it was played could be received as to Clayton, not to prove the truth of the statements, but only for the purpose of showing Clayton's response or reaction to accusatory statements. It was conceded by the district attorney that the record contained many immaterial and inadmissible statements and that the whole of the record or statements thereon should not be offered in evidence. The record was played in the presence of the trial judge, but out of the presence of the jury. After having heard the record, the judge stated in the presence of the jury that there was immaterial and inadmissible matter in the record, but a portion of the record which was represented in typewriting on the first six pages of a typewritten transcription of the record was admissible and might be played in the presence of the jury. That portion of the record was played in the presence of the jury, but the court instructed the jury at that time that it would not be binding upon Clayton. Reference will be made hereinafter to the statements included in that portion of the record.

Officer McGarry testified further that he had a conversation with Westmire on May 22nd in the presence of Officer Brown, and that Officer Laas was present during part of the conversation. The court stated that evidence as to conversations with Westmire, out of the presence of Clayton, would not be binding upon Clayton; and that evidence as to conversations with Clayton, out of the presence of Westmire, would not be binding upon Westmire. The testimony of McGarry as to that conversation was substantially the same as the testimony of Officer Brown, hereinafter referred to, concerning that conversation. McGarry testified further that he asked Westmire what happened to the purse, and Westmire replied that he did not know but he thought the purse had been thrown out of the car; and that Westmire said he had not seen the watch.

Officer Brown testified that he had a conversation for approximately three hours with Westmire on May 22nd in the presence of Officer McGarry, and that Officer Laas was present part of the time; that no force or violence was used on him at any time, no offer of reward or immunity was made to induce him to talk, and he talked voluntarily; that he (witness) was present when the record was made; that he (witness) made notes, principally in shorthand, when the conversation was had. He testified further that Westmire said: that he was driving his car on Figueroa, with Clayton in the front seat, and as they approached Avenue 26 they saw two girls on the corner, and he stopped the car and Clayton spoke to them; that the girls got into the car; that as they were approaching Fletcher Drive, Clayton nudged him with his foot, which indicated to get off the main street; that after he had turned to the right at Fletcher Drive and had gone a few blocks the girls were demanding to be let out of the car, and he stopped the car; that just as one of the girls got out, Clayton slammed the door and said, "Step on it," and they drove away fast and went into the hills; that Clayton was in the back of the car with the girl, and that Westmire could "hear her being struck," could feel the rear part of the front seat being kicked, and knew that "she was raising a rumpus"; that during the scuffle Clayton told him she was menstruating, and Westmire said, "If she is menstruating leave her alone"; that shortly thereafter he stopped the car and the girl got out; and that he did not know anything about the purse. He testified further that he was present when Westmire was asked if he would make statements to Clayton such as he (Westmire) had made to the officers, and he replied that he would not because he had a "lot of time to do up the joint and his life wouldn't be worth a nickel if they found out that he had stooled."

The portion of the record, of an interview with Westmire, which was played in the presence of the jury, was in substance the same as the testimony of the Officers McGarry and Brown concerning what Westmire said in his conversation with them. That portion of the record also included statements by Westmire, as follows: that Clayton said (when he was in the back seat with the girl), "* * * turn up this side street * * * we have got to let her out, or something, that she was giving him hell back there"; that she was fighting and screaming; that after she got out she "hollered about her purse," saying, "Oh, you have got my purse"; that Westmire told Clayton to throw her purse out, and Clayton said that he did throw it out; that Clayton did not mention the watch; that Clayton did not give him any part of the money that was in the purse; that it came as a surprise to him when the officers mentioned the watch and purse; that he was in the habit of carrying coca-cola bottles in his car. A portion of the record so played was verbatim as follows:

"Q. Well, did he say anything about having hit her over the head with a Coca-Cola bottle? A. I heard that.

"Q. You heard him hit her over the head? A. Yes.

"Q. You could distinguish that kind of a sound? A. Well, I could feel her kicking up against my back seat.

"Q. How many times? A. Oh, she must have kicked the back seat there six or seven times.

"Q. Did she scream every time? A. Yes."

Westmire testified that he was questioned by the police officers about 10½ hours while he was in their custody; that he heard the portion of the record that was played before the jury, relative to a conversation between him and the police officers, and that to the best of his recollection those were the questions asked and those were the answers given; that he had been convicted twice of the crime of burglary, a felony; that he was struck 10 or 12 times by Officer Laas, in the presence of Officer Brown, when he denied knowledge of certain things, and as a result thereof his eye was discolored; that Officer Laas told him that if he did not cooperate that he (Westmire) would get what was coming to him; that one time "they" said that if he did not confess those things they had asked about he "would go out of here on a stretcher"; and that said conduct placed him in fear.

Clayton testified that he and Westmire got together on May 19, 1944, after they had left work about noon of that day at the Coca-Cola Bottling Company; that they rode around in Clayton's car, which was a four-door sedan, until about midnight when they went to a garage at 7th and Central and took Westmire's car, which was a two-door club coupe, and left Clayton's car there; that they transferred liquor and coca-cola from Clayton's car to Westmire's car; that they had been drinking whiskey on that day after they left work; that he and Westmire were in Westmire's car at Avenue 26 and Figueroa about 12:30 a.m. on May 20, 1944, and Westmire was driving; that they stopped at that place and Clayton invited two girls who were there to ride; that after Clayton said they would take the girls home, the girls entered the rear seat of the car; that in order for a person, riding in the rear seat, to get in or to get out of that car, it was necessary to push the front seat forward; that he offered a drink of whiskey to the girls but they refused it; that when they turned to the right at Fletcher Drive, the Moreno girl said she wanted to get out of the car, and the other girl said it was all right to take a ride; that after they had gone about 14 blocks they let one of the girls out; that he got in the back seat with the other girl, offered her some whiskey, and she took two drinks of it;

that he then put his arm around her and said "let's have a little loving"; that she pushed him away, and he grabbed her, pulled up her dress and laid his head on her leg; that she asked him what he was going to do, and he said, "* * * you got in the car with a couple of strange men at 12:30 at night; you know * * * good and well what you got in here for"; that she slapped him, and then hit him on the shoulder with a coca-cola bottle; that he took the bottle from her and hit her with it, and then he said, "I am going to have a little piece"; that she said that he couldn't, because she was sick; that he said that if she had told him that "before all this started" it would not have happened, and that he thought that was "why she got in the car"; that he told Westmire to stop the car, and the car having stopped he got out and helped her out of the car; that he told her if she would quit screaming they would take her home, but she would not quit, and he started to get into the car, and she asked him for her purse; that he and Westmire looked in the car for the purse, but could not find it; and that she started down the street, and he got into the car and told Westmire to drive away. He testified further, on cross-examination, that in the afternoon preceding the time they met the two girls, he and Westmire tried to pick up a girl, a stranger to them, near Union and Olympic Avenues; that they did not pick her up, but they took her purse and divided the money therein between themselves. He also testified that he had been convicted twice of the crime of robbery, a felony, and that he had been convicted of violation of the Dyer Act, a felony.

It was stipulated that Officer Laas would testify that he did not at any time strike Westmire.

[1-5] The evidence was sufficient to support the conviction of both defendants of attempted rape. Clayton by use of force and violence, of which Westmire was fully aware, prevented Mrs. Valenzula from getting out of the automobile when Mrs. Moreno got out. Immediately thereafter, at the direction of Clayton, Westmire drove away at fast speed, turned into a side street, and went into the hills. While Westmire was so driving, Clayton was beating, choking, and threatening to shoot and kill Mrs. Valenzula, and she was kicking the back of the front seat, was fighting Clayton, and was screaming, That extreme violence was used by Clayton, while Westmire was driving, is strongly corroborated by the testimony of the physician who examined Mrs. Valenzula. Westmire was aware of such conduct by Clayton, and aided and abetted him by continuing to drive at the direction of Clayton. She was on her back and Clayton was on top of her. Clayton said he was going to rape her, and he pulled her dress up. It was only after Clayton had said that she was menstruating, and after Westmire had required Clayton "to make sure" that such was her condition, and after he had been so assured, that Westmire did anything other than to encourage and aid Clayton in his obvious attempt to commit rape. It is not suggested that Westmire was compelled to so drive. He had every opportunity to avoid participation in such conduct of Clayton.

The evidence was sufficient to support the convictions of both defendants of robbery. In the view of the evidence most favorable to respondent, Clayton took Mrs. Valenzula's watch from her wrist, and also took her purse and money from her, and kept the same; and he took and kept those things with the intention of permanently depriving her of them. As to Westmire it is argued that he did not actively participate in taking those articles, did not knowingly aid or abet in the robbery, if any, did not intend to aid therein, and did not know that Clayton had intent to commit robbery. In the view of the evidence most favorable to respondent, it was shown that Mrs. Valenzula's large purse (about 6" x 12") was thrown by Clayton into the front seat (where Westmire was riding); that Westmire told Clayton to throw her purse out; and that Clayton and Westmire, under similar circumstances, had committed robbery a few hours previously by taking a purse from a girl and dividing the money therein between themselves. The jury was entitled to conclude, especially in view of the large size of the purse and the fact that it was thrown, that Westmire knew it was in the front seat, and that Westmire's search for it in the back and in the front of the car was not in good faith and was a false attempt to find it. Although Westmire denied knowledge as to the purse, the jury was entitled to conclude that he knew something concerning it since he told Clayton to throw it out. In determining the intent of defendants, relative to the purse and watch, the jury was entitled to consider the acts and designs of the defendants, under somewhat similar circumstances, in taking a purse and money from a girl a few hours previously. In deciding the credibility of the witnesses, the jury was entitled to consider, as evidence impeaching the defendants, the fact that each defendant had been convicted of two felonies. The evidence was sufficient to support a finding that the purse and watch were taken in furtherance of a preconceived design on the part of both defendants, especially in view of the midnight shift from the four-door car to the two-door car preliminary to "riding around" soon after a similar act of taking a purse was committed by the defendants while "riding around." The circumstances under which Westmire drove the car were such that a finding that he knowingly aided and abetted Clayton in committing the robbery would be testified.

[6] Appellants assert that the instructions pertaining to robbery were erroneous, contradictory and confusing with respect to the element of intent. The court gave the following instruction: "The word 'willfully' when applied to the intent with which an act is done or omitted implies simply a purpose or willingness to commit the act or make the omission referred to. It does not require any intent to violate law or to injure another or to acquire any advantage." The court also gave the following instruction: "A person must be presumed to intend to do that which he voluntarily and willfully does in fact do, and must also be presumed to intend all the natural, probable and usual consequences of his own acts." The court gave the following instruction: "The Court further instructs the jury that the intent or intention with which an act is done is manifest by the circumstances connected with the offense and the sound mind and discretion of the accused. All persons are of sound mind who are neither idiots nor lunatics nor affected with insanity." The court also gave the following instruction: "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute any particular species or degree of crime, the jury, in determining the purpose, motive or intent with which the accused committed the act, may take into consideration the fact that he was intoxicated at the time. But in cases of Attempted Rape, Robbery and Kidnaping the specific intent to commit the crime or crimes is a necessary element of the crime and involves, of course, an inquiry into the state of mind under which the party committed the act charged; and in the prosecution of such inquiry his condition at the time of the alleged offense, as drunk or sober, may properly be considered. The weight to be given to evidence of drunkenness is a matter for the jury to determine in connection with all the other evidence and circumstances in proof of the case." No request was made for any other instruction upon the subject of intent. The instructions were sufficient.

[7, 8] Appellants contend that evidence as to the conversation with Westmire, which was recorded, should not have been received. They argue that no foundation was laid as to its free and voluntary character. Two officers testified, as above shown, that no force or violence was used on him, that no offer of reward or immunity was made to him, and that he talked voluntarily. Westmire testified that Officer Laas struck him. Officer Laas denied that he struck him. A sufficient foundation was laid for admitting the conversation in evidence. Furthermore, Westmire testified that the questions asked and the answers given, in the portion of the record that was played before the jury, were to the best of his recollection the questions asked and the answers given.

By reason of the above conclusions it is not necessary to discuss other contentions made by appellants, concerning instructions as to third degree methods and due process of law.

The judgments as to both defendants are affirmed.

DESMOND, P. J., and SHINN, J., concur.

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COLOMBO v. COLOMBO.

Civ. 12970.

District Court of Appeal, First District,
Division 2, California.
Nov. 9, 1945.

1. Divorce 🔑37(7)

Where all the evidence on issue of desertion demonstrated that wife voluntarily deserted her husband and preferred to live separate from him, wife was not entitled to a divorce on ground of desertion regardless of whether separation was made with consent of husband. Civ.Code, § 95 et seq.

2. Divorce 🔑37(7)

The beginning of an action for divorce, in absence of good faith, cannot transform a causeless abandonment of marital domicile into an innocent absence or into a separation brought about through fault of other spouse. Civ.Code, § 95 et seq.

3. Divorce 🔑31

Where husband paid all charges assessed to him for the three times wife was hospitalized and, although there was some conflict as to how much husband paid wife during her voluntary abandonment of him, it was undisputed that for whatever times he did not support her she was living separate from him of her own volition, wife was not entitled to a divorce on ground of nonsupport. Civ.Code, § 175.

4. Husband and wife 🔑4

The filing of a divorce suit by wife who had voluntarily abandoned her husband was in itself a declaration of her intention not to return to him so as to relieve him of liability for her support within contemplation of code section declaring that a husband abandoned by his wife is not liable for her support until she offers to return. Civ.Code, § 175.

5. Divorce 🔑37(19)

A wife who has separated from her husband and goes to his home to visit him and seek a reconciliation, and who is then cruelly treated by husband, is "abandoned" by husband. Civ.Code, § 98.

See Words and Phrases, Permanent Edition, for all other definitions of "Abandon".

6. Divorce 🔑37(19)

Where wife, who had voluntarily abandoned husband, went to husband's home for the sole purpose of obtaining minor child of the parties and taking child with her to her sister's home, having no intention to resume marital relations with husband or to return and care for child in the family home, wife could not predicate a charge of cruelty amounting to an abandonment on part of husband upon husband's exercise of sufficient physical force to prevent wife and her sister from taking the child. Civ.Code, § 98.

7. Divorce 🔑298(1)

Where evidence indicated that wife was suffering from a recurring type of insanity, that she had been in a mental hospital three times in a little more than four years, that less than a year had passed since the last relapse, and that physicians advised against wife's assumption of her family responsibilities, wife was not a proper person to have custody of child, and award of custody to her was error.

◆

Appeal from Superior Court, San Mateo County; Aylett R. Cotton, Judge.

Action by Stephanie Colombo against Edward F. Colombo for divorce, custody of the minor child, and other relief, wherein defendant cross-complained. Judgment for plaintiff with award of custody without right of visitation on part of defendant, and defendant appeals.

Reversed.

Richard tum Suden, of San Francisco, for appellant.

Joseph J. Bullock, of Redwood City, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued for a divorce on the grounds of desertion and failure to provide, and asked for the custody of the minor child—a boy of about five years of age. The defendant cross-complained on the ground of desertion, and also asked for custody of the minor. The trial court found in favor of plaintiff on both grounds and found the allegations of the cross-complaint to be untrue. Custody of the minor was awarded to plaintiff without any right of custody or visitation on the part of the husband, and he was ordered to pay plaintiff for the support of herself and child the sum of $100 a month out of a salary of approximately $200.

The defendant appeals on the grounds that plaintiff's own evidence disproved every issue raised by her and proved fully the allegations of the cross-complaint.

The facts are not in dispute as to these issues. Respondent concedes that appellant has correctly stated them in his brief, except as to two minor details hereinafter noted. The conceded facts as so stated are:

"Plaintiff and defendant intermarried in the City and County of San Francisco on November 27, 1938. On November 3, 1940, a son, Edward L. Colombo, was born to the parties. A month prior to the birth of the child Mrs. Colombo showed signs of a mental upset. She was committed to the Napa Asylum for the insane shortly after the child was born. The certificate of the medical examiner at the time of her commitment is found in Defendant's Exhibit 'A.' Mrs. Colombo was confined for a period of six months. She was then paroled to her husband. They lived together for a period of three or four months. Mrs. Colombo again became violent and had to be returned to Napa State Hospital. She was confined for a period of five months and then was paroled to her sister, Mrs. Virginia Zanetta, living in Monterey, California. This second parole was against the advice of the medical authorities of Napa Hospital who recommended that she remain a year. Mr. Colombo desired her to remain but the sister insisted and 'signed her out.' Mr. Colombo and the sister went to Napa in his automobile and took Mrs. Colombo home. The next day they drove to the sister's home in Monterey. Mrs. Colombo ignored her husband and even refused to speak to him. He then returned to his home and Mrs. Colombo remained with her sister. Mr. Colombo visited her in Monterey in response to a letter asking him to bring the child. As she was still on parole and as it was against the doctor's orders he did not let her have the child. About five months after her release and while yet on parole, Mrs. Colombo and her sister, Mrs. Zanetta, appeared at Mr. Colombo's mother's home and demanded the child, attempting to take it by force. Mr. Colombo refused to give him up and a family quarrel ensued. Mrs. Colombo made no further effort to secure or see the child. The little boy has remained with Mr. Colombo and his mother who have cared and provided for him all the intervening time.

"Mrs. Colombo lived with her sister in Monterey for a year and nine months and then sought employment, working at intervals. Finally she returned to her mother in San Carlos. On February 3, 1943, the Napa Hospital issued a certificate of discharge to Mrs. Colombo. On August 3, 1943, Mrs. Colombo instituted proceedings for a divorce. After Mrs. Colombo filed her action for divorce she had another mental attack and was sent to Alexander Sanitarium at Belmont, California, where she was confined from January 2, 1944, to March 4, 1944. During all this period Mr. Colombo paid medical and hospital bills and sent Mrs. Colombo $20.00 a month. He only discontinued these payments when served with the divorce complaint.

"At the time of his wife's commitment Mr. Colombo was employed in a service station earning $145.00 to $150.00 per month. Later, and at time of trial, he was employed by the United Engineering Co., netting $200.00 per month."

Respondent's reservation is that when she appeared at the home of appellant's mother she was "threatened" and that this should be considered as in some way explaining her utter neglect of her child for a period of over four years. The testimony relating to this occurrence is conflicting. Respondent and her sister who lived in Monterey went to appellant's home for the purpose of taking the child back with them to Monterey. A dispute arose and appellant and his family insisted that she leave the child at their home until she was freed from parole. This was done on the advice of a physician who attended both the mother and the child, and it was upon this advice that the mother explained her continued neglect to return to her husband and child. The other reservation made by respondent relates to the time monthly payments were made for her support, but this is not material.

On the issue of the desertion on the part of appellant there is not a shadow of conflict. The respondent and her witnesses testified to her own abandonment of appellant in such clear and explicit fashion that they proved the allegations of appellant's cross-complaint without any testimony on his part. Respondent volunteered the statement that, after her release from the asylum, she had lived continuously with her sister or her mother on the advice of her physician that she remain away from her husband for six months. She did not explain why this period was extended for more than two years. There is no evidence that during this long period she made a single offer to return to her husband, or that he did anything to prevent cohabitation. To the contrary, the evidence is that appellant provided a home for themselves, free from the "in-laws" furnished it completely and moved his wife and child in. She broke up the furniture, mistreated and neglected the child, and attacked appellant. When she returned the second time from the asylum she went to Monterey with her sister and refused to see or talk with appellant. When she returned to the home of her mother-in-law she went, not to resume relations with her husband or to "visit" the child, but to take the child from the possession of the father and remove it to Monterey.

[1, 2] On the issue of desertion the question is simple. Every scrap of evidence demonstrates that respondent voluntarily deserted her husband, and preferred to live separate from him. If this separation was made with the consent of the husband—of which there is no evidence—the rule is the same, that it is not desertion by the husband within the law as found in sections 95 et seq. of the Civil Code. Respondent's evidence shows that she voluntarily left the family home and refused to live with appellant. She at no time offered to return, but, in bringing this action, evidenced the intention to make the separation permanent. In Kusel v. Kusel, 147 Cal. 52, 56, 81 P. 297, 298, the court said: "In the absence of good faith, it is clear that the beginning of the action cannot transform a causeless abandonment of the marital domicile into an innocent absence, or into a separation brought about through the fault of the husband." The rule is approved in Ewing v. Ewing, 16 Cal.2d 208, 209, 105 P.2d 586. See also Branham v. Branham, 69 Cal.App. 742, 747, 232 P. 471; 9 Cal. Jur. p. 68.

[3, 4] On the issue of non-support the evidence fails to sustain the finding. Some conflict appears as to how much appellant paid his wife during her voluntary abandonment of him. He admittedly paid all the charges assessed to him for the three times she was hospitalized. There is no conflict in the evidence that for whatever times he did not support her she was living separate from him on her own volition. The judgment on this issue completely disregards the provisions of section 175 of the Civil Code which declare that a husband abandoned by his wife is not liable for her support "until she offers to return." Here there was no offer to return, a fact conceded by respondent. To the contrary she filed a suit for divorce which was in itself a declaration of her intention not to return. The judgment on this issue is contrary to all the authorities. Kessler v. Kessler, 2 Cal.App. 509, 512, 83 P. 257; Johnston v. Johnston, 17 Cal.App. 241, 245, 119 P. 403.

[5, 6] Respondent bases her entire argument on those two issues, on the unfounded statement that, when she went to the Colombo home to "visit" her husband and child and seek a reconciliation, she was cruelly treated and that hence there was an abandonment by the husband under section 98 of the Civil Code. If the premise had any foundation in fact, the argument would be good. But the respondent and the sister who accompanied her both testified that they went to the Colombo home for the sole purpose of taking the child with them to the sister's home in Monterey. There is not one word of evidence that respondent offered or intended to resume marital relations with her husband, or that she offered or desired to return to the care of her child in the family home; and there is no evidence of any act of cruelty; nor of any act which might be termed cruel conduct except the physical force necessary to prevent the two sisters from carrying out their expressed intention of taking the child from the home. And it should be noted that both appellant and respondent testified that each had medical advice that she should not assume her family responsibilities, and also that after this meeting she was again confined in a sanitarium for a recurrence of her former illness.

[7] The issue as to the custody of the child is not debatable. Respondent offered evidence that she was "cured" and witnesses testified that she was "all right." Appellant produced the testimony of two physicians—both qualified psychiatrists— and the certificate of the medical superintendent of the State asylum showing that her illness was diagnosed as "manic depressive type." Dr. Schaller testified that "manic depressive psychosis is a recurring type of insanity; that the patient here mentioned has been in a mental hospital three times in a little more than four years and I think that justifies the opinion we are dealing

with a recurring insanity. Now, I also feel it justifies the opinion that the patient concerned is fundamentally of unsound mind, and I might liken the situation to a person we see with a leaky heart that may be all right today but badly off tomorrow on account of many conditions that are not always analyzable, and I would feel for that reason, Judge, that there would be a very certain jeopardy arising by her having the responsibility, any large responsibility, and especially those demanding the care of a child, at least, within the short time of the last relapse which is less than a year. * * *

"It is characterized by impulsive acts and danger to the person themselves and to others. I might add when such condition appears as early in life as it did in this patient the outlook is more grave for the future, that is more chance for more frequent severe recurrence; that is fairly well established."

The statement of Dr. Gardinier was in the form of an affidavit admitted by consent of the parties. It reads in part: "I was first called to see Mrs. Edward Colombo the night before her baby was born because she had taken a large quantity of Tincture of Iodine in an attempt to commit suicide. After measures had been taken to counteract the effects of the iodine I asked her why she had done it. She stated that she had heard voices telling her she had sinned and that she was not fit to have a baby, also that everyone was against her marriage with Ed; that because of this and other fancied elements she had decided the best thing to do was to commit suicide. The next day, probably because of the shock of attempted suicide, she delivered a little prematurely. When asked if she wanted to see the baby she said 'no' and when the baby finally was brought in she would not believe that it was hers, being firmly convinced that her baby was deformed * * * she was committed to the Napa State Hospital for the insane. After a stay of some months, she was released as cured and she returned to set up housekeeping with her husband and child. For a time she seemed normal, however, the child was not properly taken care of, that is, it was underfed and was obviously frightened and nervous, whereas in contrast when Ed's mother was taking care of him he was a normal, healthy, happy child. The climax to this happened one night when I received an emergency call from Ed. When I arrived at the house it was in a shambles, mirrors and furniture broken, Mrs. Colombo disheveled, the baby's bed torn apart and smelling strongly of urine, the baby crying and Ed's face the worse from finger nails and fists. I tried to calm her down to no avail so I administered a very strong sedative and Ed and I drove her up to Napa State Hospital for further treatment. * * * It is my firm conviction that Mrs. Colombo never was and never will be a fit person to take care of any child and although for considerable periods of time she may be comparatively normal, because of her outbreaks of violence and complete mental unbalance, which have not as yet become homicidal, but might, it is dangerous for the child to be under her care. Disregarding the dangerous element entirely, because of my previous experience in her handling and care of the child, I do not feel that he would be given the proper care a child is entitled to. * * *"

In the face of this evidence the trial court assured counsel for appellant that if the respondent should have a recurrence of her illness and harm the child he would entertain a motion to change the order of custody.

The contest is not one between the natural parent of a child and the grandparent or a stranger. It is one between the father and mother. All the evidence shows that the father has given the child the best of care ever since its birth. Respondent does not even suggest that there might have been some dereliction in this respect. The evidence also shows that the mother had the child in her possession but a few months of its life and then neglected to care for it. The evidence also shows that during the past four years she attempted to see the child but once, and that was for the purpose of taking it from its home to a place in Monterey against the advice of her own and her husband's physician.

We are satisfied that the evidence does not support the order changing the custody of the child and that the award of full custody to the mother without the right of custody or visitation in the father was a breach of judicial discretion unwarranted by any evidence in the record.

The judgment is reversed.

GOODELL and DOOLING, JJ., concur.

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